

CONSTITUTIONALIZATION OF THE RIGHT TO SOCIAL SECURITY. THE SOCIAL CHARACTER OF THE ROMANIAN STATE.

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***Resumé** Le mot constitution dérive de la langue latine, où constitution signifie „règlement à base”, „l'état d'une chose”.*

Comme il est bien connu, le terme de constitution est apparu pour la première fois dans le droit romain impérial, étant équivalent avec la loi. Une telle signification a persisté en Europe jusqu'au XVIIIème siècle, les lois d'organisation de l'état étant nommées „lois fondamentales”.

En général, on peut dire que la loi fondamentale de tout état – la Constitution – est l'acte politico-juridique suprême, inspiré par une certaine philosophie politique et sociale, qui est adopté par une nation ou en son nom, par un organisme investi d'un pouvoir constituant originaire, pour établir la forme de l'état, le caractère du régime politique, les modalités de formation, l'organisation et le fonctionnement des structures de pouvoir et les rapports entre ceux-ci, les principes essentiels de l'ordre juridique, et aussi les droits et les devoirs des citoyens.

Donc, par constitution on comprend l'acte juridique et fondamental qui confirme les droits, les libertés et les devoirs fondamentaux, qui réglementent les relations sociales qui apparaissent dans le processus de l'instauration, de l'entretien et de l'exercice du pouvoir de l'état.

La caractéristique de l'état roumain d'être un „état social” signifie, au moins à l'étape actuelle, plus un desideratum qu'une réalité. L'attribut de „social” met en évidence surtout le rôle de l'état de garant du „bien social général”, de défenseur de l'intérêt général et des besoins sociaux élémentaires de l'individu défavorisé par l'économie de marché.

***Mots clé:** constitutionnalisation, état, social, constitution, ordre juridique, droits, devoirs.*

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The constitution word is derived from Latin, in which the *constitutio* means "settlement with base", "state of a thing". During the Roman Empire, *Constitutio* were those laws that came from the emperor irrespective of to subject the regulation of social relations. Jurisconsult Gaius in *Institutiones* said: „*Constitutio principis est quod imperator decreto, vel edictor, vel epistola constitut*” (The Constitution is what the king decides by decree or by epistle¹).

As is known, the term constitution first appeared in the imperial Roman law, being equivalent to the law. Such a meaning has persisted in Europe until the eighteenth century, the laws of the state organization being called "fundamental law"².

The author Mircea Criste defines constitution as "being the fundamental legal norm governing the organization of state power, fundamental rights and freedoms and the legal order in state"³.

Another definition we found at Ioan Muraru which generally considers the constitution as "fundamental law of a State, constituted by legal rules, vested with supreme legal force and governing those social relationships that are essential for alienation, maintenance and exercise of power"⁴.

In a general formulation, one can say that the fundamental law of any state - the Constitution - is the supreme legal-political act, inspired by a certain political and social philosophy, which is adopted by a nation or on his behalf, by an organism which decide the form of state, the political regime, the methods of forming, organization and operation of power structures and relations between them, the essential principles of legal order and the rights and duties of citizens⁵.

So, by the constitution we understand the legal and the fundamental document which consecrate the fundamental rights, freedoms and duties,

¹ Gionea V., Pavel N., *Constitutional law course*, Velcro Publishing House, Bucharest, 1996, p. 13.

² Duculescu V., Constanța C., Duculescu G., *Crestomație de drept constituțional*, Vol. I, Editura Lumina Lex, București, 1998, p.p. 18-19.

³ M. Criste, *Constitution, the fundamental law of the State*, World Publishing Teach Otelu-Red, 2005, p. 5.

⁴ Muraru I., Constantinescu M., *Constitutional studies*, Actami Publishing House, Bucharest, 1995, p. 95.

⁵ C. Ionescu, *Compared Constitutional Law*, CH Beck Publishing House, Bucharest, 2008, p. 4

which regulates social relations occurring during the process of establishment, maintenance and exercise of state power.

