

CONSIDERATIONS REGARDING THE CONSTITUTIONAL PROTECTION OF SEVERAL SOCIAL RIGHTS

S. BELEA

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Simion BELEA

„Technical University of Cluj-Napoca, North University Centre – Baia Mare”

Faculty of Letters, Department of Social Assistance

E-mail: simionbla@yahoo.com

ORCID ID: <https://orcid.org/0000-0003-2298-6926>

Abstract

The protection of social rights, particularly for vulnerable individuals, represents a fundamental aspect of the contemporary constitutional law across all states. Social rights are among the human fundamental rights and entail the state's obligation to eliminate economic and social inequalities to ensure the citizens well-being. This paper aims at analysing the protection of social rights at the international level, as well as the European Union as a supranational legal source. In its final section, the paper examines the protection of these rights at the national level, with reference to specific articles of the Romanian Constitution that safeguard citizens' social rights.

Key words: *constitution, citizen's rights, right to work, discrimination, sociology, social protection.*

INTRODUCTION

The constitution theory laid the foundation of modern legal thought which transitions from the recognition of rights in vertical relationships (authority – freedom) to horizontal relationships (freedom – freedom). The Swiss philosopher Jean-Jacques Rousseau argued that if people are sovereign, then the law and constitution must be a multilateral expression of their power. It is the constitution which legitimises a legal system and expresses the general will of the people. Since Rousseau onwards, law has become and has been understood as an expression of the general will, giving individuals the ability to express

themselves, and participate in governance for the first time (Rotaru, 2023, 825-874). The constitution serves as a reference for all legal acts, as it must align with the will of the people. People communicate and they do this through the law. The sovereignty resides with the people, being indivisible and inalienable.

The Declaration of Human Rights is a revolutionary milestone for the overall society, establishing the principle of equal rights for everyone. Although, it may be needed for a century to pass to see the effective application of these principles, after two World Wars that left behind a tragic page in history, 1789 represents a vital foundation of constitutionalising fundamental rights and is an essential reference for every constitutional text. To define the concept of 'constitution' it is necessary to establish the historical foundations of the state theory to explain further the concept of constitutionalisation. The constitutionalisation of citizens' rights underlines the necessity of ensuring that relationships identified by the social rights are protected by strong legal guarantees. The constitution represents a supreme source of law within the legal system, to which all other legislative acts must conform. The term *Constitution*¹ has come to acquire a plurality of meanings, being shaped by the historical, political, social, and cultural contexts. On the other side, from an axiological perspective, particularly after the Enlightenment² and the French Revolution, the term *constitution*³ emphasizes a fundamental specific law, one which establishes a

¹ The term 'constitution' drifted from the latin 'constitutio' which refers to an important law, usually issued by the emperor, and it is still used in the Canon Law to indicate the important decisions taken by the Pope, such as the apostolic constitution which establishes the regime that needs to be followed during the period where the chair of the Pope is vacant until a new Pope is chosen.

² This is the term applied to the XVIII century European and American thought. The intellectual and scientific events from the XVII century, the discoveries of Isaac Newton, the rationalism of René Descartes, the scepticism of Pierre Bayle, the pantheism of Benedict the Spinoza and empiricism of Francis Bacon and John Locke – have promoted the faith in natural laws and in the universal order, as well as the confidence in the rational human being and its innovative abilities, which managed to influence the whole society of XVIII century. Source: <https://ro.wikipedia.org/wiki/Illuminism> Accessed at 20th November 2024.

³ Constitution – fundamental legal act which constitutes a set of rules and norms with a supreme legal force, norms which regulate the social relations within the area of state establishment and use of state power, establishing at the same time the limits of this power, the fundamental rights and freedoms of citizens. The constitution represents the legal act which contributed to the regulation of society organisation. Source: <https://dreptmd.wordpress.com/cursuri-universitare/drept-constitutional/capitolul-4-constitutia-in-sistemul-juridic-normativ/> Accessed at 20th of July 2024.

