

THE RESTRICTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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Human rights are those rights inherent in people simply by the mere fact of being human. Human rights are an essential feature of a democratic society, an expression of the state's respect for its citizens, enshrined in constitutions and national laws. Thus, the indestructible association relationship between the notions of human rights and democratic society becomes apparent, because in the absence of a democratic regime, human rights do not have effectiveness. Another characteristic of society concerns the responsibility to determine what are the restrictions to be imposed on fundamental human rights. By using a research methodology based on legislative and doctrinal analysis, this article aims to argumentatively present that the margin of appreciation of states regarding the restriction of human rights is not absolute, since these limitations have limits that are provided for by international human rights law.

Keywords: human rights, fundamental rights, fundamental freedoms, restrictions on rights, exceptional situations, security.

RESTRÂNGEREA DREPTURILOR ȘI LIBERTĂȚILOR FUNDAMENTALE CONFORM DREPTULUI INTERNAȚIONAL AL DREPTURILOR OMULUI

Drepturile omului sunt acele drepturi inerente persoanelor prin simplul fapt de a fi om. Drepturile omului reprezintă o caracteristică esențială a unei societăți democratice, expresie a respectului statului față de cetățenii săi, înscrise în constituții și în legi naționale. Astfel, devine evidentă relația de asociere indestructibilă dintre noțiunile de drepturile omului și societatea democratică, deoarece, în absența unui regim democratic, drepturile omului nu au efectivitate. O altă caracteristică a societății privește responsabilitatea de a determina care sunt restrângerile ce trebuie impuse drepturilor fundamentale ale omului. Prin utilizarea unei metodologii de cercetare bazate pe analiza legislativă și doctrinară, acest articol are scopul de a prezenta argumentativ că marja de apreciere a statelor în privința restrângerii drepturilor omului nu este absolută, deoarece aceste restrângeri au limite care sunt prevăzute de dreptul internațional al drepturilor omului.

Cuvinte-cheie: drepturile omului, drepturi fundamentale, libertăți fundamentale, restrângeri ale drepturilor, situații excepționale, securitate.

RESTRICTION DES DROITS ET LIBERTÉS FONDAMENTAUX EN CONFORMITE DU DROIT INTERNATIONAL RELATIF AUX DROITS DE L'HOMME

Les droits de l'homme sont les droits inhérents aux personnes du simple fait d'être humain. Les droits de l'homme sont une caractéristique essentielle d'une société démocratique, une expression du respect de l'État pour ses citoyens, inscrit dans les constitutions et les lois nationales. Ainsi, la relation d'association indestructible entre les notions de droits de l'homme et de société démocratique devient évidente, car, en l'absence d'un régime démocratique, les droits de l'homme n'ont pas d'efficacité. Une autre caractéristique de la société concerne la responsabilité de déterminer quelles sont les restrictions à imposer aux droits fondamentaux de l'homme. En utilisant une méthodologie de recherche basée sur l'analyse législative et doctrinale, cet article vise à présenter de manière argumentative que le pouvoir

discrétionnaire des États concernant la restriction des droits de l'homme n'est pas absolu, puisque ces limitations ont des limites qui sont prévues par le droit international des droits de l'homme.

Mots-clés: *droits de l'homme, droits fondamentaux, libertés fondamentales, restrictions des droits, situations exceptionnelles, sécurité.*

ОГРАНИЧЕНИЕ ОСНОВНЫХ ПРАВ И СВОБОД В СООТВЕТСТВИИ С МЕЖДУНАРОДНЫМ ЗАКОНОДАТЕЛЬСТВОМ О ПРАВАХ ЧЕЛОВЕКА

Права человека — это те права, которые присущи людям в силу того простого факта, что они люди. Права человека являются неотъемлемой характеристикой демократического общества, выражением уважения государства к своим гражданам, закрепленным в национальных конституциях и законах. Таким образом, связь между понятиями прав человека и демократическим обществом становится очевидной, потому что в отсутствие демократического режима права человека не действуют. Другая характеристика общества касается ответственности за определение того, какие ограничения должны быть наложены на основные права человека. С помощью методологии исследования, основанной на законодательном и доктринальном анализе, в данной статье ставится задача доказать, что свобода усмотрения государств в отношении ограничения прав человека не является абсолютной, поскольку эти ограничения имеют пределы, предусмотренные международным законодательством в области прав человека.

Ключевые слова: *права человека, основные права, основные свободы, ограничения прав, исключительные ситуации, безопасность.*

Introduction

Fundamental human rights and freedoms are considered “ *essential rights for the life, freedom, dignity and development of the human being, whose universal and effective respect must be encouraged and promoted through international cooperation*” [1, p. 388].

