

# GENERAL PRINCIPLES OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE LIGHT OF THE ROMANIAN CONSTITUTION, REPUBLISHED

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**ABSTRACT:** *Because the most important human rights and freedoms, those considered essential in order to be better protected, are provided and guaranteed by the very text of the Constitution. Their regulation by the actual text of the Fundamental Law ensures their existence and recognition firstly and secondly, effective means of guarantee and protection. Having in view the role of a constitution, we find (or we should find) within its text only main regulations. It is the case of the fundamental rights and freedoms, the Constitution of 1991, as revised, imposing as principles a series of rules, therefore this paper shall present a brief review of these principles.*

**KEYWORDS:** *principles, rights and freedoms, the Constitution of Romania, republished, guarantees*

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*“Human rights and freedoms are the foundation of any democracy”<sup>1</sup>.*

## 1. GENERAL VIEWS REGARDING THE FUNDAMENTAL RIGHTS AND FREEDOMS

In the legal specialty literature, the fundamental human rights and freedoms have received various definitions. The one that seems the most comprehensive, considers the fundamental rights and freedoms as being those rights of the citizens which, considered essential for the physical existence and mental integrity, for their physical and intellectual

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<sup>1</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român - tratat*, Servo-Sat Publishing House, Arad, 2003, p. 137.

development, as well as for the assurance of the participation in the state management, are provided and guaranteed by the Constitution<sup>2</sup>.

The fundamental rights and freedoms are *subjective rights* (because they are determined by legal rules and consist in the faculty of the active subject of the legal relationship to act or claim a certain conduct whose achievement enjoys the support and protection of the state). They are characterized as *essential* (defining for the human personality) and entered into separate acts (in international law – conventions, covenants, treaties, protocols – and in the national law – the Constitution, laws, other regulations)<sup>3</sup>. Because the most important human rights and freedoms, those considered essential, in order to be better protected, are provided and guaranteed by the very text of the Constitution.

Outlining the concept of human rights was, in fact, a synthesis operation, consisting of the generalization of ideas enshrined in various countries, in legal documents with a rich moral and political content that have withstood time<sup>4</sup>. The fundamental rights and freedoms must be regarded and regulated as personality attributes of the individuals considered both as individual persons, but also as members of the community in which they are integrated<sup>5</sup>.

Although the terms “rights” and “freedoms” are synonymous, as they are actually different subjective rights, it may be considered that “freedoms” are those rights that can be exercised exclusively on the basis of assessing their owner, only he can decide on the possibility of doing or not doing something (for example, the freedom of conscience, the freedom of assembly etc.)<sup>6</sup>. According to an opinion expressed in the specialty literature, by “rights” one must understand “the human rights” in general, and by “freedom” one must have in view the so-called “rights of citizens”<sup>7</sup>.

## 2. GENERAL PRINCIPLES OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

There are guiding rules that summarize in the highest degree the essence of protection and guarantee of human rights and freedoms and we find them, primarily, in Chapter I of Title II of the Romanian Constitution, and other texts like Article 1, Article 4, Article 6 or Article 53 of the Constitution.

*The principle of universality.* According to Article 15 paragraph 1 of the Romanian Constitution, the citizens enjoy the rights and freedoms provided by the Constitution and other regulatory acts having the obligations provided by them. Universality implies the

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<sup>2</sup> See Tudor Drăganu, *Drept constituțional și instituții politice – tratat elementar*, vol. I, Lumina Lex Publishing House, Bucharest, 2000, p. 151.

<sup>3</sup> See Irina Zlătescu, *Despre drepturile fundamentale ale omului și cetățeanului*, in the Review „Dreptul”, no. 7-8/1991, p. 29-30.

<sup>4</sup> See Constanța Călinoiu, Victor Duculescu, *Drept constituțional și instituții politice*, Lumina Lex Publishing House, Bucharest, 2005, p. 148.

<sup>5</sup> See *Drepturile și libertățile individuale – componentă esențială a noii Constituții a României*, editorial in the Review „Dreptul” no. 2/1992, p. 5.

<sup>6</sup> See Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român - tratat*, p. 138.