The legal concept of constitution can be explained in two ways: material and formal. From the material perspective, the constitution is a set of laws and rules, which regardless their nature and

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system of separation of powers. The earliest studies on constitutionalism date back from the period of Enlightenment and rapidly became a means of politically articulating liberal principle, also known as '*constitutionalism*', which has evolved over the past two centuries. Limiting state power and democratisation constitute two key elements of contemporary constitutionalism in relationships between individual and authority (form of the state) but also in the relationships between supreme constitutional bodies and political governance. These mark the transitioning from the parliamentary state to a constitutional legislative state. The constitutionalisation of individual rights highlights the necessity of ensuring that social rights exist within a framework of strong legal guarantees. Thus, social rights are protected when enshrined in legal documents within the national legal framework. These are rights that involve a financial cost, which are ultimately supported by society, leading to inevitable tensions between beneficiaries and taxpayers (although the latter may also benefit from certain public services). The constitutional state is one whereby constitutional values have supreme authority and remain resilient to changes in parliamentary majorities, although their interpretation may vary. Its development has led to a gradual departure from the traditional theory of legislative supremacy within the European sphere, towards a system in which the fundamental human rights and the relationships between constitutional bodies are subject to legal constraints as well as judicial oversight.

I. THE RECOGNITION OF SOCIAL RIGHTS AT THE INTERNATIONAL AND EUROPEAN LEVELS

The recognition of social rights at the international level was primarily found in the Universal Declaration of Human Rights, adopted by the United Nations in 1948⁴. The declaration contains a significant catalogue of fundamental rights, among which social and economic rights (including the right to work and fair remuneration) rights which according to the UN Charter, are connected to the development of a social and international order. Despite its non-binding nature, the Declaration was a constant reference, essential for subsequent legal acts which defined the centre of social rights that were recognised to the individual (Rotaru, 2023, 205-221). Among these, is the International Covenant on Economical Social and Cultural rights from 1966⁵ which elaborating upon the rights

form, have the main objective: the constitution, competency and the functioning of the state's bodies, and how the government and citizens relate to each other.

⁴ The Resolution nr 217-III from the 10th of December 1948.

⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty, adopted on the 16th of December 1966 by the United Nations General Assembly through the G.A Resolution 2200A (XXI). This came into force on the 3rd of January 1976. It commits its parties to work together towards the granting of social, economic and cultural rights (ESCR)

mentioned in the Universal Declaration, identifies a minimum protection standard of these rights, although it does not establish a mechanism of judicial enforcement of these rights. Oversight is provided by the United Nations Economic and Social Council which conduct reviews of reports submitted by contracting states and can provide general recommendations. At the regional level, the most advanced protection instrument for human rights is the European Convention on Human Rights⁶ signed on the 4th of November 1950 and ratified by all the states – members of the European Council. The European Convention on Human rights not only focuses on civil and political rights, but also addresses fundamental rights such as the trade union freedom, without forgetting Article 4 which prohibits forced labour and slavery. The most significant element of this document is the establishment of the European Court of Human Rights⁶, providing a justiciable mechanism, allowing both the state and individuals to challenge violations of their rights, including the social ones.

a) *Regional documents on the social rights of citizens*

The African Charter of Human and People's Rights⁷ provides protection for the right to work in Article 15, the right to health in Article 16, and the right to education in Article 17. Another important step in the protection of social rights is the European Social Charter⁸ which was signed on the 18th of October 1961 in Torino by the member states of the European Council. This was later revised in 1966 and enumerates a list of fundamental social rights, including the right to

towards territories and individuals who are not self-governing. This includes the right to work, right to health, right to education and right to a decent standard of living. Source: https://ro.wikipedia.org/wiki/Pactul_interna%C8%9Bional_pentru_drepturile_economice_sociale_%C8%99i_culturale. Accessed on the 20th of November 2024.

⁶ In January 2020, the European Court of Human Rights (ECHR), also known as the Strasbourg Court' was developed in order to hear applications of complaints regarding the human rights from the member states of the European Council. The Court's mission is to ensure that the human rights of the European Convention of Human Rights and the Supplementary Protocol are respected by the state members. Source: https://ro.wikipedia.org/wiki/Curtea_European%C4%83_a_Drepturilor_Omului Accessed at 20th of December 2024

⁷ The African Charter of Human and People's rights also known as the Banjul Charter is a convention developed by the African Union in Nairobi on the 27th of June 1981, within the Justice Ministers Conference of the Organisation of African Unity.