Human rights are of particular importance in the contemporary world, being omnipresent in the political discourse of state authorities. The definition of international human rights law was necessary after the Second World War and the extent of human rights constituted a real political, social, legal phenomenon, with implications in all areas of human existence. This phenomenon presupposes deep knowledge of creation and the historical evolution of human rights, of the situation in which they are currently evolving, as well as discerning their perspectives.

The emergence and promotion of democracy worldwide contributed to the reformation of state institutions, the adoption of constitutions and numerous international legal instruments that regulated the protection of people's fundamental rights, as well as

the establishment of international security organizations with peacekeeping duties. International instruments in the field of human rights expressly provide for the obligation to be disseminated, appreciating that this is part of the imperative measures that must be taken to ensure the guarantee of respect for fundamental rights. They oblige, in general, the elaboration of an internal implementing legislation.

The protection of human rights imperatively calls for measures in all areas of life, social, economic, political, legal, both at the national and international level, measures aimed at developing the protection of fundamental rights.

The field of human rights was constituted by successive contributions made by researching the great principles in the matter, the normative provisions and the institutions. This science of human rights has progressed, thus reaching the individualization of an independent discipline, with its own language and methodology, for interpreting and clarifying information, with statistical analysis techniques. From the international

documents, the idea emerges that human rights include different aspects and have an extensive area of applicability. In this sense, in their exercise, the principle of equal treatment and non-discrimination on any criterion, such as race, nationality, sex, language, or social origin, is applied.

The science of human rights is a science whose objectivity and rigor is guaranteed by the independence of human rights in relation to any school of thought or any interpretation of reality that is the basis of the rule of law. International pacts and treaties in the field of fundamental rights and freedoms give all people a right to equality before the law and protection against any form of discrimination. The ideas of freedom, equality, non-discrimination promoted with the value of principles unanimously recognized by international documents are enshrined in legislation. The idea is thus seen that “*natural equality represents an individual predisposition, being devoid of finality and meaning within a society, if it is not doubled by the guarantee of equality established from a legal point of view*” [2, p. 126].

The Charter of the United Nations recognizes the possibility for all people to enjoy the exercise of equal rights. The Charter declares human dignity and equal rights as inalienable intrinsic values for all people on which freedom, justice and peace in the world are based [3].

The science of human rights crystallized according to the current of natural law in the adoption of *the Universal Declaration of Human Rights* [4]. Thus, Article 1 provides that all people are born free and have the right to equality in terms of their dignity. Everyone is entitled to the equal exercise of all rights and freedoms as provided herein, without distinction of any kind, such as race, colour, sex, language, religion, politics, opinion, national or social origin, birth or other status. *The United Nations (UN)* has reiterated in

international conventions on human rights that every person is entitled to the exercise of all the rights and freedoms included in these documents, without distinction of any kind. Thus, the UN requests the signatory states to take all possible measures to ensure equal treatment and eliminate discrimination in the exercise of all human rights.

Principles applicable to the restriction of fundamental rights

The general interest causes the state to restrict the exercise of some human rights “*in order to ensure an optimal balance in the development of legal relations between the state and the natural person. This balance must ensure both the manifestation of human personality and the observance of the general values of the rule of law, focused on the general interest*” [2, p. 263].

The exceptional character of the restriction of some fundamental rights and freedoms results from *the Universal Declaration of Human Rights*, from international pacts as well as from other international legal documents. It is generally accepted that there may be restrictions in relation to the exercise of fundamental human rights and freedoms, subject to certain conditions: they are expressly provided by law, are necessary in a democratic society and are proportional to the cause that determined them.

The protection of integral rights against arbitrariness of restrictions is recognized by universal human rights law and state constitutions. So most human rights are influenced by restrictions that are necessary and rational in a democratic society to achieve specific common benefits, such as social justice, public order and ensuring the protection of the rights of others.

So, the interests of society and the scope of fundamental rights and freedoms are included in an integrated legal structure. They create a regulatory framework in which cumulative

conditions are provided that allow justifications for restricting human rights. Thus, a relationship of proportionality between the rights and freedoms of citizens and the general interest of society is outlined. Globally, no generally accepted system has been established to define the measure of this proportionality, so that each society has regulated this understanding differently according to its own circumstances, shaped by its own distinct problems and historical events.

Human rights restriction clauses therefore allow for a balance between the protection of society as a whole and the rights of people. These means are determined nationally through the application and observance of international provisions in the matter, represented by pacts and treaties. Clauses restricting human rights are appropriate to the principles of international human rights law while, on the other hand, the scope of the right cannot be limited. Likewise, restrictions on human rights are not equivalent to a derogation from these rights, but become necessary to allow a balance in the achievement of community objectives.

