

THE GENERATIONS OF HUMAN'S RIGHTS

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Abstract

The current article wants to treat the genesis of subjective rights, especially the fundamental human rights and identifying the four generations of rights as they appeared during time. A very important problem is represented also by the conflict between the generations of rights due to the process of multiplying them.

Key words

Professional self-governance; legal norm; judicial review.

The development of subjective rights, in terms of number, content and completeness of their function is strongly connected to the disequilibrium of the relationships between the individual (the citizen) and the social group (state), and it can astonish the evolution, in terms of human history.

In ancient times, the balance between the individual (citizen) and social group (state) was clearly in favor of the state. Individual rights were subordinated to the interest of the "fortress". This was the situation for the people who enjoy the status of citizen, for all other social classes or foreigners (barbarian people themselves), the situation was much more dramatic. In the medieval period, personal safety and private property were at the arbitrary disposal of the sovereign who had absolute rights without limits, the right to life and death over their subjects. This period generally is characterized by the existence of *the right to force* itself and not *the force of law*, subordinating rights of circumstance, to servitude towards the absolute monarch (monarchy by divine right). Under these conditions, individual rights were at the discretion of the ruling class, the senior pyramid to the monarch. In terms of the history of law, and general theory of law, this evolution may be surprised by the evolution of the generations of subjective human rights.¹ In essence, the evolution of generations of rights is a return, a refund of duties previously delegated to Hobbes's sovereign or government, citizen and civil society. On the other hand, represents a return to the jusnaturalist conception of subjective rights and to the valorization of persons in a juridical sense, as a human being.

¹ Silvia Castignone, *Introduzione alla filosofia del diritto*, Ed. Laterza, Roma, 2004, p. 198

THE FIRST GENERATION OF SUBJECTIVE RIGHTS

This generation of subjective rights is *the generation of civil and political rights* acquired through the force of writing and of arms.

Once time passed and ideas and concepts about state were developed, political power, and right and freedom (the works of philosophers John Locke, Ch Montesquieu, Th. Hobbes, JJ Rousseau), appeared a fight against monarchical absolutism, struggle which will be successful, success expressed by documents with legal force as:

- Magna Charta in 1215
- Petition of Rights in 1628
- The Bill of Rights (Declaration of Rights) in 1689, England
- The American Declaration of Independence in 1776
- The French Declaration of Human and Citizen Rights in 1789.

Through these documents of constitutional nature, were established early forms of limitation of absolute power in the sense that:

1. There were established safeguards against the introduction of taxes by the king, without the approval of Parliament;
2. also have established safeguards against arrest of persons and confiscation of assets without observance of procedure of courts;
3. there were supported and declared the freedom of speech, that freedom of thought and the right to petition;
4. there were stated principles of individualism, starting from the idea expressed by the French Declaration of Human and Citizen Rights in 1789 as "*the purpose of each political associations is keeping natural and indefeasible human rights.*"

It is considered that the Declaration of human and citizens rights from 1789 expresses in the best way the idea that there are inherent human rights, rights that are exercised in a state which is not an end in itself, but only a mean to ensure coexistence of individuals and the exercise of individual rights. For this reason, it is estimated that it is an expression of the first generation of subjective rights. The French Declaration of Human and Citizens Rights from 1789 contained two new ideas:

1. the idea that man as an individual, benefits of "natural rights, inalienable and sacred" including *liberty and equality*;

2. The second idea is that the "purpose of all political associations is the preservation of the natural and inalienable rights of man" (Article 2 of the Declaration).

There are two categories of rights which the Declaration of Human and Citizens Rights from 1789 is referring to:

1. civil rights or human rights as:

- Freedom of opinion (Article 10)
- Freedom of expression and press (Article 11)
- Personal ownership (Article 17)
- The right to personal security in relation to justice and police (art. 7-9)
- Equality before the law (Art. 6)

2. political rights, those that allow citizen participation at power, namely:

- Equal access to public (Article 6)
- Participation in elaboration of laws (Article 6)
- Control of taxes (art. 13-14)
- Citizen control over the administration (Art. 15)

These rights represent the first generation of subjective rights, and more precisely those rights that refer to personal autonomy of the individual and the rights that enable citizen participation in power in a society where "the exercise of natural rights of each man has no limits, than those which ensure for the other members of society the same rights" (article 4). In the modern age, these rights have found their consecration in constitutions and in the laws of most countries, as well as in international documents. Among them we mention:

- The Universal Declaration of Human Rights U.N.
- The International Pact on Civil and Political Rights.

