

The Rights of the Persons who Lost their Autonomy and their Social Protection

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Abstract: To this day, the rights of people who lost their autonomy (the old people over 75, the persons with disabilities and the mentally retarded), have not yet been the object of a special legislation, both at an international and at a national level, hence the lacunary aspects in the field of their rights` legal protection. Thus, with a view to ensuring a dignified existence to old people, the world`s States should also ensure – by means of special laws – their right to medical, sanitary, social protection etc. and not merely provide special social protection measures for them. These social rights, that should allow any individual to live a life characterized by “self-determination and the forbidding of exclusions”, are placed - in the rights` hierarchy - at the level of human fundamental rights, because they have in view the observance of human liberties, equality and dignity, irrespective of human living conditions, irrespective of the economic and social conditions, irrespective of age and of the citizens` state of health.

Keyword: legal protection; social rights; human liberties

In the last decade, we could notice a major preoccupation of the E.U. States for a profound restructuration of the human society. Indeed, in April 2002, the member States of the European Union signed “The International Plan of Action on Ageing”.

Through this Plan, the signatory States took upon themselves the obligation to promote and support the process of “active ageing” – as the World Health Organisation called it that year – by including the needs and the rights of the old people in the social policies and in the national economy programs.

According to the Declaration made by the World Health Organisation in the year 2002, “active ageing” represents “the process of optimizing the opportunities for maintaining health, for participation and personal security, with the purpose of improving the quality of life during the ageing process. Active ageing – they specified in the text of the same Declaration – allows the persons to reach their potential of physical, mental and social well-being during their entire life and to participate within the society, at the same time offering them protection, security and adequate care when they need it”.

“The European Commission” of the European Parliament proclaimed the Year 2012 “The European Year for Active Ageing and Solidarity between Generations”¹.

In order for the old people to remain independent, the European Commission recommended the E.U. States to take practical measures that would aim at:

- a) Increasing the number of years of healthy life to a maximum;
- b) Assuring preventive medical assistance and a favourable living environment to them (public buildings, infrastructure, transports etc.);
- c) Stimulating the elder working people to remain on the labour market, which involves the responsibility of the respective States to improve their working conditions and to adapt the latter to the state of health and to the necessities of the former;
- d) Offering a simplified access to the process of learning throughout one`s entire Long life Learning;
- e) The revision of the taxation systems and the systems of social services;
- f) Contributing to their active insertion within the society, in order to avoid, this way, social isolation and its risks;
- g) Facilitating the creation of a culture of active ageing in Europe;
- h) The right to a decent pension and the reorganization of the system of pensions and of the public policies;
- i) The improvement of professional perspectives, so that the old people “remain on the labour market and share their long experience”, in order “to play further on an active part in the society”;
- j) The solidarity between generations;
- k) The revision of the social policies.

Except for the Social Charter² (from the year 1961 or for the revised one from the year 1996) and for the additional Protocol of 1988, the texts signed by the Government representatives of the member States of the European Union – that have juridical binding force for their members – make no reference to the persons who lost their autonomy (the persons with disabilities, the persons with mental retardation and the old people). Indeed, up to the present, the rights of the persons

¹ The Reporter of The European Parliament for “The European Year for Active Ageing and Solidarity between Generations” was the German Deputy of the European Parliament Martin Kastler, from the Group of the European People`s Party, member of the Christian Democratic Party from Germany.

² For the text of the *Social Charter* from the year 1961 and of the revised one from the year 1996, see the Handbook of the Council of Europe (2006, pp. 441-497) and *Principalele instrumente internaționale privind drepturile omului la care România este parte /The main international instruments regarding human rights that Romania is a party to*, Vol. II (2003, pp. 651-686).

who had lost their autonomy have not yet been the object of a special adequate legislation, both on a European level¹, and on a national level, hence the lacunary aspects in the field of the juridical protection of their rights and, ipso facto, of the social protection of the vulnerable persons (Renucci, 2009, pp. 613-627) to which the Social Charter and the Additional Protocol of 1988 explicitly refer.

These lacunary aspects are especially evinced in the case of elder persons from some E.U. States – the legislations of which do not provide concrete measures in order to ensure a dignified existence to the former. That is why these States should guarantee – by means of special laws – a panoply of fundamental rights as, for example, the right to medical, sanitary, social protection etc. and provide special measures for the juridical protection of these rights, not just limit themselves to Declarations regarding “Active Ageing” or to “Solidarity between generations”, which, in fact, in some States of the European Union only remain a “pium desiderium” (pious wish).