The requirement of proportionality gives the necessary legitimacy to restrictions on human rights. In a state of law, the application of the rule according to which legislation could restrict fundamental rights only to make conflicting rights compatible or to protect the rights of other people or the important interests of the community is paramount. Consequently, any restriction of human rights needs not only a constitutionally valid reason, but also one proportionate to the concrete situation. We find that *“the application of the principle of proportionality has a double importance: state guarantees regarding human rights become effective in concrete situations; the arbitrary interference of public authorities in the exercise of these rights or the application of measures to restrict their exercise, measures that represent an excess of power, is removed”* [5, p. 30].

The restriction of fundamental rights must be authorized by law, which means that it must be in accordance with law and expressly and implicitly provided for by law. A legal restriction must be clear, accessible, predictable and precise and must not reveal excessive rigidity. However, a general clause stating that the right may be limited *by law* is not an open invitation to the legislature to restrict that right because, in addition to the condition of legality, the restriction must be proportionate and serve the purpose. This means that it should be necessary and rational in a democratic society.

The principle of necessity is significant in this context because it must be analyzed if the interference with the fundamental right corresponds to a determined social need, if it was proportionate to the legitimate aim pursued and if the reasons invoked by the national authority to justify it are relevant and sufficient. As a result, the existence of limits in the exercise of human rights is justified by *“the need to protect important human or state values, but it is not admissible that in the name of these values, the state authorities limit the exercise of constitutionally guaranteed rights in an abusive and discretionary manner”* [6, p. 56].

Provisions of international documents regarding the restriction of human rights

The possibility of restricting the exercise of certain rights and human liberties is specified in several international acts/regulations/norms that have as their object the protection of human rights. Thus, *the Universal Declaration of Human Rights* provides that in the exercise of his/her rights and freedoms, each person is subject only to the restrictions established by law for the sole purpose of ensuring the recognition and respect of the rights and freedoms of others and for the satisfaction of the just requirements of morality, public order and general welfare, in a democratic society.

Through this provision, some fundamental rights are given a relative character, which means that the rights can be restricted in such a way as to prevent the abuse of rights and, at the same time, to preserve the democratic character of the society.

International Covenant on Civil and Political Rights stipulates that in the event of an exceptional public danger that threatens the existence of the nation and is proclaimed by an official act, the party states may, within the strict limits of the requirements of the situation, to take derogatory measures from their obligations, provided that these measures are not incompatible with the other obligations they have according to international law and that they do not result in discrimination based only on race, color, sex, language, religion, or social origin [7].

International pact on economic, social and cultural rights stipulates that the state parties can only subject the rights to limitations established by law, only to the extent compatible with the nature of these rights and exclusively with a view to promoting the general well-being in a democratic society. The pact regulates the fact that no provision can be interpreted as implying for a state, a group or an individual any right to engage in an activity or to perform an act aimed at suppressing recognized rights or freedoms or limiting them more wider than those provided for in the Pact. No restriction or derogation from fundamental human rights, recognized or in force in any country by virtue of laws, conventions, regulations or customs, can be admitted, under the pretext that the Covenant does not recognize these rights or recognizes them to a lesser extent [8].

European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that no provision of the Convention can be interpreted as *implying*, for a state, a group or an individual, any right to carry out an activity or perform an act aimed at

the destruction of rights or of the recognized freedoms or to bring broader limitations than those provided by the Convention [9]. The European Convention, based on the jurisprudence of *the European Court of Human Rights*, allowed the definition of an important delimitation of the articles on which restrictions can be made, namely Article 8 (protection of private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (right to assembly and association).

The Convention provides in Article 18 that the restrictions that are brought to certain rights can only be applied for the purpose for which they were provided. This article is not “ *a general clause of public order applicable to all the rights and freedoms guaranteed by the Convention, nor in the sense that it would establish a general authorization that would allow states to bring restrictions on these rights and freedoms, other than those already provided for in the Convention texts* “ [10, p. 1016].

The Charter of Fundamental Rights of the European Union establishes that any limitation in the exercise of certain rights must be included in the law and no provision of the Charter limits or affects the rights recognized at the European or international level, especially those provided by the European Convention as well as by the constitutions of the member states. The Charter prohibits the abuse of rights, so in accordance with Article 54 no provision of the Charter entitles someone to engage in an activity or commit an act aimed at violating the rights and freedoms recognized by the Charter or wider limitations thereof [11].

Restriction of fundamental rights in exceptional situations in relation to the concept of security

The institution of the restriction of certain rights becomes all the more important as, in certain circumstances, it can even determine

the survival of states, the restrictions on them becoming obvious. When the life of the nation is at stake, this concept gives a special authority to a state to limit or restrict the scope of its obligations. While applying restrictions it is obvious that the core of the right cannot be affected nor the purpose of the protective instrument must be distorted. According to *the 1948 Universal Declaration of Human Rights*, general restriction clauses can be used to limit a person's rights and freedoms by the state when states of emergency are instituted.