At regional level in Europe, there were created legal mechanisms for protecting these rights: the system of the Council of Europe and of European Court of Human Rights, based on European Convention of human rights and The Additional Protocols of this Convention.

In the system of protected rights which belong to the first generation protected by the European Convention on Human Rights and by The Additional Protocols to this Convention we mention:

1. The right to life.

- the Right to life;
- the Right to privacy;
- Prohibition of torture and inhuman or degrading punishments;
- Prohibition of slavery and forced labor.

2. Freedom and security of a person.

- the Right to a fair trial.

3. The right to property of the person or of a legal person.

4. Freedom of mind, of thought and religion.

5. Freedom of expression and information.

6. Freedom to free elections.

THE SECOND GENERATION OF SUBJECTIVE RIGHTS

In the category of socio-economical and cultural rights we can identify these categories of rights:

1. the right to work;
2. freedom of association;
3. the right to education, learning;
4. the right to insurance for sickness, old age and disability (Social insurance).

These rights come from positive law, as well as from international law (International Covenant on Economic, social and cultural). This dedication has not the same coverage, as in the case of first generation rights, as consecration requires significant effort from the State and so it is appropriate to everyone's prosperity. The second generation of rights, against the first generation of rights requires institutional support from the state, the first generation rights can be exercised independently and singular. The state must intervene through legislation to create an institutional system that allows the exercise, for example, of the right to education or retirement. It is estimated that if the first generation rights form "free status", social economic rights are related to the "social status" of the individual. In the system of rights that belong to the second generation and protected by The

European Convention on Human Rights, Additional Protocols to this Convention and The European Social Charter include:

1. freedom of meeting, association and establishing unions;
2. the right to education;
3. social rights (social security, pensions, medical services).

In the paper "Legal Sociology", Mrs. Professor Sofia Popescu treats the sociology of human rights and when she refers to the rights from the third generation of social rights she presents Norberto Bobbio's view, which asserted the importance of research "*for applying effective legal rules which affirm, recognize, define and assign human rights. It was given the example of the rules from the Italian Constitution which enshrines social rights which were called bashful as "programmatic" and that do not command, prohibit and allow hic et nunc, but command, prohibit and allow for future, without a certain overdue*"²

The same situation is found in the Romanian legal system and this way it appears to be more legitimate and interesting the question regarding the nature of these rights: they have the nature of rights in themselves or of moral or political goals, of some good intentions and goals of the future?

The same author, based on the above considerations, "inclined to mark a distinction between *a right of strong sense*, involving claims that enjoy effective legal protection and *rights in a weak sense*, marking a historical process that interests the sociologist of law. It is a process of transition, in a first phase from an unwritten system of rights in a weak sense, in conformity with the rules of natural or moral rules, to a system of rights, in a strong sense, consecrated by the positive right of national states that, later, which is actually now, is due to the emergence of international documents on human rights and there will be a reverse pass from a system of strong human rights, such as the ones recognized by national states to a system of human rights, in a weak sense, like the international one is."³

THE THIRD GENERATION OF HUMAN RIGHTS

In this category we can identify the so called *solidarity rights*, rights which can not be exerted only by an individual, but only collectively, like:

1. the right of people to self-determination;

² Sofia Popescu, Legal Sociology, Ed. Lumina Lex, Bucharest, p.149

³ Sofia Popescu, op. cit. p.149-150

2. the right to peace;
3. the right to development;
4. the right to humanitarian assistance;
5. environmental law;
6. the right of sexual minorities, ethnic, religious, linguistic, etc.

These rights have a positive consecration, generally in international law.

The rights in this category can not be exerted individually, but only by groups or collectivities of people. The third generation rights require not only the need to create an institutional support by the State, but, as in the case of second generation rights, they need to restrict the first generation of rights, through a so called “positive discrimination”, in the sense that these rights, like the rights of any minority, require a limitation of rights of first generation. The environmental law allows social groups to live in a healthy environment, clean, without harmful agents to health but, in the same time, involves a number of limitations of rights of first or second generation, like owning a forest or the right to work.

