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**Restriction of Certain Rights and Freedoms
in the Romanian Constitution**

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Abstract: When we speak of human rights and fundamental freedoms essential to the existence of individuals, the first thing that comes into mind is “what we must do more to protect these rights?”, “What to do to for our freedoms not be violated?”. For this reason the mere mention of the phrase “the restriction of certain rights and freedoms” makes us rebel against this idea and wonder if it is legally possible that such an event may happen. Thus, in this paper we propose to analyze the possibility and legality² of restricting certain fundamental rights and specific conditions in which this restriction can be achieved according to the provisions in the Constitution of Romania.

Keywords: fundamental rights, restriction of rights, the Romanian Constitution

The concept of human rights has its origins from ancient times, the concept of that time being very different from today. Throughout its evolution, the concept was influenced by ancient thinkers (Plato, Pericles, Aristotle, Cicero) through their works, by Christian philosophy (Thomas Aquinas) in the Middle Ages, by the Renaissance masters (John Locke) and Enlightenment masters (Montesquieu, JJ Rousseau) and not least, by the innovative ideas of independence revolutions, ideas enshrined in legal documents such as the Declaration of Independence of the United States (1776) or Declaration of the Rights of Man and of the Citizen from France (1789).

Fundamental rights have been defined as “subjective rights which are essential for physical and mental existence of individuals, physical and intellectual development, as well as to ensure their active participation in state governance enshrined and guaranteed by the Constitution and other laws of the state” (Deaconu, 2011, p.191).

Increasingly frequent and sustained concerns for protection of fundamental human rights have emerged in the twentieth century, which led to a wide-ranging European and international codification of human rights, being able today to talk about Europeanization and internationalization of these rights as a reality. Of the most important European and international documents, which establish in their text fundamental human rights, we include: the Universal Declaration of Human Rights³, the International Covenant on Economic, Social and Cultural Rights⁴, the International Covenant on Civil and Political

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² Legality assumes respecting of the prescribed conduct by complying with the rule of law, providing a climate of respect for values and of the social rules. (Maftei, & Coman, 2011).

³ Adopted and proclaimed by General Assembly of UNO by the Resolution no. 217 A (III) of 10 December 1948.

⁴ Adopted by General Assembly of UNO, 16 December 1966, ratified by Romania on 9 December 1974.

Rights¹, the European Convention of Protection of Human rights and Fundamental Freedoms² and the Charter of Fundamental Rights of the European Union.

Fundamental rights and freedoms covered by these international documents have found over time correspondent also in national legislation of our country, the most representative document in this respect being the Romanian Constitution³. The notions of “right” and “freedom” have the same legal value; they differ only in terms of terminology.

In the constitution of our country, in addition to the fact that the fundamental rights and freedoms are enshrined (see detail Maftai, 2010, pp. 137-139), it is provided the possibility of restricting certain rights and freedoms, conditions in which this restriction is making the subject of this paper.

Thus, in art. 53 paragraph (1) it is provided that *the exercise of certain rights or certain freedoms may only be restricted by law and only if necessary, as appropriate, for: the defense of national security, of public order, of health or morals, of rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster. Also paragraph (2) states that the restriction may be ordered only if necessary in a democratic society and the measure must be proportionate to the situation that caused it, to be applied without discrimination and without prejudice to the existence of the right or freedom.*

In other words, the law makes it possible the restriction of certain rights and freedoms in certain circumstances and under strict conditions. This principle established by the Romanian Constitution is not a singular event but a “perception of international rules on human rights” (Selejan-Guțan, 2008, p.132). Thus, there are several important international documents on human rights that include provisions similar to those in the Constitution of Romania.

The Universal Declaration of Human Rights provides in art. 29 that *“in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, only for the sole purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, of public order and of the general welfare in a democratic society”*. We note that this international document mentions the possibility of restrictions on the exercise of human rights and freedoms, stating explicitly that this restriction shall be established by law, and only in special circumstances (the rights of others, meeting the requirements of morality, of public order and of the general welfare).

