

1. FUNDAMENTAL RIGHTS

It is generally accepted that the Constitution comprises rules that regulate the organization and exercise of State power, on the one hand, and the relations between the State and its citizens, on the other. The rules that stipulate and regulate the relations between the State and its citizens and, more generally, the relations between the controlling and the controlled are characterized as public freedoms or fundamental rights or human rights.

Fundamental rights determine the percentage of freedom that the members of a certain society have in relation to State power, thus delimiting the size of self-existence and self-determination of every human being.

It would also be useful to clarify that fundamental rights, when formulated in the Constitution, have increased formal power. This means that they cannot be abrogated or changed by a formal law or any regulatory deed of the executive power, but they lay down the limits and the legal framework within which State agents should act as regards their relations with the citizens. In this sense, fundamental rights have an interdisciplinary legal character, since they lay down the principal rules of administrative law, criminal law, labor law, civil law, as well as overall procedural law.

For the notional approach to fundamental rights, the findings of political science, constitutional history and political sociology are useful, in addition to traditional legal interpreting methods. The enrichment of the list of fundamental rights and the re-conception of the content of the rights provided for in the Constitution are assisted by rules of international law, which are sanctioned pursuant to the procedure of article 28 of the Constitution of 1975/1986/2001 and are applicable as domestic law. An example is legislative decree 53/1974, which transposed into Greek legal order the European Convention of Human Rights (Rome Convention of 1950), whose formal validity is superior to any contrary provision of the Greek

legislation, enacted either by formal law or regulatory deed of the executive power.

2. DISTINCTION OF FUNDAMENTAL RIGHTS

The term “fundamental rights” means the ability awarded by applicable laws to satisfy interests relating to the exercise of State power, as long as there is an individual on the one side and a State power agent acting in this dominant capacity on the other. Fundamental rights include individual, political and social rights.

Individual are the fundamental rights with negative content, which ensure the legal status negatively and establish a claim for abstention of State power (*status negativus*).

Political are the fundamental rights with active content, which establish a claim for participation of the holder in State power (*status activus*).

Social are the fundamental rights with positive content, which establish a claim for the provision of certain services and a claim for financial provisions (*status positivus*).

However, the above classification of fundamental rights is schematic and relative, because the three types are supplementary to each other, since they mutually affect the protection and exercise thereof.

3. IMPORTANCE OF FUNDAMENTAL RIGHTS

In ancient Greece, individual freedom was a real state and not a legal safeguard, which is verified if we recall Aristotle’s words “alternatively to rule and be ruled”.

The road to legal safeguarding fundamental rights is long. Its starting point was in late Middle Ages, when people were emancipated by the Church and later by the Monarch. This period saw the formulation of economic and social elements that will lead to the distinction between private society and political society. In time, the development of trade and economic transactions shaped the bourgeoisie which, being the holder of accumulated capital, was legally unprotected towards the arbitrariness of the authoritarian

power of the monarch. The demands it raised were the protection of freedom and ownership. The demands of the bourgeoisie constituted political decisions, since they were imposed in some countries (France) and adopted in others (England). Then, in order for these decisions to maintain their validity, they were incorporated into the Constitution. At the level of fundamental rights, freedom is safeguarded in a dual way: first, as autonomy and, second, as participation. Individual rights are considered to be autonomy and political rights are considered to be participation. The former, being “human rights”, guarantee the abstention of the State power and the latter, being “citizens’ rights”, guarantee the participation in the shaping and exercise of political power.

Therefore, the first arrangements in the 18th century comprise individual and political rights. People become “political beings”, having been “private beings”. Social rights were safeguarded in the Constitution only after World War I.

4. INDIVIDUAL RIGHTS AND REGIME

Regime is the systematic way that State power is constituted and exercised. The regime that ensures individual freedoms is called liberal. Modern regimes are liberal to the extent that they ensure individual rights and democratic to the extent that they ensure political rights, with parallel operation of the principle of universal vote. Democratic regimes tend to the self-determination of their citizens, an element favored both by the participation in the shaping and exercise of State power and by the protection of individual rights. However, in modern pluralist regimes, the congruence of rulers and subjects is impractical, that is unfeasible for the people to self-determine by unanimous vote. If this finding is true and real, then the establishment and protection of individual rights is a *conditio sine qua non* for the modern democratic regime, since individual rights ensure the protection of minorities. In addition, it has recently been observed that freedom loses its effectiveness when it is reduced to a privilege; in other words, freedom should be ensured in favor of those who

disagree with the majority. Besides, it is the individual rights in their entirety that guarantee the unadulterated exercise of political rights.

