THE 14TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Human Rights, International and Constitutional Guarantees - Concept and Evolution. Elements that Lead to the Need for Coding of Human Rights

Emilian Ciongaru[1]

Abstract: The science of human rights is influenced by the other social sciences because the areas taken into consideration were and are in contact with other areas belonging to other disciplines, and they are not few in number. Thus, the chains of interference between disciplines have a high frequency. In our times, we are witnessing a continuous fragmentation of the social sciences in specialisations more or less narrow. Human rights are initially studied in parallel with two or more disciplines. Gradually, a new field was institutionalised, which, by emancipation, was recognised as independent. It has rightly been said that the history of science is the history of the multiplication and diversification of subdisciplines, which, by maturing, were recognised as disciplines. This is the case for the science of human rights. The field of human rights was created by successive contributions arising from researching the great principles in the field, of the normative provisions, of the institutions. However, as any other theoretical, pure and applied science, the science of human rights has progressed through the alternation of periods of brightness and others of obscurity.

Keywords: human rights; law; justice; human behavior; juridical rules; society

1. Introductory Elements

The origins or prefigurations of human rights are lost in the mist of time and looking for the sources, the regulations which govern them begins with studying the traditions, customs, archaeological traces, the first written testimonies. Human rights have evolved throughout history, reaching the forms which we know nowadays. (Miga-Besteliu & Brumar, 2010, p. 5)

In an international document (*Projet de plan a moyen terme pour 1977-1982* (19C/4) UNESCO Document, p. 7, par. 11-22) it is stated that *human rights are neither a new morality, nor a lay religion; they are much more than a language common to all mankind*. They are requirements that human beings must study and integrate in their culture according to their own rules and methods, no matter the diversity of their preoccupations.

Human rights have had a prodigious development after the second world war, and, through the magnitude they have achieved, they have become, as it has been observed, a real political, social, legal phenomenon, with implications in all the areas of human existence, the phenomenon the magnitude of which involves knowing the historical evolution of human rights, of their current status, as well as distinguishing their perspectives. Only thorough and objective works, with an interdisciplinary character, can shed light on them from a scientific point of view. That is why the United Nations

[1] Professor, PhD, University Bioterra Bucharest; Associate scientific researcher, Romanian Academy - Institute of Legal Research "Acad. Andrei Radulescu", Bucharest, Romania, Address: Calea 13 Septembrie no. 13, corp B, et. 4, sector 5, Bucharest 050711, Romania, Corresponding author: emil_ciongaru@yahoo.com.

Commission on Human Rights requested the United Nations Educational, Scientific and Cultural Organisation to examine *the opportunity of taking into account a systematic study and elaborating a distinct scientific disciplines regarding human rights, taking into account the main legal systems of the world, with a view to facilitating, at a university level and later, at other levels of education, the knowledge, understanding, study and teaching of human rights*. The study was performed by UNESCO and at the initiative of the International Institute of Human Rights in, being *a true scientific work on human rights*, which will have to progressively be promoted. As a result, throughout time, the bases of a genuine science of human rights have been set up.

2. Science of Human Rights

It should also be noted that in the field of social sciences, maybe more significantly that in other areas of science, the tendency towards specialisation, which involves a fragmentation of the realities of the contemporary society which we make up and in which we evolve, has become increasingly clearer.

The science of human rights is influenced by the other social sciences because the areas taken into consideration were and are in contact with other areas belonging to other disciplines, and they are not few in number. Thus, the chains of interference between disciplines have a high frequency. In our times, we are witnessing a continuous fragmentation of the social sciences in specialisations more or less narrow. We are also witnessing a recombination of such specialisations which give birth to new disciplines, initially as subdisciplines. (Badescu, 2013, pp. 14-17)

The proliferation of scientific disciplines is increasingly more pronounced, as each of them becomes richer. New areas are created, and the specialisation triggers new progress through their fragmentation, which, in turns, combines with fragments from other disciplines, creating new fields of study, developing their own heritage.

Human rights are initially studied in parallel with two or more disciplines. Gradually, a new field was institutionalised, which, by emancipation, was recognised as independent. It has rightly been said (Vanderbilt, 2016, pp. 372-375) that the history of science is the history of the multiplication and diversification of subdisciplines, which, by maturing, were recognised as disciplines. This is the case for the science of human rights.