⁸ The European Social Charter is a European Council treaty, adopted in 1961 in Torino and revised in 1996 in Strasbourg. The revised version came into force in 1999 and slowly replaces the initial treaty which came into force in 1965. Source: https://it.wikipedia.org/wiki/Carta_sociale_europea. Accessed at: 20th of November 2024

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work, the right to social security and social protection. Although, it is a document which lacks direct legal enforceability and does not provide a jurisdictional protection of the rights specified above (*F. SUDRE, 1996, 739*)⁹, it relies instead on a controlling system of reporting, triggered by complaints, and monitored by the *Committee of Independent Experts*¹⁰, (*F. Akandji-Kombe, 53/2003, 113 ff.*). The main purpose of this is to promote the uniformity of the state systems and encourage harmonization among the internal systems with the principles established in the Charter. At a European level, the document has a fundamental impact on the protection of social rights, as its key dispositions can be highlighted within the national systems through two essential mechanisms:

- Firstly, the member states of the Charter are forced to follow the established rights and ensure an effective application of these rights through measures which facilitate their application, further suggesting that the document can be invoked in the National Courts if the state is not accomplishing its duties and not aligning with the rights enshrined by the Charter (action of ascertaining the abstention of actioning).
- Secondly, complying with the principles developed by the Charter can be ensured through the conform interpretation technique¹¹. The European Social Charter safeguards and upholds a varied list of economic, social, and cultural rights, such as the right to work, fair working conditions, the right to adhere, collective bargaining – in Articles 12-14, protection for vulnerable groups in articles 15-17 and 19, and access to living conditions in Article 31.

⁹ The Charter recognises the human rights and human freedom and establishes a control mechanism to guarantee that the member states respect and follow them. Recently, through Law nr.74/1999, Romania ratified the European Social Charter, developed at Strasbourg on the 3rd of May 1996. Similarly, Romania signed the Charter on the 14th of May 1997, being the tenth member state and the first from the Central and East Europe that took responsibility to ratify this treaty, considered to be the reference document of the XXI century concerning social rights.

¹⁰ A system completed in the 1998 which focuses on the collective complaints and allowing organisations to file complaints to the European Committee for Social rights. Since its establishment, it has made important decisions such as the Complaint Example nr.8/2000, CQAE c. Greece, that led to the Committee's decision to extend the application domain of the right to work from the article 2 of the Charter, for a general presentation of the Committee's decision.

¹¹ Similarly, the National Legislature often made reference to the Charter, and its dispositions to interpret the state's regulations, or to modify the national dispositions which are not compliant with the objectives and principles established by the Charter.

- The Protocol of San Salvador¹², within the Inter-American human rights system, protects a range of economic, social, and cultural rights.

b) States Responsibility

The economic, social, and cultural rights established in the regional and international human rights' instruments are legally binding. The member states have the legal duty to respect, protect and fulfil these rights. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³, and the Optional Protocol on economic, social and cultural rights which was established according to the Declaration and Action Programme from Vienna¹⁴, the states have the obligation to undertake progressive realisation of these social, economic, and cultural rights, being required to take the necessary steps towards their fulfilment, even if full implementation is constrained by economic limitations. The progressive realisation is supported by the participant state. Non-discrimination in economic, social, and cultural rights must be implemented immediately, states being obligated to repeal laws, policies and practices that impede their realisation and take reasonable measures to prevent discrimination in the public sphere. All member states (regardless their economic situation or lack of resources) must ensure compliance with the rights, and equitable allocation of resources, subjecting government budgetary decisions to legal scrutiny. The legislative measures alone, are insufficient to ensure compliance with the ICESCR and it is expected that states offer judicial appeals, among the implementation of administrative, financial, educational, and social measures.

¹² The American Convention on Human Rights (ACHR) also known as the Pact of San Jose, is an international agreement that protects human rights. It was adopted in 1969 by the American Nations at San Jose, Costa Rica. It came into force after the 11th ratification (that of the Grenada ratification) which was submitted on the 18th of July 1978.

¹³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral [treaty](#) adopted by the [United Nations General Assembly](#) (GA) on 16 December 1966 through GA. Resolution 2200A (XXI), and came into force on 3 January 1976.

¹⁴ Between the 14-25th June 1993, in Vienna took place the World Conference of the United Nations on Human rights. At the end of this conference, the representatives of 171 states voted and granted a Declaration and a Program of action for promoting and protecting the individual's rights. The Declaration and the Vienna Programme consolidated the universal principle of human rights and the states obligation to respect them. This document illustrates a whole section on education regarding human rights, and highlighting its importance. Furthermore, paragraph 78 reads: The World's Conference of Human Rights considers that the education and public information on the human rights are essential in order to establish and promote stable relationships between communities; and to promote mutual communication, understanding, tolerance and peace.

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II. SOCIAL RIGHTS ENSHRINED IN THE ROMANIAN CONSTITUTION

The Constitution of Romania contemplates and regulates various rights classified by the legal scholarship as social rights. The main reason for attributing the qualification of 'social' to these rights is found in the necessity of distinguishing them from the so-called '*freedom rights*', which have been present in all liberal constitutions for a long time.