5. THE LEGAL NATURE OF INDIVIDUAL RIGHTS

Individual rights acquire legal substance not because they are based on “divine intention” or “proper discourse” or “human nature”, but because they are the products of an applicable Constitution that determines the beneficiaries and the protected interests. The rights are an ascribed legal ability, therefore they require a (positive) law and state power, which effectively imposes the protection of the established rights.

The relevant constitutional provisions, which safeguard individual rights, are legally equal and equivalent. Certain provisions, however, enjoy special validity since, pursuant to article 110 (1) of the Constitution of 1975/ 1986/2001, they are not subject to revision. These are article 2 (1) (“Respect and protection of the value of the human being constitute the primary obligations of the State”), article 4 (1), (4) and (7) (“1. All Greeks are equal before the law” – “Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws” – “Titles of nobility or distinction are neither conferred upon nor recognized in Greek citizens”), article 5 (1) and (3) (“1. All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages” – “Personal liberty is inviolable. No one shall be prosecuted, arrested, imprisoned or otherwise confined except when and as the law provides”), article 13 (1) (“Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs”), article 26 (“The legislative powers shall be exercised by the Parliament and the Presidents of the Republic. The executive powers shall be exercised by the President of the Republic and the Government. The judicial powers shall be exercised by courts of law,

the decisions of which shall be executed in the name of the Greek People”).

6. CARRIERS OF INDIVIDUAL RIGHTS

Individual rights are dual, namely they comprise the ascribed legal ability and the corresponding obligation.

Carriers of individual rights are all individuals, therefore foreign citizens as well, in principle. Subject to certain conditions, foreign citizens are carriers of individual rights of collective action (rights to assemble and associate).

Carriers of individual rights are also the minors, since constitutional protection does not require adulthood under civil law. It is worth noting that minors and children are subject to additional rights.

Women, especially mothers, are also subject to additional rights, while the need of special protection to the elderly has also been ascertained.

Conversely, military, judicial and civil servants, being under a special relation of office, enjoy individual rights but with additional restrictions. Carriers of individual rights are legal entities in private law, associations of persons without legal personality, as well as groups in general with legal substance.

Carriers of individual rights are certain legal entities in public law, especially in their management actions (local authorities, universities).

Carriers of obligations corresponding to individual rights are all State power agents, namely those who have the capacity of State agents. Moreover, article 25 (1) of the Constitution stipulates that "The rights of people as individuals and as members of the society are guaranteed by the State and all agents of the State shall be obliged to ensure the unhindered exercise thereof".

The latest revision of the Constitution (2001) resolved an old issue, the handling of which was contributed to by both theory and case law. It is the question of whether individual rights have a one-side direction, namely whether they are ensured only towards State

power or whether they are also ensured towards any type of power, including the power of individuals as third parties, usually with financial features. The question had been replied in the positive through the German origin theory of “third party action”, pursuant to which individual rights are also applicable in private-law relations, namely they develop actions towards third parties.

Article 25 (1) (c) of the current Constitution stipulates that “these rights are also applicable in relations among individuals to which they appertain”. With the explicit safeguard of this provision, individual rights establish a law “in subject” and “in object”, namely they are rules of law that directly bind individuals as well, by enacting objective values, applicable throughout the legal order and covering the entire spectrum of legal relations.

7. REGULATION OF INDIVIDUAL RIGHTS

The safeguarding of individual rights in the Constitution regulates matters concerning State power, in its relations with its subjects. Specifically, individual rights constitute legal forms of self-restriction and self-commitment of the State power which, by organizing the method of exercise in the Constitution, recognizes certain rights in favor of its subjects. They are enacted restrictions to potential State arbitrariness.

The regulation of individual rights consists in determining:

- a. their content,
- b. the method of their exercise, and
- c. the guarantees that make regulation possible,

given that detailed regulation of individual rights is assigned to the common legislator, namely the agent of legislative power (Parliament and President of the Republic) and the regulatorily acting administration. These interventions – which are provided for by the constitution and are, therefore, admissible and legitimate – lead or may lead to the relativity of the constitutional protection of individual rights.

In the process of detailed regulation, account is taken of the fact that:

- a. the regulation is associated with the ensuring and non-undermining of State power,
- b. with the regulation, provision has been made that the exercise of the right of one person does not interfere with the exercise thereof by others.

Specifically, the ensuring of State power is pursued through “public order and security”. Using this condition, an effort is made to balance and combine citizens’ rights with the security of the State.

If this combination cannot be implemented – due to conjunctural conditions – the security of the State prevails and individual freedoms fall back, as they are temporarily suspended.