These social rights, that should allow any individual to live a life characterized “by self-determination and the forbidding of exclusions” are placed by some jurists – in the hierarchy of rights – “at the level of human fundamental rights”, as “they have in view the observance of the human liberties, of the equality of humans and of the human dignity, irrespective of the human background, irrespective of the economic-social background, of age and of the citizens’ state of health.” (Delpérée, 1995, p. 51)

In matters of human rights and, ipso facto, of the juridical protection, we should know that these ones are not “at the ease of every state.” (Beșteliu & Brumar, 2008, p. 24) On the contrary, all the States of the world must guarantee and observe the rights provided by the international norms in matters of human rights. That is why we can say that “in matters of international protection of human rights”, the exercise of the sovereignty of every state “is limited by the international norms which convoke and guarantee these rights” (Beșteliu & Brumar, 2008, pp. 24-25). But, with regard to the enforcement of these international norms regarding human rights on an internal level, we must specify that a state will not be obliged to other states, to its own people living on its territory, “irrespective of their citizenship”, as they actually are “the beneficiaries of the international norm” (Beșteliu & Brumar, 2008, pp. 24-25). That is why the international competent bodies only intervene in the cases when there are violations of the human rights within a State and “the state mechanisms are unsatisfactory” (Beșteliu & Brumar, 2008, p. 27). That such violations or infringements upon human rights frequently appear in some States of the European Union, too, is also clearly certified by the Jurisprudence of ECtHR (See, for example, the Jurisprudence of ECtHR in the cases against Romania, edition made up by (Ramașcanu, 2008).

¹ Only in the Social Charter and in the Additional Protocol of 1988 they make explicit reference to the social protection of vulnerable persons (the age and the disability).

According to the E.U. regulations, the social legislator is obliged to forbid any “violation” of the rights of the human person, including “physical or mental violence” (according the Resolution of the European Parliament of 11.06.1986), and “... to assure especially the citizen who lost his autonomy, by ensuring him a social protection meant to make him gain control over his own existence, with care for his dignity and liberty.” (Delpérée, 1995, p. 51)

The juridical protection in the civil relations, which involves “the protection of the state and of the capacity of the persons”, is especially necessary in the case of the persons with disabilities, of the persons with mental retardation and of old people. That is why these persons must be the object of some special protection measures, so that their physical and intellectual state and capacity could be influenced in a positive way.

However, through this protection we should not only aim at their possibility to benefit from and to exert their rights and obligations, but also at their having the capacity to become subjects of rights and obligations and to fulfill them, that is to have the necessary juridical “capacity”. That is why for the persons whose capacities are reduced we should establish a special juridical protection, yet keeping, to the extent it is possible, “the autonomy and liberty of these”, hence the necessity to find “a balance between liberty and protection” (Delpérée, 1995, p. 111).

Anyhow, reaching such a balance is not easy in the case of people with disabilities, of the people with mental retardation and of the old people who lost their autonomy, and who – because of their vulnerability itself – are hindered in the exercise of their rights. We could even say that disabilities, for example, “... destroy and suppress the rights to a large extent, the constitutional rights inclusively”. That is why “if the society does not do anything in order to compensate the juridical effects of disability, the persons with disabilities are at a high risk of losing their rights.” (Delpérée, 1995, p. 112)

Based on Article 1 of “The Declaration of the rights of men and citizen” of August 26, 1789, “people are born and remain free and equal in rights”. Anyhow, in the case of those who lose their autonomy, becoming thus vulnerable to the conditions of everyday life, we can no longer talk of remaining in a state of liberty and equality of rights, hence the obligation of the human society to ensure, promote and defend these rights on behalf of the persons with (physical) disabilities, of the persons with mental retardation and of the people in the fourth age.

In the Resolution of the European Parliament of June 11, 1986, they provide that “... all the aspects of physical or mental violence against the human person are a violation of his rights...”. In this sense, the latter are even more serious when committed against some persons with disabilities, with mental retardation or against the old persons. That is why we have to know that any aspect of physical and mental

violence against such human persons is a serious violation of the human fundamental rights¹ hence the obligation of the international bodies and organisations and of the authorities of every State to ensure the necessary juridical protection (Dură, 2007, pp. 18-25; Dură, 2008, pp. 19-23) with the purpose of promoting and asserting human rights.

With regard to the persons with mental disorders, we must say that the problem of their rights, of their individual liberties inclusively, "... is especially complex and difficult: it is so – the French jurist, Mrs. Nicole Delpérée, specified - by its pluridisciplinary nature" (Delpérée, 1995, p. 163), hence its approach and solving must be made inter- and pluridisciplinarily.