The field of human rights was created by successive contributions arising from researching the great principles in the field, of the normative provisions, of the institutions. However, as any other theoretical, pure and applied science, the science of human rights has progressed through the alternation of periods of brightness and others of obscurity.

Thus, the individualisation of an independent discipline was achieved, having its own language and methodology for accumulating, interpreting and explaining information, with statistical techniques of analysis.

The science of human rights is a science the objectivity and rigour of which is guaranteed by the independence of human rights in relation to any school of thought or any interpretation of reality.

Specialists from the United Nations, regional and national organisations, teachers, lawyers, political scientists, specialists in sociology, anthropology, history, geography, economics, doctors, psychologists, etc., have contributed to outlining and developing this discipline.

A definition of this science was formulated during the works of the Convention organised on 5-6 March 1971 in Nice by the International Institute on Human Rights with the title: *The science of human rights:*

its methodology and teaching. On this occasion, among others, problems regarding defining the objects of the science of human rights and its method were debated.

It is a theoretical science made up of knowledge ordered in a logical succession, in a continuous search for new elements, which means increasing knowledge. This search has stimulated the human effort and has supported, throughout history, the aspiration towards freedom and progress; it has answered some present and potential, practical and intellectual needs.

Of course, it is necessary to know the history of human rights in order to understand the mechanism of formation and functioning of the science we are discussing, because only through such study, of other related disciplines, the science of human rights can define its object and the methods, in general, the knowledge which forms the system of human rights developed in a chronological order, later knowledge encapsulating that before it. The progress achieved had a linear development, with some stagnation, but also with leaps, all causing the ascending evolution in the formation of our science. It is a special science, with elements and interests of an encyclopaedical nature, with knowledge borrowed from myths, folklore, religious beliefs, traditions, customs, mentalities, social, political reality, etc.

3. The Concept of Human Rights

It may be observed how big the need of man to understand what is happening in his environment and why what happens happens was, that, in the absence of adequate descriptive and explicative information, human beings invented myths. Fire was given to humans by Prometheus, the founder of the first human civilisation; Antigone defended the unwritten rules of moral obligations against the false justice of the state; Gilgamesh, the legendary hero of the Summerian-Akkadian epic poems, looked not only for the rights to live, but the way to immortality; the goddess Proserpine governed the annual reproduction of vegetation, without which humankind could not have existed; these are just a few of the multitude of myths and legends. (Craiovan, 2010, pp. 168-183)

Gradually, they were replaced with concepts and theories that were reached through confrontation, through scientific research, in various areas, in history, in the political, social, legal, anthropological, philosophical fields, etc. The explicative systems are not provided as groups of definitive and undeniable conclusions, but rather as perfectible products of a continuous flow of research, which involves an inexhaustible application of the critical method. An example of such a process may be the succession of human rights in the three generations, their succession being otherwise open.

The scientific nature of human rights, as an interdisciplinary field of human behaviour, must therefore be understood in light of tradition, of the ideas of contemporary philosophy. It is a border, a contact science, as is, for example, the science of economic thinking, between economics, history, philosophy, geography, political science.

The science of human rights was formed and has evolved in the interdisciplinary field because it researches the individual and societal behaviours applicable to a group of disciplines which study the systems, structures and interactive manifestations in society, between the individual and the state, as well as the systems of relationships and interactions between different people or groups.

The careful study of the international, regional and national instruments regarding the fundamental rights and freedoms of man emphasises the interaction between the individual as a person and citizen and the institutions, as well as the numerous struggles to enforce them (Barsan, 2005, pp. 3-19). It is from here that the above mentioned need for studying the traditions in the field, basically a code of values passed down from generation to generation, according to which each person or institution has acted or acts

within the community contemporary to them arises.

4. Evolution of the Concept of Human Rights for Coding Purposes

Slowly, the idea of the natural equality of all, as well as the idea according to which the development, the progress of humanity depend on external connections, on contingent, in other words environmental, events, took their places in people's minds. This was explicitly formulated in the materialistic philosophy of Thomas Hobbes (1588-1679) and John Locke (1632-1704), according to whom the knowledge and even the principles for the organisation and functioning of the human mind come from experience, therefore from the interaction with the environment.