It is widely accepted idea that "historically there is a constitution, even if not starting from a certain moment of metaphysical account or combination of material elements from the life of a society"⁶.

Freedom of choice of profession and the workplace are fundamental freedoms, expressions of freedom in labor domain⁷.

Constitution enshrines these freedoms give everyone the opportunity to choose their own profession as well as work. The choice is determined by skills, desires, some economic and social coordinates and the willingness of those interested.

Furthermore, in a society that operates on principles of economic, social and moral healthy, employment is made on the criterion of competence, together with the seniority, ensuring that efficiency and welfare. One of the definitions of wealth explains that this means prosperity⁸. The desire to improve the welfare of individuals belonging to a particular social group is often given as a reason for social policy development. Developing these aspects is related to law. In this respect, the Constitutional Court held that "freedom of choice of profession does not mean that a person may choose to exercise any profession, regardless of training and experience they have. Choice of profession involves proper preparation for practice it"⁹.

Please note however is that the state must show his social character provided for in art. 1 para. 3 of the Constitution¹⁰ for the realization of these components of the right to work. In fact, art. 6 of the Covenant provide that States Parties shall take appropriate measures to ensure this right.

By "character of the state" we understand a defining feature of that State which gives its own individuality, thanks to which is different by

⁶ L. Stroe, *The Constitution of 1923 in the debates of contemporaries*, Humanitas Publishing House, Bucharest, 1990, p. 28.

⁷ Gheorghe Iancu, *The fundamental rights, freedoms and duties in Romania*, All Beck Publishing House, Bucharest, 2003, p. 174.

⁸ Walsh M., Stephens P., *Social policy and welfare*, Nelson Thomes Publishing House, 2000, p.2.

⁹ *Decision no. 80/25.04.2000*, published in CDH, 2000, p. 587.

¹⁰ Which reads: "Romania is a state of law, democratic and social, in which human dignity, rights and freedoms, development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and ideals of the Revolution in 1989, and are guaranteed. "

another state. Such a feature accompanies the State throughout its existence and does not change his content, even if is not expressly stated in a politico-legal document of value of Constitution¹¹. The social character of the state emerges from the Government Ordinance no. 137/2000¹² on preventing and sanctioning all forms of discrimination where in the art. 1 was provided that in Romania, as a state of law, democratic and social, human dignity, rights and freedoms, development of human personality represent the supreme and are guaranteed values.

The principle of equality among citizens, the exclusion of privileges and discrimination are guaranteed also when are exercised the following rights:

- Right to work, to free choice of occupation, to fair and satisfactory working conditions, protection against unemployment, to equal pay for equal work;

- The right to form unions and to join at trade unions;

- The right to education and professional training;

- Right of access to all places and services intended for public use.

Any person or entity has the obligation to respect the principles of equality and discrimination.

Given all the provisions mentioned and rules of labor law, his principles are as follows:

- a) no restriction of the right to work;

- b) freedom to work.

According to art. 41 of the constitution the right to work can not be restricted, and the choice of profession and job are free.

The right to work implies the freedom of everyone to choose their place of employment, the right to participate in collective or individual bargaining and the right to receive a appropriate salary for their work¹³.

Guaranteeing the right to work does not mean providing jobs to

¹¹ Ionescu C., *Treaty of contemporary constitutional law*, All Beck Publishing House, Bucharest, 2003, p. 556.

¹² *Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination*, was published in the Official Gazette of Romania no. 431/2000, approved by Law no. 48/2002 published in the Official Gazette No. 69/2002, amended by Government Ordinance no. 77/2003, published in the Official Gazette of Romania no. 619 of 30 August 2003, approved by Law no. 27/2004 published in Official Gazette of Romania no. 216 of March 11, 2004, republished in the Official Gazette of Romania no. 99 of February 8, 2007.