The areas that are particularly protected by constitutional dispositions concern: education (Art. 32), health (Art. 34), labour (Art.41), social assistance (Art.47), family (Art.48). In this respect, reference is being made to:

- Article 32 bearing the marginal title '*Right to Education*':
 - (1) *The right to education is ensured by compulsory general education, secondary and professional/vocational education, higher education, as well as other forms of instruction and professional development.*
 - (2) *Education at all levels is taking place in the Romanian language. Under the conditions developed by the law, education may also be conducted in an internationally used language.*
 - (3) *The right of individuals belonging to national minorities to learn their native language and the right to be educated in this language are guaranteed; the methods in which these rights are exercised shall be established by the law.*
- Article 34 bearing the marginal title '*Right to Healthcare Protection*':
 - (1) *The right to healthcare protection is guaranteed*
 - (2) *The state is obliged to take reasonable measures to ensure hygiene and public health*
 - (3) *Organising medical assistance and the system of social insurances for illness, accidents, maternity, and rehabilitation, controlling the medical professions and paramedical activities, and other measures for the protection of physical and mental health shall be established by the law.*
- Article 41 bearing the marginal title of '*Labour and social protection of labour*':
 - (1) *The right to work cannot be refused/restricted. The choice of occupation, profession, or trade, as well as the choice of workplace is free.*
 - (2) *Employees are entitled to measures of social protection. These include but are not limited to workplace health and safety, employment regime for women and young workers, establishment of a national minimum gross wage, weekly rest days, paid annual leave, work under special or*

exceptional conditions, professional training and other specific situations determined by the law.

By regulating the freedom of labour for everyone and their right to choose their profession and workplace, the Constitution primarily focused on ensuring that every person who can work, is given the opportunity to work as they deem appropriate. By acknowledging the status of ‘employee’ and contributing monthly to the social insurance funds, the employed person is entitled to a series of social protection measures, bearing in mind that the justification and the fundamental principle underlying the development of social insurance funds is that of solidarity among the contributing members¹⁵.

- Article 47 bearing the marginal title of ‘*Standard of Living*’:

- (1) *The state is obliged to undertake measures for economic development and social protection to ensure citizens a decent standard of living*
- (2) *Citizens are entitled to the right to have a pension, paid maternity leave, medical assistance in public healthcare institutions, unemployment benefits as well as other forms of public or private social insurances, established by the law. Citizens are also entitled to social assistance measures, according to the law.*

Article 47 of the Constitution nominates several areas in which citizens are entitled to rights, areas which, from a large legal perspective have a connection to the concept of a decent standard of living. The nomination includes the following: the right to a pension, paid maternity leave, access to public healthcare, unemployment benefits and other social insurance forms ensured by the law. This article allows the law to identify and nominate additional forms through which certain groups of people may receive social assistance. Although we are debating a right guaranteed by the Constitution of Romania, article 47 should not be interpreted as an exclusive obligation for the state, which would exempt an individual of any effort in creating their own social environment for development.

¹⁵ Similarly, the same article establishes the fundamental right for collective negotiation, as well as the compulsory behaviour of negotiation and contracts between employers and trade union organisations. An interdependent and united state is created starting from these three fundamental rights (the right to work, right to benefit from social assistance and the right to collective negotiation). The state and its representative authorities and institutions are under the constitutional obligation to safeguard and guarantee the fair remuneration of work, and protect in difficult situations the employees who contributed on a monthly basis to the funds for social protection.

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- Article 48 bearing the marginal title of 'Family': '*Family is founded on the freely consented marriage between spouses, on their equality, and on the right and duty of parents to ensure the upbringing, education and instruction of their children.*'

As mentioned above, a fundamental key of social rights is that they activate the states' obligations, which, among recognition, 'guarantees the non-violation of human rights' and takes responsibility for 'eliminating the economic and social barriers, that limit the citizens freedom, prevent the full development of the human being.'

III. THE RIGHTS 'FOR FREEDOM'

The right to choose a profession or workplace is recognised in Article 15 which states:

'Every person has the right to work, and the right to a freely chosen or accepted occupation.'