By observing the collection of ideas, rules and institutions, an author (Cassin, 1952, pp. 239-367) defined the science of human rights as being a distinct branch of social sciences which has as its object the study of the relationships between people according to human dignity, determining the rights and faculties the totality of which is necessary in order for the personality of each human being to flourish.

In this statement it is suggested (Marga, 2017, pp. 131-135) that the discipline of human rights as a distinct branch of social sciences meets and intertwines with the other humanistic sciences, such as law, sociology, political science, philosophy, psychology, history, moral doctrines, etc.

A specialist, Karel Vasak, specialist of great value in the vast problematic of human rights, formulated a second *inductive* definition of the science of human rights. The statement had as its basis *the study of the frequency of the terms in national and international texts dealing with human rights*. Namely, 50 thousand terms related to human rights were entered into a computer, and their highest frequency allowed the specialist to develop the following definition: *the science of human rights refers to the person and especially the working man who is living within a state and is accused of a criminal offence or is the victim of war, who benefits from the protection of the law due to the national judge and the intervention of international organisations (such as the authorities of the European Convention on human rights) and whose rights, especially the right to equality, are in harmony with the requirements of public order* (Vasak, 1978, IX).

The science of human rights has undeniable connections to all the branches of law: international, comparative, constitutional, penal, civil, administrative, etc. Even the language in which human rights and fundamental freedom use is the legal one, as they are first and foremost legal concepts. They are different, but complementary, branches of law, each answering the requirements for the protection of the human being with their own characteristics.

The science of human rights has a strong connection to constitutional law, because the constitutional laws containing human rights, rights which basically determine the relationships between the state and the person, seen as a citizen, are present in this branch of the law. These laws define the areas in which the state cannot intervene, in which the state has the obligation to protect them, to promote them, and the obligations of the citizen towards the state are also stated here.

The sources of the science of human rights derive from the interaction of human rights with the other humanistic disciplines it encountered. The diversity of these sources is especially complex: general and specific instruments, bilateral or multilateral treaties, general principles of law recognised by civilised nations, the national and international customs as proof of a generally accepted practice, the practice of organisms with jurisdictional attributions, the jurisprudence of the International Court of Justice and of the regional courts of human rights, decisions of international organs, the doctrine of specialists.

Within numerous international scientific reunions, conferences and congresses, well-known lawyers, specialists in comparative law, in public and private law have analysed the place codification occupies in the evolution of the sources of law.

Being a creation of modern law, some authors show reservations regarding the vocation codification may have for future development (Oppetit, 1998, pp. 73 and next), while other authors think that it has a future in the postmodern era, universalism giving it the vocation to participate in building the worldwide legal order (Decheix, 2000, pp. 5-11).

At one of the editions of the International University of Human Rights, attention was drawn to a frequent confusion between the work of elaborating a *code* and *codification*, the code being *a vague and at the same time prestigious word* (Zlatescu, 2008, pp. 25 and next), covering over five thousand years of legal history. The term has a technical aspect because it tends towards a better knowledge of law, a social one, because, often times, drawing up a code takes into account social and political antagonisms and therefore must contribute to their attenuation, serving the glory of the leader who attached his name to it, for example Hammurabi, or affirmed the independence of a new state.

Obviously, it is not enough to pass a text that contains numerous articles in order for the effect of the codification to be produced. Therefore, along with unifying dispersed laws, it is necessary to order a collection of rules out of which value is derived in connection to other rules, and a system is formed around the general principles, expressed or inferred.

Codification is a systematisation, an application of this philosophy, because it proposes *a common law for humankind*. It represents a special process of using the codes in the field of law. The body of law resulting from this process surpasses classical codes, a phenomenon which, as we have previously emphasised, is as old as legislation. They frequently represented mere compilations of law.