¹³ Grădinaru N. *Law Labour and Social Security*, Economic Independence Publishing House, Pitesti, 2005, p. 12.

those which are interested, but presume ensuring of other forms of legal safeguards like: regulation of professional training policies tailored to market demands, establishment of a social protection system equitable and effective for those who have lost their job in order to ensure equal employment opportunities for all citizens who can work as well as for financial support of those who are temporarily deprived of professional income.

In this normative context, the natural person is free to decide if to exercise or not their right to work¹⁴.

More broadly, the right to work includes the freedom to choose her profession, occupation, place of employment, wages, the right to collective bargaining and stability in job, social protection of labor.

In a narrow sense, in market economy conditions, it is designed to include, in particular:

- a) freedom of labor¹⁵.
- b) non discrimination in working relations;
- c) the right to social protection measures, resulting in art. 41 para. (2) of the Constitution;
- d) negotiation of working conditions;
- e) labor discipline;
- f) improvement of professional training;
- g) the right to rest stipulated in the Labor Code and in the Constitution;
- h) the right to association in trade unions;
- i) the right to strike, a right that belongs to employees. According to art. 43 (1) of the constitution - "the employees have the right to strike to defend their professional, economic and social interests".

Romanian state characteristic of being a "social state" means, at least at the present stage, more a desideratum than a reality. The concept of the welfare state is a result of the proximity between political power and civil society. The conception about legal state - proper for an industrial emancipated society - requires a balance between state intervention in the social and economic life, and liberal democratic principles and also, the state assumes the fact that has the obligation to ensure a decent life for its citizens. According to the concept underlying the institution of social

¹⁴ Ticlea A., *Labor Code*, Vol.1, Universul Juridic Publishing House, Bucharest, p.51

¹⁵ Stefanescu I.T., *Labour Law Treaty*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 59.

state, state cannot have a passive role compared with free economic competition, characteristic of liberalism, which can lead inevitably to huge social tiebreaker based on wealth. On the other hand, the holder of private capital, the private investor cannot support development programs at economic branch level, or even national of scientific research. This is why the state assumes direct economic and social responsibilities¹⁶.

According to Professor Tudor Drăganu¹⁷ the consecration of social character of the state by the Constitution definitely, will lead, in practice, at the difficulties of interpretation.. Thus, it may put the question to what extent the state can intervene in the sphere of activity of individuals once the Constitution provides the inviolability of private property and lists limitative the cases in which the exercise of rights and freedoms may be restricted, indicating that this restriction should be proportionate to the situation that caused it and cannot touch the existence of such right or freedom. If it is sure that the social state must take the appropriate measures to safeguard and promote the general interests and material conditions necessary to ensure that citizens can enjoy equally the rights and freedoms.

Subsection 1.3.1. The right to a decent standard of living

Art. 47¹⁸ of the Constitution enshrines one of the most fundamental human rights at a decent standard of living, which was later spotted in the catalog of rights and freedoms was contained in the Constitution under the influence of art. 11 of International Covenant on economic, social and cultural rights.

It is largely the result of a new vision of ensuring civil rights, not only through individual efforts of each state, but through the collective efforts of the international community.

In fact, art. 11 section 1 of the International Covenant on Economic, Social and Cultural Rights states that "States will take appropriate measures to ensure the implementation of this right, recognizing to this effect the essential importance of international cooperation, free consenting."

¹⁶ C. Ionescu, *The Romanian Constitution: Law Review commented and annotated with parliamentary debates*, All Beck Publishing House, Bucharest, 2003, p. 4.

¹⁷ Drăganu T., *Constitutional Law and Political Institutions, Treaty Elementary*, Vol I, Lumina Lex Publishing House, Bucharest, 2000, p. 355.