Also, the Convention for the Protection of Human Rights and Fundamental Freedoms states (Article 15 - Derogation in time of emergency) that *“in case of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention, to the extent strictly necessary in that situation, provided that such measures are not inconsistent with other obligations under international law.”* This article allows states to derogate from the provisions of the Convention in time of war or other public hazards, but only if the situation requires. Parties exercising this right of derogation shall inform the Council of Europe on the measures they have taken, the reasons that led to taking those measures and when these measures cease.

¹ Adopted by General Assembly of UNO by Resolution no. 2200 A (XXI) of 16 December 1966, ratified by Romania on 9 December 1974.

² Signed by the Member States of the Council of Europe on 4 November 1950 and enforced on 3 September 1953.

³ Amended and completed by revising the Constitution Act no. 429/2003, published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003, republished by the Legislative Council under Art. 152 of the Constitution, by updating the names and renumbering the texts (Article 152 became, as republished, art. 156).

Article 4 of the International Covenant on Civil and Political Rights provides that “*where an exceptional public danger threatening the existence of the nation and proclaimed by an official act, the States Parties to the present Covenant may, within strict requirements of the situation, take measures derogating from their obligations under the present Covenant, provided that such measures are not inconsistent with their other obligations under international law they have and that they do not result in discrimination based solely on race, color, sex, language, religion, or social origin.*” This protocol allows taking measures derogating from their obligations to situations that endanger the life of the nation, and one-off measures should not conflict with international law and do not give rise to discrimination.

Under the provisions of art. 52 of the Charter of Fundamental Rights of the European Union “*Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided by law and must respect the essence of those rights and freedoms. By the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives only if the general interest recognized by the Union or the need to protect the rights and freedoms of others.*” The analysis of the text mentioned shows that in the European Union it is possible to restrict the exercise of certain rights and freedoms under conditions similar to those provided in the Romanian Constitution, which confirms the compatibility of Romanian legislation with that of European human rights (Deaconu, 2011, p.231).

The analysis of the international acts above shows that all allow restriction of certain rights or liberties but under conditions such as: restriction may be provided by law, be made for a fixed period and only in certain expressly provided cases, conditions similar or even identical with the Romanian legislation.

In literature (Iancu, 2011, p. 246) it has been presented two categories of reasons that may restrict the exercise of certain rights and freedoms of the general reasons (applicable to all the rights and freedoms) and specific reasons (for one or the other of them). General grounds are those provided by art. 53 of the Constitution and the specific content covered in each fundamental right under the Constitution.

The Romanian Constitution does not expressly mention whether “the restriction” only refers to the fundamental rights and freedoms or to any other rights and freedoms. However, through a consistent jurisprudence the Constitutional Court defined the scope of art. 53 of the Constitution stating that it only concerns fundamental rights and freedoms and no any rights and freedoms, even if they arise from normative acts or consensual acts (Muraru & Tanasescu, 2008, p. 531).

As mentioned previously, for the restriction of certain rights and freedoms it is necessary to be fulfilled several conditions as follows:

- a) restriction of the exercise should be done by law;
- b) restriction is made only if necessary and only in certain situations;
- c) restriction is possible only if necessary in a democratic society;
- d) restriction must be proportionate to the cause;
- e) restriction should be applied without discrimination;
- f) restriction does not affect the existence of rights.

a) To analyze this condition - *restriction of the exercise should be done by law* – we note at the outset that it is one of the conditions set by international laws and human rights. It is also important to specify what is meant by the term “law”. Doctrine (Muraru, & Tanasescu, 2011, p. 164) interpreted this term as referring to the narrow sense of the term, namely the law as normative act of Parliament. Practice of the Constitutional Court revealed that the restriction of certain rights and freedoms is

possible also by legal acts with a force equivalent to law (Ordinance of the Government or Government Emergency Ordinance). As for us, we share the view (Deaconu, 2011, p. 231) that after the revision of the 2003 Constitution, Article 53 must be interpreted in conjunction with Article 115 of the Constitution (legislative delegation), interpretation which states that “*the restriction of certain rights and freedoms cannot be done but by the law as a legal act of Parliament*”. However, there are at present opinions (Safta, 2014, p. 181) according to which the concept of law envisages substantive law, which has the consequence that such a restriction can be achieved through Government Ordinance.