The same jurist stated that "... the medical or social solutions can be negative on a psychological level, negative on a juridical level, just as the juridical measures will have consequences on a medical level" (Delpérée, 1995, pp.193-164). That is why these juridical measures must have in view both the medical solutions and the social ones because there is always a relation between them which conditions it mutually and on which their effects depend, both on a psychological and on a juridical level.

The fundamental laws of the E.U States provide that the judicial authority should be "a defender of individual liberty" (cf. Art. 66 of the French Constitution of 1958). In this sense, as we know, in the former Countries with ideological totalitarian-communist regimes, the individual liberty of the person with mental disorders had been suppressed by the bodies of political police through administrative procedures or even through court resolutions. Unfortunately, such a situation was also peculiar to Romania up to December 1989, when many of the opponents of the totalitarian regime were forcibly confined institutionalized in Mental Hospitals. Of course, in that respective case, we were not only dealing with the provision of forced medical assistance but with a measure meant to deprive the individual of his liberty, an individual labeled by the former political regime and by its administrators and accomplices as "an enemy of the people" or as a "renegade" of the so-called "multilaterally developed socialist society" (sic.).

Unfortunately, the granting of the rights of the persons with mental disabilities is not yet mentioned in the text of all the Constitutions of the European States. That is why "... the persons with mental disabilities are often subject to discriminations", hence the obligation that the public authority "ensure to all individuals (including the old people and the people with physical or mental disabilities) a favorable way of life (as it is the case, for example, in Sweden, article 2 of Chapter I of the Constitution)" (Delpérée, 1995, p. 196). Anyhow, we should mention the fact that, in the last years, some democratic countries in Western Europe (such as France, for example) have provided - in special laws - "... a higher protection of the rights of the persons with

¹With regard to human rights, see (Dură, 2005, pp. 5-33; Dură, 2010, pp. 153-192)

mental disabilities, whose capacity of decision is either defective, or limited or even nonexistent ...”, hence the obligation of establishing “a more efficient control of hospitalization conditions in psychiatry, irrespective of the manner of hospitalization or of the type of the hosting institution”, of ensuring “in a more efficient manner the rights of the persons hospitalized without their consent”, of establishing a “procedure for the periodical revision of forced hospitalizations”, of favouring “the readaptation, the recovery or the social reintegration of the persons hospitalized without their consent, ...” (Delpérée, 1995, p. 179).

The persons who lack mental capacity also enjoy protection from the international penal Court, which prescribed their acquittal after only “a psychiatric evaluation and a treatment” in order to avoid “the passing of the sentence in a differentiated manner for the same cases.” (Ghareh Baghi, 2011, p. 86).

The analysis of the protection systems of the old persons in the States of the European Union also emphasized the fact that, because of their vulnerability, old persons are easier subject to the lacks and imperfections of the administrative and social systems and, ipso facto, to the serious infringement of their fundamental rights. That is why these persons must benefit from a protection that is individualized to their civil capacity when the emergence of some problems of behavior is noticed. Also, they have to be helped in an adequate and fast manner in all aspects regarding their physical and moral health, to be protected in a special manner against any form of violence, to have the possibility to appeal to a mediator that would defend their fundamental rights etc.

In the same regard, “... it is recommendable to dissociate what is done for old persons in matters of juridical protection from what is anticipated or done through the population as a whole”, because “age entails a medical, social and psychological vulnerability” (Delpérée, 1995, p. 18). Hence, the necessity to establish some “specific norms for old persons”, that is of a “law” that “would eliminate the negative consequences of functional inequality, in order to keep or give back to every citizen, especially to the old people, their place in the city, by the observance of their rights and liberties” (Delpérée, 1995, pp. 18-19).

Indeed, old people will only find their place in the City when their fundamental rights will be observed and protected, that is, the right to a dignified life, to a satisfactory pension, to adequate medical and social assistance etc. Actually, no human organized society, - in the form of a state or in any other form – can pretend to be a defender of the human fundamental rights and, ipso facto, of the human dignity (Dură, 2006, pp. 86-128), as long as the social rights of the persons who lost their autonomy are not only unobserved, but not even provided by the legislation of the respective States.

Unfortunately, up to the present, penal Law – at a European and national level, - “... did not respond in a very adequate manner to the protection necessities of the old

people, potential victims of violence or maltreatment”. In this sense, the vulnerability of some (old) citizens needs a specific protection especially against violence, “a protection which is lacking to a large extent... Therefore, it is necessary that the old persons benefit from a number of specific rights in face of violence” (Delpérée, 1995, p. 211).