Interestingly, regarding the right to environment is the jump which tends to do to the legal status of human beings, hypostasis in which environmental law would become a science of law, fundamental, subordinating all other branches of legal science. The doctrine about the environmental right, talks about these rights as “*rights of future generations*”. We appreciate that they should be seen within the tendency of assertion of the rights of the fourth generation of rights, because right now, the rights of future generations are only some developments trying to crystallize in the form of solidarity rights.

In the Romanian environmental law through the Water Law no. 137/1995 (subsequently repealed by Emergency Ordinance no. 195 of December 22, 2005) on environmental protection, we find an express reference to the rights of future generations, when the legislature defining the concept of "sustainable development" said that it is "a development that meets the needs of present without compromising the ability of future generations to meet theirs" - (Art. 1)

There are laws that recognize different and in some proportions, the existence and exercise of this kind of rights, environmental rights, rights of minorities. Romania is one of the countries that have recognized the great importance of third generation rights. We have the right to environment, the right of ethnic and sexual minorities (their substantial base being put after 1990, in the approach to join the Council of Europe and integration in the European Union, and harmonization of national legislation with international documents of the two regional organizations).

THE FOURTH GENERATION OF SUBJECTIVE RIGHTS

In this category are included the so called “rights related to genetic engineering”, rights which are on the doctrinal debate in what regards their recognition or prohibition of certain activities.

We could put in the same category the so called *rights of future generations*, as well as rights that can not belong to an individual nor to social groups, including nations, they belong *only to humanity* as a whole. The rights of humanity would treat the common assets of **the whole** humanity.

In the same category it is possible to insert rights deriving from exploration and exploitation of cosmic space. In the classic way it is considered that rights related to genetics can be classified as belonging to this last generation of rights, but even if fourth generation in itself is challenged as existence. In doing so, there are identified rights that ensure the inviolability of individual rights and unavailability of human body in terms of development of medical science, of genetics.

Studying the human genome, genetic manipulation, in vitro fertilization, experiences with human embryos, euthanasia and eugenics are activities that can generate complicated legal issues, ethical, moral and even religious, reason for which public opinion has led States to deal with regulation of these issues. The European Council recommends to member states to adopt principles which will govern the relation between genetic engineering and human rights, in such a way that the right to life and dignity would be understood as a right over genetic characteristics of a person. (Recommendation 934/1982).

Thus, each person has its right to life, dignity, personal identity, closely linked to its genetic type configuration, unique, right which it can transmit as genetic heritage to descendants, without being subject to genetic manipulation. From this perspective, human organ donation is prohibited.

In the same time, taking into consideration the principles of inviolability of a person and unavailability of human body, it must be accepted that genetic engineering can be applied for therapeutic purposes to treat and eliminate genetic diseases.

The central idea is that human being should not be genetically influenced, in any way. There are mentioned Nazi ideas about the superiority of a race which required the elimination of others, ideas embodied legal (and factual) in laws of euthanasia of mentally ill, the sterilization of persons with hereditary abnormalities, the bastards sterilization or prohibiting interethnic marriages. Just to avoid doing the same thing in history, the international community has proclaimed the fact that human genome is part of the human heritage.

The UNESCO Declaration on human genome from 1997:

1. stipulates the compulsoriness of the international community to protect the human genome, the right to genetic identity of a person entitled to the banning of cloning;
2. stipulates the obligation of States to defend the person and its dignity, regardless of its genetic characteristics;
3. stipulates limits of intervention on a person's genetic characteristics, subordinated to medical purposes, that concern human health;
4. the respect of humans ego from conception to real death.

In the debate are issues of assisted euthanasia (the right to die in peace and dignity), maintaining artificial life after brain death, sterilization, fetal status, infanticide (late abortion)⁴.

MULTIPLICATION AND INSTIUTIONALIZATION OF NEW RIGHTS

In their historical evolution, mentioned earlier in this paper, it is estimated that human rights have passed through four different processes:

1. of positivation.
2. of generalization.
3. of internationalization.
4. of specialization.