<sup>7</sup> See Nicolae Purdă, *Protecția drepturilor omului. Mecanisme interne și internaționale*, Lumina Lex Publishing House, Bucharest, 2001, p. 21.

abstract vocation of each individual (of all individuals) to be recognized and to have access to all fundamental rights and freedoms without discrimination. Thus, the universality relates both to the sphere of the holders of rights and freedoms but also to the plenitude of these rights and fundamental freedoms<sup>8</sup> and represents, however, a fundamental principle of law found in any branch of law<sup>9</sup>.

*The principle of non-retroactivity* is enshrined in Article 15 paragraph 2 of the Romanian Constitution<sup>10</sup> according to which *the law takes effect only for the future*. Thus, a new law should be applied only to situations arising after its entry into force, by the simple reason that the subject of law conforms to the existing legal order, therefore known, and thus it cannot be claimed to act under a rule that did not exist at that time<sup>11</sup>. It is a very important constitutional guarantee<sup>12</sup> of the rights and freedoms of the human being.

From this principle, arise two exceptions: the retroactivity of criminal law and the law more favorable (*melior lex*) – the last theses of Article 15 paragraph 2 of the Romanian Constitution; the retroactivity of the interpretative law<sup>13</sup>.

Although Article 15 paragraph 2 of the Romanian Constitution uses the term “law” evidently in a broad meaning (normative act, ie a general rule of obligatory conduct issued by the competent body according to a regulated procedure), fall under the principle of non-retroactivity the decisions of law interpretation issued by the High Court of Cassation and Justice (are valid only for the future) but also the Constitutional Court decisions (*have authority only for the future* – Article 147 paragraph 4 of the Constitution of Romania, republished)<sup>14</sup>.

*The principle of equality* of rights is one of the most important principle of exercising the rights and freedoms of the people. It assumes equal opportunities and equal treatment for all citizens under the law. Essential premise of democracy and of the rule of law, this principle was enshrined in the Romanian Constitution, and in the related legislation. Thus, according to Article 4 paragraph 2 of the Romanian Constitution, republished, “*Romania is the common and indivisible homeland of its citizens, without distinction of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property*

<sup>8</sup> See Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 159.

<sup>9</sup> For example, about peculiarities of the universality principle in the field of public finance law – see Ioan Lazăr, *Dreptul finanțelor publice*, vol. I, *Drept bugetar*, Universul Juridic Publishing House, Bucharest, 2013, pp. 115-116.

<sup>10</sup> Also, the non-retroactivity of law is regulated also by Article 6 paragraph (former Article 1) of the Civil Code (adopted by Law no. 287/2009, republished in the Official Journal of Romania no. 505 of 15.07.2011), Article 11 of the Criminal Code. By including it in the text of fundamental law, the rule of non-retroactivity was elevated to the rank of constitutional principle, representing a fundamental principle of law, thus applicable to all fields of law. – see also Bianca Seleşan-Guțan, *Drept constituțional și instituții politice*, 2<sup>nd</sup> edition, Hamangiu Publishing House, Bucharest, 2008, p. 124.

<sup>11</sup> See Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. I, p. 159.

<sup>12</sup> See Bianca Seleşan-Guțan, *Drept constituțional și instituții politice*, p. 125; Maria Năstase Georgescu, Simona Th. Livia Mihăilescu, *Drept constituțional și instituții politice*, Universul Juridic Publishing House, Bucharest, 2011, p. 151.

<sup>13</sup> Reservations were expressed regarding the feature of exception within the principle of non-retroactivity of interpretative laws, sustaining that these would not be real exceptions as they only clear up the content of the interpreted rule without adding or modifying anything, without being excluded – see Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. I, p. 160.

<sup>14</sup> See Maria Năstase Georgescu, Simona Th. Livia Mihăilescu, *Drept constituțional și instituții politice*, p. 152.

or social origin". And, Article 16 of the Romanian Constitution, republished, named even "Equality of rights" requires some benchmarks of equality<sup>15</sup>:

- paragraph 1 - the equality of all citizens *facing the law and authorities, without any privilege or discrimination* (in terms of Article 4 paragraph 2 - regardless of the field of activity or other aspects, without discrimination based on race, nationality, ethnic origin, language, religion, sex, political affiliation, property or social origin), which implies an equality of chances<sup>16</sup>;

- paragraph 2 – "*No one is above the law*". Reiterating<sup>17</sup> this obligation of all (people and states) to comply with the law, the sentence summarizes exceptionally the cornerstones of democracy: "respect for the human person and the rule of law"<sup>18</sup>.