Equality of rights is, in itself, an equality of opportunity which is granted by the Constitution to all citizens¹⁶. This is also reflected in paragraph (1) of the Article 16, which guarantees the equality before the law and public authorities, without any privilege or discrimination. The content of paragraph (1) is correlated with Article 4, paragraph (2), which determines the criteria on non-discrimination such as race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin¹⁷. The right to life and physical and mental integrity are highlighted in Article 22 such as:

- (1) *'The right to life, as well as the right to physical and mental integrity are guaranteed.'*
- (2) *'No one shall be subjected to torture or to any form of inhuman or degrading punishment.'*

Furthermore, article 49 emphasises on the protection of children and young individuals:

¹⁶ Article 16 – Equality of rights

- (1) Citizens are equal before the law and public authorities, without privileges and discrimination.
- (2) No one is above the law.
- (3) The public, civil or military functions can be taken according to the law, by individuals who have a Romanian Citizenship and residence in the country. The Romanian State guarantees the equality of opportunity between women and men for these functions.

¹⁷ Source <https://lege5.ro/Gratuit/gg4deoiv/egalitatea-in-drepturi-constitutia?dp=ggztemrwgey> to . Accessed at: 20 th of October 2024.

- (1) *Children and young individuals benefit from a special regime of protection and social assistance in their exercise of their rights.*
- (2) *The state grants allowances for children and benefits for the care of ill or disabled children. Other forms of social protection for children shall be established by the law.*
- (3) *The exploitation of minors, their use in activities which may harm their health, morality or which endanger their life or their normal development, are prohibited.*
- (4) *Minors under the age of 15 years old cannot be employed as salaried workers.*
- (5) *Public authorities have the duty to ensure conditions for the free participation of the youth in the political, sport, social, economic, and cultural life at the national level.*

The protected categories include all people with disabilities, severe pathologies, and other forms of psychological impairments. To protect these individuals from discrimination in the workplace, specific legal protections for protected categories exist in the Constitution of Romania.

IV. THE PROTECTION OF INDIVIDUALS WITH DISABILITIES

Individuals with disabilities benefit from special protection. The state ensures the implementation of a national policy of equality and equal opportunities, prevention, and treatment of the disabled, aiming to enable the effective participation of individuals with disabilities in the community life, whilst also respecting the rights and responsibilities of parents. Each state has programs in the field, for example the Social Security Disability program in the United States that provides cash benefits to people who meet the legal definition of disability in the Social Security Act (David A. Weaver, 2020, p. 51). Studies of claimants who filed claims for acquired disability to obtain a new status of beneficiary and incapacitated for work highlight key barriers to the approval process, such as: high costs for obtaining medical results, long time to establish the file, stigma about receiving disability benefits (Lila Rabinovich, Doerte Junghaenel, Tabasa Ozawa, 2025, p.2)

The main issue in the constitutional study of disability is the way in which the provisions of the fundamental charter address the individual living with a disadvantaged condition, that distinguishes their existence and places them in a position that is different from the others. Therefore, the condition of disability must be examined considering the equal social dignity, the personalism principle,

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and the concept of substantive equality. It is convenient to preliminarily break down the constitutional dimension of disability into two complementary themes: the relational and the individualist perspective¹⁸. The constitutional framework governing the regulation of disability is also limited by the inability of reshaping the structure of constitutional rights, particularly for individuals with disabilities. This is reflected by the constitutional prohibition of discrimination against people with disabilities in comparison to others, based on their presumed minority status within social or personal conditions. Similarly, and in contradiction with the above, the essential recognition of the differential element of disadvantage to support individual self-determination freeing them from the disadvantages which may arise from their condition. Nevertheless, an individual with disability is first and foremost, a person and therefore, must be able to aspire to their rights, both as an individual and as part of their social groups in which their personality develops. To an extent compatible with their condition, it is just to expect that they fulfil the obligatory duties of civil, social, and economic solidarity.

CONCLUSION

I noticed that social rights are both 'fundamental rights' and 'human rights', and in order to be effectively applied, two structural conditions should be met: 1) They must be developed and regarded as 'indivisible', 'interdependent' and 'interconnected' with other fundamental rights (both civil and political) as established in the 1993 Vienna Declaration, the outcome of the 1993 World Conference on Human Rights; and 2) they also must be 'contextually rooted' in a social and institutional space which nowadays can only be 'multilevel', however which at the same time, cannot overlook the regulatory and implementation powers of the state. In essence, the future of social rights will depend on the capacity to manage public budgets appropriately. The Constitution of Romania is characterised by the presence of a wide range of social rights which serve to define our state, Romania - as a social one. In conclusion, we can argue that all social rights share the typical status of fundamental rights and have the advantage of a primary legal rank that for many of them, equates to genuine inviolability.

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