After the second world war, as a response to atrocities of the war and to affecting of human person, both in civil society, as well as in institutional, national and international level, humanity has sought to assert its valences and to obtain legal recognition and protection of its sacred values. So, appeared more demands from the individual, as well as from groups of individuals, demands which evolved and took up the legal form of subjective rights, the State recognizing and protecting them . What is characteristic of the postwar period is the *multiplying and institutionalization* of human rights. In the doctrine⁵ this legal and factual reality is undergoing critics:

⁴ See in the same sense, Duculescu Victor, Juridical protection of human rights. Internal and international means, Ed. Lumina Lex, p. 294-306

⁵ Sofia Popescu, Legal State in contemporary debates, Ed. Academiei Romane, Bucharest, 1998, p. 153-159; Henri Oberdoff, Droit de l'homme et libertes fondamentales, Ed. Armand Colin, Dalloz, Paris, 2003, p.13

1. it is considered as threatening the existence of legal States, weakening its authority;
2. the institutionalization of some rights would attract inefficiency of others;
3. the apparition of a conflict between different generations of rights.

Under the name of *human rights* there were to be affirmed, recognized and protected in national and international level, a number of rights of first and second generation rights. Subsequently, the concept of human rights had to be included rights of the third generation.

From the generations of rights only a part was defined as *human rights*. After a socio-legal criterion, the latter are different from the other subjective rights for two reasons:

1. they are fundamental rights, absolutely essential for human beings, as individuals or members of a community, rights recognized at an international level;
2. secondly, these are “models destined to convince, lacking any sanction, enjoying approval and spontaneous support, motivated by ethical values”. In the category of human rights, we can identify the rights from the first generation like: the right to life, personal safety, the right to property and rights from the second generation like: socio-economical rights or freedom rights (freedom of association) or from the third generation (minorities’ rights, the right to an environment).

On the other hand, the doctrine⁶ says that we are facing two tendencies:

- a. *of creating new subjective rights* (of children, old persons, sick people, those with disabilities);
- b. *of creating new subjects of rights* (the case of animals, environment, human specie). These tendencies are affronting the classical conception of subjective rights and cause reflection to the anticipation of future.

THE CONFLICT BETWEEN GENERATIONS OF RIGHTS

As shown above, the process of multiplication of rights led to the emergence of some frictions, of a conflict between them. Thus, the generation of social economical rights, which requires intervention and support of the state in the economy, for example, limits the rights of first generation and the right to property or rights that limit the power of the state (the issue of new taxes and control over their establishment). Or for example, the right to instruction, education, and freedom of scientific research come into conflict

⁶ Silvia Castignone, op.cit. p.200

with the field of genetic manipulation; the right to security of a person comes into conflict with the right to privacy.

It is estimated that the conflict between subjective rights of different generations or between them and those human goals which tend to jurisdize (fourth generation of rights) is a factor of crisis, a potential danger to the rule of law. The universal nature of subjective rights, qualified as human rights makes them have a transnational relevance, which involves treating them at an international level, beyond the position of the State in question.

It is estimated that the situation of conflict between rights is of two types:

1. conflicts opposing different conceptions about one and the same fundamental right;
2. conflicts that arise from the inability to protect or exercise a fundamental right, without violating another fundamental right;

It is very possible that the exercise of a fundamental right can not be plenary, without limitation of another fundamental right: the right to technological development within environmental law, the right to work, in relation to the right to social security. According to Mrs. Professor Sofia Popescu conflicts between different generations of subjective rights and fundamental rights are explained by the fact that they come from different social interests, protected by different rights and from the rivalry between the values that are protected by various fundamental rights to protect their "existence of second-generation rights (economical, social, cultural) and involves massive state legislature, are endangering the first generation of human rights (political and civil rights).⁷

So, the concern and obligation to organize the equilibrium of the exercise of subjective rights go to the State (and not only, also to the civil societies which may bring their own contribution). They must bring accord between the persons' interests (civil and political rights of first generation of rights) and the communities' interests (social solidarity rights from the second generation of rights). Such a State is the State of Rights and in a modern conception The Social State of Rights.

The subjective rights of an European citizen, mentioned in the Unions' Charter of fundamental rights, which belongs to the Treaty of European Constitution, are recognized in the spirit of society's evolution, social progress and scientific and technological development and, also, in

⁷ Sofia Popescu, *General Theory of Rights*, Ed. Lumina Lex, Bucharest, 2000, p.356

⁸ See the Treaty of institution of a Constitution for Europe, Ed. of the European Institute from Romania, Bucharest, 2005, p. 17, 19, 41.

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considering the responsibilities and duties which they imply for a third party and for the human community and future generations.⁸

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