¹⁸ Which reads: "(1) The State is obliged to take measures of economic development and social protection, such as to provide citizens a decent standard of living"

Regarding the contents of the right to a decent standard of living, the Constitutional Court held that it "is not defined by the Constitution, but he resulting from situations envisaged

by the legislature, and international regulations regarding human rights¹⁹."

In this respect, in its complex content, the right to a decent standard of living includes the right of citizens to reasonable conditions of life and continually improve them, that would ensure him and his family a decent living, decent, by providing food, clothing and an satisfactory house.

Living standards are ensured, with priority, through the citizen's own work and his family work, but according to art. 43 para. (A) of the Constitution the state must contribute alone and/or in cooperation with other countries in the world decisive in order to realize and improve living conditions for achieve their desired standard of civilization, by taking, obligatorily, measures of economic development and social protection.

So Constitutional Court decided that "according to art. 1 of the Constitution, Romania is a state of law, democratic and social, which means its obligation to ensure citizens to live in decent conditions - this is covered by the Constitution in art. 43 - The state must take steps to create a suitable framework for increasing quality of life²⁰ .

In art. 47 para. (2) of the Constitution are included some domains that are regulated , broadly, in the content of the right to a decent standard of living or have some links with this right and ensure its realization, namely: the right to pension, the right to paid maternity leave , the right to medical care in public health centers, the right to unemployment benefits and other forms of public or private insurance provided for by law and social welfare measures and also social assistance measures, according to the law.

This latter formulation gives the impression that, by law, can be created and such other rights, which contribute to a decent standard of living.

Some elements from the content of the right to a decent standard of living can become specific guarantees of this fundamental right, elements which are: the state's obligation to take measures for economic develop and social protection, to ensure citizens a decent standard of living, paid

¹⁹ *Decision no. 30/06.04.1994*, published in CDH 1994, p. 21; *Decision no. 224/07.12.1999*, published in CDH 2000, p. 252.

²⁰ *Decision no. 75/13.07.1994*, published in CDH 1994, p. 65.

maternity leave, medical care in public health centers, unemployment benefits and other forms of social assistance provided by law, including the right to paternity leave.

Subsection 1.3.2. The right of children and young persons to protection and assistance

In art. 49 of the Constitution is regulated is another fundamental right, namely: the right of children and young persons to protection and assistance.

Constitutional text is consistent with art. 10 section 3 of the International Covenant on Economic, Social and Cultural Rights, which states that "Special measures of protection and assistance should be taken for all children and young people without any discrimination for reasons of parentage or other reasons."

From reading entire Title II of the Constitution can be easily found that many rights and freedoms refers to children and young people directly, sometimes exclusively.

In this category can be mentioned: the right to education (art. 32), right to employment and social protection of labor (41), the right to marry (article 48), etc.

Also, there are other provisions of the Constitution, which governs the rights and freedoms, in which are nominated children and young people.

In such vision, in content, this right appears as a right-synthesis which exploit the reality according to which children and young people represent, in our days, a great human potential of the society, but especially in the future, are the continuity and the future, human perspective.

Concretely, one can say that they are the causes for this human potential is entitled to an special protection and assistance.

This right, naturally, has correspondent the obligation for the State to ensure for children and young people the necessary conditions for the harmonious physical and intellectual development. In this sense, the Constitution provides protection and assistance measures as part of the content of the right, establishing that the State give state allowances for children, aid for caring sick children or disabled, and other forms of social protection of children and young people, measures which are established by law (Article 49, paragraph (2)).

Also, public authorities are obliged to contribute to ensure the conditions for the free participation of youth in political, social, economic,

cultural and sporting life of the country (art. 49 para. (5) of the Constitution).

Another measure to protect children and young people is to regulate the minimum age of 15 years, of minors, under which they cannot be hired as employees.