- paragraph 3 – "*The public positions or dignities, civil or military, may be filled up under the law, by people who have Romanian citizenship and residence in the country. The Romanian State guarantees the equality of chances between men and women to fill these positions and titles*". Although it seems curious the placement of such a provision in the content of an article entitled "Equality of rights"<sup>19</sup> its existence and limitation resulting from the first thesis of the paragraph is justified by the special nature of public offices and dignities which involve the exercise of the state power<sup>20</sup> and therefore a duty of loyalty to the country by the holders<sup>21</sup>. The second thesis of the paragraph represents a particular application of equality and concurrently assuming by the Romanian State the obligation to promote and ensure equality between men and women to fill these functions, otherwise not being the only constitutional consecration of equality between men and women.

- paragraph 4 – "Based on the Romania's accession to the European Union, the EU citizens who meet the requirements of the organic law have the right to elect and to be elected in the authorities of public administration". The inclusion in the text of the fundamental law of this particular manifestation of equality is part of the string of consequences subsequent to Romania's accession to the European Union. It is a right of

<sup>15</sup> It represents the general framework as the Constitution also includes other particular applications determined by social or natural considerations – see Tudor Drăganu, *Drept constituțional și instituții politice – tratat elementar*, vol. I, p. 186.

<sup>16</sup> See Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații*, All Beck Publishing House, Bucharest, 2003, p. 21, as well as in I. Muraru and E.S. Tănăsescu (coord.), *Constituția României – comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 151.

<sup>17</sup> It was also expressed the view according to which the text could have missed from the Constitution without notable consequences – see Ioan Muraru in I. Muraru and E.S. Tănăsescu (coord.), *Constituția României – comentariu pe articole*, p. 152.

<sup>18</sup> According to the Charter of Paris for a New Europe of 21 November 1990, published in the Official Journal of Romania no. 181 of 9 September 1991 – „*Democracy is founded on respect for human person and the rule of law. Democracy represents the best guarantee of the freedom of expression, of tolerance towards all groups of society and of equality of chances for each person. Democracy, with its representative and pluralist feature assumes responsibility towards the electorate, the obligation of the authorities to comply with the law and the exercise of the impartiality of law. No one is above the law*”.

<sup>19</sup> The article includes an apparent exception to the principle of equality, except all the persons who do not have Romanian citizenship or residence in the country - see Bianca Selejan-Guțan, *Drept constituțional și instituții politice*, p. 126.

<sup>20</sup> See Tudor Drăganu, *Drept constituțional și instituții politice – tratat elementar*, vol. I, p. 133.

<sup>21</sup> See Bianca Selejan-Guțan, *Drept constituțional și instituții politice*, p. 126.

the European citizens<sup>22</sup> conferred by the Treaty on the Functioning of the European Union (TFEU) and the European Union Charter of Fundamental Rights.

Thus the equality of rights is a guarantee provided by the Constitution, but which refers to all the rights and freedoms (provided by the Constitution and other regulations).

But equality does not imply uniformity, respectively the principle of equality shall not prevent a law to establish different rules in relation to people who are in special situations<sup>23</sup>. For example, a social protection measure can not be regarded as a privilege or discrimination<sup>24</sup>.

*Free access to justice* – Is a guarantee of the respect and protection of the rights and freedoms<sup>25</sup>, the phrase summarizing the entirety of legal means<sup>26</sup> available to citizens to address the court in order to protect the rights and liberties against any abuse or harm. It is enshrined in Article 21 of the Romanian Constitution, republished according to which “Any person can address the court to protect its rights, freedoms and legitimate interests”, the constitutional text providing at the same time effective guarantees of achievement “(2) No law may restrict the exercise of right”. (3) The parties have the right to a fair trial<sup>27</sup> and settlement of cases in a reasonable time. (4) Administrative special jurisdictions are optional and free of charge<sup>28</sup>. As the literature stated, the access to justice requires not only an individual right of the person to address the Justice, but also the correlative obligation of the competent court to decide upon the ongoing litigation<sup>29</sup>.

The *protection* of Romanian citizens abroad but also of foreign citizens and stateless persons in Romania.

The principle of protection for the Romanian citizens abroad is enshrined in Article 17 of the Romanian Constitution, republished, and is based on the political and legal relationship between the state and its own citizens. Based on this principle, Romanian citizens, wherever they are in the world, have the right to appeal and to seek the protection and support of the Romanian state, and the State has the constitutional obligation to provide that protection<sup>30</sup>. Correlative, obviously, the Romanian citizens are obliged to fulfill their obligations, except those which are incompatible with their absence from the country.