Concerning the exercise of individual rights in conjunction with the rights of others, the provision of article 5 (1) of the Constitution of 1975/ 1986/2001 is decisive, since it stipulates that “All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages”.

The concept of “good usages” simply denotes the rules of social ethics and not “moral law”, whose content is uncertain, unproved and inexpedient. As the possibility of abusive and unconstitutional restrictions to individual rights becomes marked, it is better to consider that the concept of “good usages” has a purely legal content, which should be approached on the basis of the lessons of common experience.

8. COEXISTENCE AND CONFLICT OF INDIVIDUAL RIGHTS

The restrictions to individual rights are often a necessary condition for their exercise. Thus, the freedom of others is not just a limit, but also a condition for everyone’s freedom. The relativity of the protection of individual freedoms also takes the form of conflict between them. Thus, the same individual right cannot be exercised

simultaneously by many people, but should be regulated by successive restrictions, e.g. the road traffic of pedestrians and vehicles is regulated successively.

The simultaneous exercise of more than one right is many times impossible, especially when the exercise of one right excludes or drastically restricts the exercise of other rights, e.g. the freedom to assemble in highways conflicts with the freedom of road traffic.

In any case of conflict of rights, it is imperative that the competent authority weighs the interests using objective criteria. When legal provisions grant discretion to the competent authority, it should be exercised using objective criteria and not on the basis of arbitrary estimates of ideological or political texture. Besides, the Constitution does not set priorities among individual rights, as the relevant provisions have the same validity as product and derivative of the same constitutional intent.

Conflicts are resolved on a case-by-case basis, according to principles and interpreting criteria proposed by theory and adopted by case law.

9. THE RESERVATION OF THE LAW

Although the enactment of an individual right by provision of formal law cannot be ruled out, individual rights are usually protected by provisions of the Constitution. The constitutional protection is preferred over any other procedure that the national legislator may follow, because individual rights are protected in a fixed and constant manner, since the common legislator cannot change the provisions of the Constitution.

The constitutional protection of fundamental rights and their entailing safeguarding at the level of Constitution do not mean that they are protected in an absolute manner. Fundamental rights are usually safeguarded in the Constitution under reservation of law. These laws are called executive laws of the Constitution, since they are dictated by the latter in order to ensure the fullest application of the provisions of the Constitution relating to fundamental rights.

Although it has been argued that “law” means formal law, namely the product of the intent of the legislative agent of the State, the view has prevailed that the Constitution means substantive law, namely any rule of law, irrespective of the procedure of enactment and irrespective of the enacting agent.

At this point, it is worth recalling that formal law is discussed and passed by Parliament and then issued and published by the President of the Republic in the Government Gazette.

The substantive law includes acts of executive agents that contain a rule of law. These deeds are provided for by the Constitution, which grants direct delegation for the issuance of some of them. These are acts of legislative content and executive presidential decrees pursuant to article 43 (1) of the Constitution. Acts of legislative content are provided for in article 44 (1) of the Constitution and are issued by the President of the Republic, upon the proposal of the Cabinet under extraordinary circumstances of an urgent and unforeseeable need.

The substantive law also includes presidential decrees under article 43 (2) and (4) of the Constitution. In these cases, the delegation to the President of the Republic for the issuance of a presidential decree upon the proposal of the competent Minister (or more than one competent Ministers) is provided by a formal law. Under the provision of article 43 (2) of the Constitution, the delegation is special. The provision of article 43 (4) stipulates general delegation for the issuance of presidential decrees, which is comprised in a framework law.

The substantive law also includes other regulatory acts of the Administration, such as ministerial decisions, for the issuance of which article 43 (2) (b) provides for delegation by formal law.

By means of all the above cases of substantive law, the detailed regulation of a fundamental right becomes possible, with the obvious risk of relativizing the constitutional protection. It becomes clear that the practical value of safeguarding a fundamental right

does not depend on its constitutional announcement, but rather on its overall legislative regulation.

10. RESTRICTIONS OF FUNDAMENTAL RIGHTS IN THE CONSTITUTION

Although in most cases of fundamental rights safeguarded in the Constitution the detailed regulation of their exercise is referred to the law, the legislative provision itself may either protect them directly by binding the common legislator or restrict them directly. Direct restrictions of the Constitution concern either the manner of exercise of the right or the carriers of the right.

Thus, certain rights are safeguarded exclusively for Greek citizens (right to assemble, right to associate) or provide reduced constitutional protection of certain fundamental rights for specific categories of Greek citizens under a special relation of office (prohibition of any form of strike for judicial officials and security service personnel, special restrictions to the exercise of the right to strike for civil servants, employees of the local authorities and employees of legal entities in public law).