The complexity and unpredictability of requirements and measures concerning the special regime of protection and assistance explain the constitutional legal formulations. First are enumerated the most important and certain measures domains where state requirements are clearly concretized. In this sense state is obligated to grant child allowances and benefits for the care of sick children or disabled. The open nature of the constitutional provisions on life dynamics and his demands, but also the opportunities, is expressed by the possibility given to the law to establish other forms of social protection. Secondly, the constitutional text prohibits actions that would contravene the law²¹. In this sense exploitation of minors is prohibited. So is exploited the provisions of Article 10 (3) concerning the International Covenant on Economic, Social and Cultural Rights according to which children and young people should be protected against economic and social exploitation. In addition, constitutional provisions prohibit the use of children and minors in activities that would harm the health, morals or endanger their life or normal development.

The text of the Constitution is in line with Directive 94/33/CEE on youth employment protection²², which is a reference document for the EU social legislation and a summary of the relevant concerns in domain of the European Union. The directive develops the preceding provisions of the European Community Treaty from 1957 and of the Community Charter of Fundamental Social Rights of workers from 1989. The essential principles are: prohibition of child labor, protection and strict regulation of child labor and youth. States should take appropriate measures in this regard.

Prohibition of child labor should not be applied if: they work in cultural or similar activities, which require only prior approval issued under certain conditions (Article 5 of the Directive), children aged at least 14 years may work in training systems, in enterprises and activities legal pre-

²¹ See Muraru I. Tanasescu ES, *Constitutional law and political institutions*, Volume I, Eleventh Edition, All Beck Publishing House, Bucharest, 2003, p.p. 207-208.

²² *Regulations of labor relations. European practice*, Economic Tribune Publishing House, Bucharest, 1998, pp. 152-161.

scribed. Article 3 lit. d) defines "easy work" as being all works, which not affects safety, health and child development, school attendance, participation in training or orientation, legally approved.

Directive lays down provisions relating to: general obligations of the employer, working time, night work, the weekly rest period, break time and adolescents work in case of force majeure.

An important measure to protect children and young people is provided in Art. 45 para. (3) of the Constitution that prohibited the exploitation of minors, their employment in activities that would harm the health, morals or endanger their life or normal development.

This constitutional text exploits provisions of art. 10 section 3 of the Covenant, under which children and young people must be protected from economic exploitation and social and is in conformity with Art. of 94/33/CEE Directive.

The use of minors in work likely to harm their health or morals, of putting lives in danger or harm to their normal development should be punishable by law.

But it is necessary to do the specification that the Constitution refers only to protection and assistance to children and youth. 94/33/CEE Directive defines the notions of "young" and the "child."

By "young" we understand any person under the age of 28 years (Art. 3 lit. a)).

"Child" means any young person who has not attained the age of 15 years or is still subject to compulsory schooling imposed by national law (Art. 3 lit. b)).

Directive defines also the notion of "teenager", which means any young person aged 15 years to 18 years, which is no longer subject to compulsory schooling (Art. 3 lit. c)).

Some elements of the content of the right of children and young to protection and assistance may constitute specific assurances of this fundamental right. These content items are as follows: establishment of an special protection regime and care only for children and young people, the state's obligation to grant state allowances for children and benefits for care of sick or disabled children , and other forms of social protection for children and young people, ban on minors exploitation, their use in activities that would harm the health, morals or endanger their life or normal development, prohibiting the employment under the age of 15 years, public authorities are required to contribute to creating the conditions for free participation of youth in political, social, economic, cultural and sporting life of the country.

Changes introduced by Law to revise the Constitution are drafting. Instead of the phrase "handicapped children", mentioned in the previous text, the Act introduces the term "ill or disabled child." Also, taking into account that the State may only grant allocations from the budget, we preferred the term "allowances" instead of "state allocations"

Subsection 1.3.3. The right to special protection of disabled persons

In art. 50²³ of the Constitution is regulated for the first time in Romania, a new fundamental right, namely the right of persons with disabilities to special protection. In this way it is recognized and solved at the highest judicial level, namely the constitutional one, an reality which can not be ignored in internal and international life.