The principle of protection for foreigners and stateless persons in Romania is included in the Article 18 of the Romanian Constitution, republished, and is based on the status of human being and the enshrinement of the general obligation of the state to regulate the

<sup>22</sup> [http://ec.europa.eu/justice/citizen/index\\_ro.htm](http://ec.europa.eu/justice/citizen/index_ro.htm) (seen on 16.11.2013).

<sup>23</sup> See Decision of the Constitutional Court no. 70 of 15 December 1993, published in the Official Journal of Romania no. 307 of 21 December 1993; Decision of the Constitutional Court no. 74 of 13 July 1994, published in the Official Journal of Romania no. 189 of 22 July 1994.

<sup>24</sup> See Decision of the Constitutional Court no. 71 of 15 December 1993, published in the Official Journal of Romania no. 305 din 23 December 1993.

<sup>25</sup> See Maria Năstase Georgescu, Simona Th. Livia Mihăilescu, *Drept constituțional și instituții politice*, p. 157.

<sup>26</sup> For details, see Nicoleta Adriana Odina, *Considerații cu privire la mecanismele de protecție și garantare a drepturilor omului*, in the Review „Juridical Current”, no. 1-2/2006, pp. 12-17.

<sup>27</sup> About the right to a fair trial, see details Dragoș Chilea, *The right to a fair trail*, in the Review „Juridical Current”, no. 3/2010, pp. 29-50.

<sup>28</sup> Details about administrative jurisdictions and especially about the financial jurisdictions, see Ioan Lazăr, *Jurisdicții administrative în materie financiară*, Universul Juridic Publishing House, Bucharest, 2011, pp. 61-70.

<sup>29</sup> See Tudor Drăganu, *Liberul acces la justiție*, Lumina Lex Publishing House, Bucharest, 2003, p. 7.

<sup>30</sup> See Ioan Muraru in I.Muraru and E.S. Tănăsescu (coord.), *Constituția României – comentariu pe articole*, p. 161.

status and to respect the rights and freedoms of all people. According to Article 18 paragraph 1 of the Romanian Constitution, republished, the foreign citizens and stateless persons that live in Romania shall enjoy general protection of persons and property, protection guaranteed by the Constitution and other laws. Basically, under this constitutional provision, foreign citizens and stateless persons can enjoy all the rights and freedoms conferred by the Romanian legislation (including those undertaken by Romania's accession to international treaties and conventions), except of those that are accessible only to persons who have (also) Romanian citizenship. In particular, paragraph 2 of Article 18 of the Romanian Constitution, republished, regulates regarding the foreign citizens and stateless persons on the territory of Romania, the right to immigration asylum, providing that it shall be granted and withdrawn under the law, complying with the treaties and international conventions to which Romania is a party.

A special form of protection, both for Romanian citizens, for the foreign citizens and stateless persons is ensured by regulating the extradition<sup>31</sup> and expulsion.

Firstly, the Article 19 paragraph 1 of the Romanian Constitution, republished, prohibits the extradition or expulsion of the Romanian citizens, but paragraph 2 of the same article regulates also an exemption: Romanian citizens can be extradited based on the international conventions to which Romania is a party, under the law, and based on reciprocity. Hence, the Romanian citizens may not be expelled from the territory of Romania.

Secondly, Article 19 paragraph 3 of the Romanian Constitution, republished, requires that the extradition or expulsion of foreign citizens and stateless persons should be made only on the basis of an international convention or reciprocity.

Thirdly, according to paragraph 4 of Article 19 the decision of expulsion or extradition enters the decisional competence of the judiciary.

*The priority principle of the international regulations on human rights and freedoms.* It is provided by Article 20 of the Romanian Constitution, revised, according to which *constitutional directives regarding rights and liberties shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party of* (paragraph 1), and in case of *disparity between the covenants and treaties on fundamental human rights to which Romania is a party, and internal laws, the international rules have priority of application, unless the Constitution or internal laws comprise more favorable provisions.*

Thus, Article 20 of the Constitution requires the *priority rule of international law over national law*, but only in the field of human rights and only if the national law does not contain provisions more favorable.