We mention, for example, that attempts for systematisation, and not mere unifications of regulations existed in the initial phase of the formation of the Roman-Germanic system of law (Zlatescu, 2012, pp. 15-24). Such attempts took place in the 5th- 7th centuries, but also in the Middle Ages. According to doctrine, systematisation attempts are found in Eastern Europe beginning with the 9th century, and in the West from the 11th century. As is emphasised in the specialised literature, the systematisation of regulations from canonical law in the 16th century had a major significance especially for the evolution of the systems of law in Western states.

Starting with the 18th century, remarkable works have appeared, that renounced the tradition of presenting the science of law and the simple interpretation of it in order to create a body of law which associated Roman law, local law and the spirit of nature (Zimmermann, 2004, pp. 77-81).

Actually, according to the dominant opinion of doctrine, codification became prevalent in the 17th and 18th centuries and was the work of the great lawyers of the time, who actually codified the law. *In non-Western countries codification was an instrument for modernisation. It was largely achieved in countries withouth common law influences in the 19th and 20th centuries, and, of course, in the Arab world*. (Deronssin & Garnier, 2004, p. 831) Codification desginates a body which refounds the law, terminating the plurality of sources. It especially represents the movement for the transformation of sources of law which takes place under the action of modern states by going from customary law to written law. This is an unusual event. It has as its effect the unification of customary law with the help of Roman law and its modernisation in contact with natural law. Of course, it is not reduced to an art or a mere technique for practising law and justice, as codes traditionally were before it, but is animated by the philosophy of the school of modern natural law, which thinks that positive law is an attempt to reveal the law of nature, a law common to all people, and that this revelation may be performed through a

simple exercise of reason.

A successful codification is thought to be that which corresponds to the traditions and wishes of the population it is addressed to. It should also be taken in account that a political discourse cannot be a source for interpreting codes as long as it is not materialised in a legal text. At the level of international private law, attempts are made for the international uniformisation of solutions through conventions, which can create many difficulties in practice. States codify internal rules, pushing them towards international custom, and, sometimes, they suffer from the sin of excessive nationalism.

It has been stated in doctrine that international public law has two sources of codification, namely: international custom, which does not have many rules, and treaties, which always contain treaty-law type provisions. The UN Bill is one example. It provides the development of international law, but it has imposed general conduct rules for member states. For example, they were prohibited to resort to force, unless, of course, it is a case of self defence. It may be observed that customary law is faithfully reflected, emphasising the importance of custom, and states can create entirely new rules through a treaty-law. Codification in international law represents stating the rules of international law in their entirety in writing, in a coherent, systematic way, or it may look at a specific matter, codification being always connected to the substance of the law. It transforms it, develops it, completes it through the agreement of the states adopting it. The International Law Commission of the UN ensures the representation of the great forms of civilisation and the main legal systems of the world.

Returning to the UN Bill, it may be observed that it provides the development of international law, but codification meets increasing obstacles due to the difficulty of reaching a consensus over the legal regulations regarding new areas, which are in transformation. That is why it is often difficult to differentiate between international custom and codified convention. The idea was also proposed that by a certain number of states accepting a conventional provision, an *instantaneous custom* would appear, however, custom involves, in its essence, the repetition of a behaviour for a certain period of time. This period may not be too long, an example in this respect being the work of the UN for the codification of human rights.

Obviously, there are several techniques of codification. A better result is ensured if the task of codification is attributed to a single author, observing that, when a committee is created, the effect is more reduced, even though the time for achieving the codification is shorter.

In the recent decades information technology has opened new horizons for codification. However, the major difficulty often consists in using the specific terms in different languages because the computer does not always link one term and its legal meaning. Of course, there is a movement towards decodification which emerged with the creation of new branches of law, as there also is the risk of destroying the codification through excessive power given to the judge, especially in the common law system.

In case we are referring to the codification of the fundamental human rights, we should mention that the international law on human rights only appears as a science at the end of the 19th century and the beginning of the 20th century. It is presented as a system, or, better put, as a microsystem, characterised by: a set of regulations, procedures and rules which identify, and, as a result, individualise it; communication links inside and outside the microsystem; internal and external adjustments related to the international and national environment, due to which the science maximises its objectives.