b) Regarding the second condition - *restriction is made only if necessary and only in certain situations* - it should be noted that the legislator constituent explicitly stated circumstances which may restrict the exercise of certain rights and freedoms. Thus, restriction on the exercise is made by the law and is necessary for: the defense of national security, of public order, of health or morals, the rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster. We note that some of these cases are mentioned in international law. Also, another important aspect is that this list is exhaustive and not descriptive. Expressly, there are listed the exceptional cases which may interfere the restriction of certain rights and freedoms: national security, public order, public morality, natural disasters, etc..

c) The third condition - *restriction is possible only if necessary in a democratic society* - requires that the restriction of certain rights and freedoms to be made for a limited period of time and not indefinitely. “Restriction should be temporary because only a temporary restriction would be in line with the democratic nature of a society” (Deaconu, 2011, p. 232).

d) *Restriction must be proportionate to the cause* - proportionality is used in the appreciation of necessity in a democratic society. Restriction of certain rights and freedoms “cannot exceed the limits imposed by the circumstances that led to the protection and by the legitimate aim pursued” (Selejan-Guțan, 2008, p. 133). In other words, it is mandatory to take such measures restricting the exercise, where provided by the legislature, but this measure must be proportionate to the cause of it and not exceed its limits. (eg: the emergence of bird flu or other contagious disease in a town can lead to the restriction of right of free movement only in that area and does not lead to restriction on the exercise this right across the country).

e) *Restriction should be applied without discrimination* - “The constituent established an obligation not only to refrain from arbitrary legislator in establishing the restriction of certain rights in proportion to the social reality, but also the authorities responsible for the enforcement of legal norms, by establishing the obligation not to discriminate on the implementation of the restrictive measure” (Muraru & Tănăsescu, 2008, p. 545). Restriction of certain rights cannot be applied only to certain people, regardless of the criteria used in this shootout; we must apply the general principle of non-discrimination.

f) *Restriction does not affect the existence of rights* - If this measure of restriction might affect the existence of the right, it would be violated the provisions of the international treaties to which Romania is a party and also, in this case, we could not talk about the existence a democratic society. Thus, “we must make a distinction between the legal concept of “restriction” and “reduction” since they are not the same legally, because if the restriction of certain rights is allowed, their reduction is not. The reduction is the decrease of the material content, the volume of goods and guarantees, it is illegal and unsubstantiated limitation of rights namely limiting amount of action in time and space on people, suppressing or reducing their protection safeguards” (Aramă & George, 2009, p. 42).

Restrictions should aim exercise of the rights and freedoms and never existence of the right or freedom.

Restriction or limitation on the exercise of certain fundamental rights is possible only if a fundamental right is not absolute. (Right to life is an absolute; its exercise can be neither limited nor restricted) (Iancu, 2011, p. 246). There are also conflicting views (Deaconu, 2011, pp. 233-234) considering that the right to life, as any fundamental right, is not an absolute right, and they bring as evidence the legal and natural limits of such a right (an example of the legal limit of the right to life is the decriminalization of abortion in the Romanian criminal law; an example of a natural limit is suicide).

Restriction of certain rights and freedoms is of course unpleasant, yet necessary. The article 53 of the Constitution enables us to guarantee all citizens respecting the rights and fundamental freedoms in the context of a complex social and political life, which is constantly changing. Restriction of certain rights and freedoms is a measure that can be applied as a last resort, after having exhausted all other means of action and only in compliance with all conditions above.

The main reason for establishing the extent of restriction is to protect the rights of those around us, “my right extends up to the point where someone else's right begins” and it is a measure which can only have exceptional and temporary feature.

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