*The exceptional feature of limitation of certain rights and freedoms.* The principle<sup>32</sup> according to which the limitation of rights and freedoms can only have an exceptional feature (of strict interpretation and application) constitutes an important guarantee for the protection of human being rights and freedoms<sup>33</sup>. Article 53 of the Romanian

<sup>31</sup> See Dragoș Chilea, *The European regulation of extradition*, in the Review "Juridical Current" no. 2/2013, pp. 36-48.

<sup>32</sup> About defining the principle of exercising certain rights and freedoms in doctrine and jurisprudence, details see Dumitru V. Big, *Restrângerea exercițiului libertăților publice*, Hamangiu Publishing House, Bucharest, 2008, pp. 16-30.

<sup>33</sup> See Maria Năstase Georgescu, Simona Th. Livia Mihăilescu, *Drept constituțional și instituții politice*, p. 157.

Constitution, republished, provides the limitation of exercising certain fundamental rights and freedoms only as an exceptional measure, if it is necessary in a democratic society and with a temporary feature.

The principle of *acknowledging the right to identity* of persons belonging to national minorities. According to Article 6 of the Romanian Constitution, republished “(1) *The State acknowledges and guarantees the right of the national minorities to preserve, develop and express their ethnic, cultural, linguistic and religious identity. (2) The protection measures taken by the state for the preservation, development and expression of the persons’ identity belonging to the national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens*”.

Romanian Constitution as well as the international instruments with binding feature<sup>34</sup> does not define the concept national minority. We find definitions in various documents with the role of recommendations<sup>35</sup>. In Romania, the legislature addressed the issue of the statute of the National Minorities<sup>36</sup>.

Although the constitutional text, as well as all international instruments applicable in this matter, uses the term “persons belonging to national minorities” having in view as holders of rights the persons and not the minorities as such, by Article 6 of the Constitution, the Romanian state has undertaken the obligation to *acknowledge and guarantee the right of persons belonging to national minorities to preserve, develop and express their ethnic, cultural, linguistic and religious identity*.

To shape the meaning of the phrase “ethnic, cultural, linguistic and religious identity” the following issues may be considered: the right of persons belonging to national minorities to enjoy their own culture, to profess and practice their own religion and use their own language, including in relations with public authorities, the right to name their own language, rights related to education.

On the other hand, the constitutional text imposed on the Romanian State the correlative obligation to take protective measures *for the preservation, development and expression of the persons’ identity belonging to the national minorities* and which *must conform to the principles of equality and non-discrimination in relation to the other Romanian citizens*. Other constitutional provisions outline the necessary legislative framework: Article 32 paragraph 3, Article 62 paragraph 2, Article 120 paragraph 2, Article 128 paragraph 2.

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<sup>34</sup> See *Convenția-cadru pentru protecția minorităților naționale* (adopted in Strasbourg on 1 February 1995 and entered into force on 8 February 1998. It was ratified by Romania by Law no. 33/1995, published in the Official Journal of Romania no. 82 of 4 May 1995).

<sup>35</sup> Recommendations no. 1134/1990, no. 1201/1993 of the Parliamentary Assembly of the Council of Europe.

<sup>36</sup> The procedure of adoption a new law regarding the statute of national minorities was initiated in 2005 (see the project PL-x no. 502/2005, the procedure not being completed by this time (November 2013). After having been subjected to debates in plenary in the Chamber of Deputies, the draft law was referred to the Commission for Human Rights, Cults and National Minorities -[http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=677](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=677) seen on 23 November 2013), Article 3 of the draft law regarding the statute of the National Minorities defines the national minority as being “any community of Romanian citizens living in Romania since the establishment of the modern State, numerically inferior to the majority population with its own ethnic identity, expressed through culture, language or religion wishing to preserve, express and develop it.” See also Laura-Maria Crăciuneanu, *Discuții referitoare la o definiție legală a sintagmei de „minoritate națională”*, in the Review „Dreptul”, no. 11/2012, pp. 130-151.

### **3. CONCLUSIONS**

It follows that, at least theoretically, the Romanian Constitution, republished, provides the necessary regulatory framework to confer, ensure and guarantee fundamental rights and freedoms, all the basic principles being found therein. In our opinion, it is the first step in achieving and consolidating a democratic society. Thus, the role of contributing to the effective achievement of the aspirations of a democratic state and the rule of law belongs to the secondary law but also to the organizational system of the state and last but not the least to people.