According to Art. 15 para. 1 of *the European Convention*, states can take measures derogating from their obligations, in case of war or other public danger that threatens the life of the nation, if the situation requires it and the measures are not in contradiction with other obligations arising from international law. At the same time, no derogation from art. 2 (right to life), except in the case of death resulting from lawful acts of war, nor from art. 3 (prohibition of torture) and art. 4 (prohibition of slavery and forced labour).

European Social Charter contains, in art. F, provisions regarding exemptions in case of war or public danger. Thus, in the event of a public danger that threatens the life of the nation, any contracting party may take measures that derogate from the obligations set out in the Charter, to the strict extent that the situation demands it and provided that these measures are not in contradiction with the other obligations that derive from international law [12]. In Art. G of *the European Social Charter* provides that the rights and principles enunciated in the Charter cannot be subject to restrictions, except for those listed in the law and which are democratically necessary to guarantee respect for the rights and freedoms of other people or to protect public order, national security, public health or good morals. The restrictions assumed by virtue of the charter and the obligations recognized by it can only

be applied for the purpose for which they were provided.

Consequently, restricting the exercise of certain rights or freedoms is permitted by law for one of the following reasons: ensuring national security, order, public health or morals, citizens' rights and freedoms; conduct of criminal investigation; preventing the consequences of a natural calamity or a disaster. The measure of restriction must be proportional to the situation that generated it, be applied non-discriminatory and not affect the existence of the right or freedom. Derogations from some international obligations in emergency situations are clearly different from the limitations allowed even in normal times. However, the obligation to limit any derogations to those strictly imposed by the exigencies of the situation reflects the application of the principle of proportionality in any situation [13].

Therefore, the establishment of exceptional states to protect the homeland and the nation was seen as a tool to ensure security. At the present time, the concept of *security* is not interpreted in a narrow sense, limited to the security of the territory against external aggression and the protection of national interests. Personal security is indivisible and universally applicable to any citizen, without discrimination. *Human Development Report*, elaborated in 1994 by the United Nations Development Program, devoted exclusively to human security, highlights that human development and human security are as important as territorial security [14] and identifies the seven categories of human security, as follows: *economic, food, sanitary, personal, community, political and environmental*.

Security analyzes focus on the protection of all vital aspects that are meant to enhance human freedoms and fulfillment. Human security interconnects with fundamental human rights. From its narrow perspective,

human security is a human right. In order to protect human security, institutions responsible for political measures must identify effective solutions for managing risks and limiting the causes of insecurity. Consequently, human security associates the sovereignty of the state with the duty to protect its own citizens under the state umbrella.

Conclusions

The considerations made so far are intended to underline the fact that international law has defined certain circumstances that confer legitimacy on the restriction of human rights. The actions of states that fall under the margin of appreciation doctrine must be examined in detail. Therefore, it is appropriate to analyze meticulously those conditions in which the state can derogate from its responsibilities with ensuring a balance of legitimate interest, necessary in a democratic society, and the margin of appreciation must be used in a democratic way. The interpretation of this recital does not only refer to a proportionality of the interference in relation to a legitimate aim but also to the responsibility to use minimal interference to secure the objective and achieve the objective. From another perspective, the very structure of the international documents that regulate these clauses imposes the rule that any restriction on recognized rights requires a legal provision. In other words, the restrictions are governed by the principle of legality aimed at avoiding the discretionary power of states. Furthermore, laws must be clear, accessible to citizens and accurate.

Second, the measure of restriction of rights must be necessary in a democratic society, that is, respond to a pressing and intense social need. This requirement seems to serve a clear objective: to guarantee the protection of non-derogable legal rights and to ensure the democratic functioning of society as a whole.

Finally, all these articles include a list of legitimate purposes that argue for the application

of a restriction of fundamental rights. But this list of purposes is not an exhaustive one so that, according to international documents, the state can be exempted from its duties in exceptional or emergency situations that affect the entire population and constitute a threat to the organization of life in the community of which the state is composed. The crisis or danger must be exceptional, in the sense that the normal measures or restrictions, permitted by law to maintain safety, health and public order, are clearly inadequate and the main criteria for rationalizing the exemption must justify that they threaten the life of the nation. In such situations, ensuring the security of the state and citizens, viewed in an extinguishing way, through all aspects of human existence, becomes a priority over human rights.

In conclusion, the principles and criteria established by international human rights law draw admissible limits that states must take into account in order to restrict some fundamental rights of citizens, in a non-discriminatory manner, without affecting their essence and existence. However, the effectiveness of these international guarantees depends substantially on the adequate development of constitutional provisions and national legislative provisions.

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