In these conditions, the science of the international law of human rights appears as a subsystem of the system of international law, which, in its turn, appears as a subsystem in the system of legal science, along with other subsystems which have become systems for their components, or, to use the same

language, for their subsystems. It should also be emphasised that in previous centuries human rights were only found in internal law, within constitutional law.

After the appearance of the UN, of the Bill of this organisation and adoption of the Universal Declaration of Human Rights, it is thought that we are in the contemporary era of human rights, characterised by the appearance of numerous regulations in the matter and by codifying fundamental rights. Thus, the UN Bill of Human Rights is a special type of codification. This Bill contains the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights and the Protocols to the two Covenants.

At the level of the member states of the Council of Europe which have revised their Constitutions or have adopted new Constitutions with the participation of the Venice Commission for Democracy through Law, in order to include the rights provided in the Universal Declaration of Human Rights in the fundamental law, thus giving it legal force through the constitutions of the states, and, if we take the example of Romania, due to art. 11 and 20 of the Constitution and the entire Chapter regarding human rights, the process for the internal codification of human rights has been initiated. Also, at the level of the European Union, the Charter of Fundamental Rights, which can also be found in the project for the Constitution of the European Union, and at the level of the Council of Europe, the European Convention on Human Rights, with the additional protocols, the Revised Social Charter and other regional instruments have opened the way to the codification of human rights at a regional level. (Micu, 2016, pp. 27-28)

5. Conclusions

In conclusion, it can be said that the notion of human rights claims to include some essential aspects for human evolution, the change in the perception by the society of the fundamental rights and freedoms of the individual, the adjustment of the national law norms to the international principles of human rights in the legislative and institutional practice of the country. Human rights are the rights of the human being endowed with reason and conscience, and whose natural law are recognized as inalienable and imprecise law. Given these conditions the process of codification of human rights at an international, regional and national level regards the era we are living in, therefore the contemporary one.

6. References

Badescu, M. (2013). *General theory of law*. Craiova: Sitech.

Barsan, C. (2005). *European Convention of human rights. Comments on articles*. Bucharest: All Beck.

Cassin, R. (1952). La Declaration universelle et la mise en oeuvre des droits de l'homme/ The Universal Declaration and the implementation of human rights. In Académie de droit international de La Haye: *Recueil des cours/ Academy of International Law, The Hague: Course Collection.*. Tome 2 en 1951.

Closca, I. & Suceava, I. (1995). *Tratat de drepturile omului/ Human rights treaty*. Bucharest: Europa Nova.

Craiovan, I. (2010). *Filosofia dreptului sau dreptul ca filosofie/ Philosophy of law or law as philosophy*. Bucharest: Universul Juridic.

Deronssin, D. & Garnier, F. (2004). *Passé et présent du droit/ Past and present of law*, no. 6, Compilations et codifications juridiques, t.3; V.S. Jahel, *Code civil et codification dans les pays du monde arabe, 1804-2004, Le code civil, un passé un présent, un avenir/ Compilations and legal codifications, t.3; V.S. Jahel, Civil Code and Codification in the Countries of the Arab World, 1804-2004, The Civil Code, a past a present, a future*. Paris: Dalloz.

Marga, A. (2017). *Justice and values*. Oradea. Romania: Ratio.

Micu, G. (2016). *European Construction*. Bucharest: Pro Universitaria.

Miga-Besteliu, R. & Brumar, C. (2010). *International protection of human rights. Curs notes*. 5rd Edition. Bucharest: Universul Juridic Publishing House.

Moroianu, Zlatescu I. (2008). *Human rights a system in evolution*. Bucharest: Romanian Institute for Human Rights Publishing House.

Oppetit, B. (1998). L'avenir de la codification/The future of codification. *Droits/Laws*, no. 24/1998.

Vanderbilt, A. (2016). Pre-Legal Education. *Studying Law*. Bucharest: Viga.

Vasak, K. (1978). *Les dimensions internationales des droits de l'homme/The international dimensions of human rights*. Paris: UNESCO.

Zimmermann, V.R. (2004). *Roman law, contemporary low, European law, the civilian tradition today*. Oxford University Press.

Zlatescu, V.D. (2012). *Great contemporary law systems*. Bucharest: Pro Universitaria.