11. GUARANTEES TO THE ENACTMENT OF RESTRICTIONS

Pursuant to article 72 (1S), bills and draft laws concerning the exercise of individual rights are debated and voted by Parliament in full session.

Moreover, pursuant to article 43 (5S), matters which belong to the competence of the plenary session of the Parliament cannot be the object of delegation on the basis of a framework law pursuant to article 43 (4) of the current Constitution.

When the Constitution refers to the reservation of law, it is mainly interested in regulation, which can entail the enactment of restrictions only secondarily. As it has rightly prevailed, the regulation of a fundamental right by law does not aim at enacting restrictions, but at ensuring the effective exercise of the right.

Specifically, the regulation and the enactment of restrictions to fundamental rights are subject, in their turn, to restrictions. Such

restrictions must be objective and impersonal, must be justified by serious reasons of overall interest, must meet the purpose for which they are enacted, i.e. they must be necessary and appropriate (principle of proportionality), and must not disprove the core of the fundamental right, i.e. the exercise of the fundamental right must not be subject to absolute prohibition.

12. SYSTEMS RESTRICTING FUNDAMENTAL RIGHTS

a. The exercise of fundamental rights originates from the classical liberal perception that it is not prohibited, is permitted and cannot be obstructed. Formulated in other words, this axiom means that no one can force anyone to do what the law does not dictate. This is known as the principle of legitimacy, which establishes the presumption of *in dubio pro libertatis*. Under this assumption, the system principally applicable in liberal and democratic regimes is the repressive system, which dictates the ex post intervention of the judicial power to impose sanctions to persons who violated the limits prescribed by law.

However, in order for the repressive system to be truly protective of fundamental rights, it must be structured on the following conditions: there should be no enactment of sanctions that do not entail from the regulation of the specific individual right; sanctions should be determined exactly and not vaguely; sanctions should be imposed by agents of the judiciary; and the behavior of citizens should not be unjustifiably penalized.

The repressive system is evaluated by and depends on the content of the criminal legislation, as well as the operation of the State mechanism, especially public administration and the police, and the case law of the courts. It is worth noting that the repressive system governs the exercise of most fundamental rights.

b. Pursuant to the preventive system, the administrative authority intervenes ex ante, namely before a specific fundamental right is exercised. The preventive system in its mild form means that the competent authority is notified a priori.

A more intense form of the preventive system is the prohibition of exercise of a fundamental right, a necessary condition of which is that the exercise of the right is allowed in principle and can only be prohibited by way of exception.

The most intense form of the preventive system is the prior permission to exercise a fundamental right. In the case of permission, a necessary condition is that the exercise of the right is prohibited in principle. By granting permission, the general prohibition is lifted in favour of a specific concerned party.

13. THE CONSTITUTIONALLY ENACTED SUSPENSION OF FUNDAMENTAL RIGHTS

Pursuant to article 48 of the Constitution, in case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the government, puts into effect throughout the State, or in parts thereof the statute on the state of siege. The first consequences of the state of siege are the establishment of extraordinary courts and the suspension of the force of many fundamental rights.

The provision of article 48 was revised by the 6th Revising Parliament in 1986. Before its revision, the provision also stipulated that, *inter alia*, the state of siege may be put into effect due to “serious disorder or obvious threat to public order and safety from internal dangers”, by presidential decree countersigned by the Prime Minister.

Such direct handling of “internal dangers” was (rightly) held to entail risks of abusive exercise, in view of the vague and unclear notion of “internal danger”.

With the current regulation, declaring the country in a state of siege is formalized with clarity and Dorian frugality, leaving no room for abusive exercise. Article 48 of the Constitution and the corresponding Law 566/1977 enact extraordinary law and should be

interpreted in a contracting manner, because they are about the security of the State and the preservation of the democratic regime.

14. CONCLUDING REMARKS

The preceding outline attempted to make a concise presentation of the general reasoning on the safeguarding, protection and restrictions of fundamental right. A central point in this presentation is the constitutionally enacted suspension of the force of fundamental rights. However, the conditions set by article 48 require the investigation into the concept of “national security”. This concept, although much debated, remains unclear and largely ambiguous, especially when account is taken of the fact that, being part of the Constitution, it does not have a descriptive-ascertaining character only, but also a formative content, recalling and underlining the two-way relationship between law and politics, since it touches on both. Its clarification provides elements that delimit both the political dimension of law and the legal dimension of politics.

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