In fact, today, globally there is an effervescence in the protection of this category of persons, effervescence, which aims, mainly, total or partial integration in the daily life of our peers, who are disabled and especially to treat them as a human being living on Earth.

These goals cannot be achieved without special protection, of which should be enjoyed people with disabilities and to surmount the handicap that they have in comparison with their peers.

Only in this way, disabled people will feel and will be together with their peers and equals, they will can exercise all rights and fundamental freedoms and to assume their constitutional duties.

Because there is not this special protection will result the discrimination so being violated the constitutional principle of equality, principle which is corollary of all human rights and fundamental freedoms.

Correlative of this right, the state has very important obligations, which is about ensuring the implementation of a national policy of equal opportunities, disability prevention and treatment for people with disabilities in order to participate effectively in community life but respecting the rights and duties their parents or guardians (art. 50 of the Constitution).

The special protective measures for persons with disabilities must be aimed at preventing, mitigating or eliminating of professional consequences, economical or social of the disability, by putting into practice of

²³ Which has the following content: "Persons with disabilities enjoy special protection. State ensure the achievement of a national policy of equal opportunities, disability prevention and treatment in order to participate effectively in community life for people with disabilities, while respecting the rights and duties of parents and guardians. "

three important international principles, namely: precocity (diagnosing and timely detection of persons disabled), continuity (continuous application and in the best stages of the most effective methods of healthcare, of normal and special education, of academic-professional orientation and qualification, ensuring job and social integration of persons with disabilities) and finality (recovery and socio-professional insertion of persons with disabilities).

In order to realize effective these principles state must ensure those with disabilities a sufficient number of amenities, which must be developed by law.

Among the guarantees of this right, alongside the amenities mentioned, may be listed, without being exhausted: already organized system of institutions dealing with these persons, material base made available for special protection and recovery actions for persons with disabilities, setting up the National Agency for Persons with Disabilities²⁴ subordinated to the Government, which is responsible for national policy in the domain, support provided by international organizations to resolve problems arising in this area.

All these safeguards detailed by law, clearly classifies the right of persons with disabilities to special protection, including economic rights, social and cultural.

In the parliamentary debate was given a high enough importance etymology expressions "disabled" or "disabled " P.D. parliamentary group the Senate proposed an amendment for framing art. 46, as follows: "Persons with disabilities have assured the equality of opportunities with other citizens". State shall ensure achievement of an national policy of equalization of opportunities and full social participation for people with disabilities. Rights and duties of parents or guardians are respected. The amendment was rejected by the Commission of developing the legislative proposal to revise the Constitution which considered it that "full and equal participation of persons covered by this article, with that of other citizens is by definition impossible, which justifies the special norm of special protection stipulated in Constitution". Because both chambers have voted different texts²⁵, the mediation committee proposed a personal text, which

²⁴ *Emergency Ordinance no. 14/2003* on the establishment, organization and functioning of the National Agency for Persons with Disabilities, published in the Official Gazette of Romania no. 63 of February 1, 2003.

²⁵ Text adopted by the Chamber of Deputies had the following wording: "Protection of persons with disabilities. Persons with disabilities shall enjoy special protection. State

was approved by Parliament.

At the Senate, the text is as follows: "Protection of Persons with Disabilities. Disabled persons shall enjoy special protection. State shall ensure the national policy of prevention, treatment, rehabilitation, education, training and social integration of persons with disabilities, while respecting the rights and duties of parents and guardians. "The text proposed for adoption by the Commission for mediation has the following wording: "Disabled persons shall enjoy special protection. State ensure a national policy of equal opportunities, disability prevention and treatment in order to participate effectively in community life for people with disabilities, while respecting the rights and duties of parents and guardians."

shall ensure the national policy of prevention, treatment, rehabilitation, education, training and social integration of persons with disabilities, while respecting the rights and duties of parents and guardians. "