As it is known, in our country, such rights are not yet well-known among the public opinion and, ipso facto, of mass-media, even if some of them are also provided in the text of the Constitution, hence their being ignored with regard to their observance in everyday life. In the specialized literature, too, these rights are not expressed and evaluated in the entirety of their content.

The European jurists also underlined the fact that “violence against the old persons in the bosom of the family is for the sanitary and social services a new problem and a pluridisciplinary matter” (Delpérée 1995, p. 213), and that “penal law has deficiencies: indeed – Mrs. Delpérée wrote – if physical violence is considered a crime in all countries, mental violence and violence within the family are seldom classified as proper crimes ... That is why it is important for the old persons – the French jurist concluded – that violence within the family be treated as a real crime and not as an aspect of violence in general.” (Delpérée, 1995, p. 215)

In the case of persons who lost their autonomy, social protection should of course take into account the fate of their incomes and of the services they need, especially when they can no longer fulfill the daily obligations of their existence. That is why this social protection should not be reduced only to a mere mention in the texts of the legislation of a State, but be put into practice through the efficient and concrete preoccupation towards the ones who lost their autonomy, id est, the persons with disabilities, the persons with mental retardation and the old persons.

Since “... the observance of human rights must be an integral part of global education and of human dignity, ...” (the Resolution of the European Parliament of 11. 06. 1986), it is absolutely necessary that every E.U state also initiate and instrument an educational process in matters of social rights of the persons who lost their autonomy. Actually, an education that would lead to a real “culture” of “human rights” is also desirable (See, Diaconu, 1993, p. 133). In order for this educational process to be global, it should be accomplished both in Schools and in the family, where the young must learn the respect for the old people, for the persons with disabilities and for the ones with mental retardation and, ipso facto, for the human dignity, for the love for one`s fellow man, irrespective of race, gender, age, religion, physical or mental disability etc.

As regards the protection of old people, this should not be established only depending on age as it is not age alone that creates the necessity of a protection, but also “... the deterioration of one`s capacities. Therefore, the criterion should be functional, not chronological: of course, we have to take the age into account, but

without turning it into a reason of segregation ...” (Diaconu, 1993). In this sense, there are not few States where third age is already a reason of segregation and, ipso facto, of exclusion from society. Anyhow, even more serious is the fact that this exclusion, that also brings about the feeling of uselessness, with disastrous effects both on the mind and on the body of the respective human being is not determined by some intellectual or physical incapacities, but only by one`s age. Therefore, that is why the School and the Society in general have the duty to include in their educational process not only the themes regarding the juridical protection of the third age and fourth age persons, but also the obligation to raise the awareness of the members of the human society on the utility of these people and, ipso facto, on the necessity to eliminate any form of segregation (out of reasons of age, social, cultural, religious background etc.), and, ipso facto, on their complete integration in the city.

Among the economic and social rights there are also the right to retire and the right to work. In this sense, in the opinion of some experts, at present, “the right to retire and the right to work seem to oppose and to exclude each other” (Delpérée, 1995, p. 107), since the right to retire – established and generalized once with the creation of social security as a new social right of work – is conditioned either by the priority granted to the right of any human being to retire, or by the collective interest to impose a compulsory retirement or a pre-retirement.

Some State, confronted with a significant unemployment, also established “a new mentality with regard to retirement..., preaching either pre-retirement, or compulsory retirement in order to render some work places available for the younger working people. The collective interest (to put an end to unemployment) will therefore have priority – the same French jurist wrote – over the individual liberty to choose (that of the worker who gets old)” (Delpérée, 1995, p. 107). Actually, in reality, the primacy of this so-called “common interest” is often the unfortunate result of the defective politics of the Governments of the respective States, which, on the one hand, make human rights “the religion” of the century, and on the other hand deliberately break the individual rights and liberties of man, namely his fundamental rights and liberties, which are based both on “Jus naturale” (the natural Law), and on “Jus positivum” (the written Law), in the case of the latter on international, European and national Law.

As regards the body of employers, “favourable to getting rid of elder working people”, retirements and pre-retirements appear as “the simplest and least expensive means to administer the workforce” (Delpérée, 1995, p. 107). Indeed, rendering the workplaces available “represents for the body of employers significant savings with regard to salaries since, in general, these increase once with one`s length of service; they allow the dismissal of some working people whose productivity decreased or whose professional education is outdated” (Delpérée, 1995, p. 107). But, since the former turn the right to retire into an “obligation” to retire and even to pre-retire,

“the condition of age limit will therefore limit the choice regarding one`s way of life and of existence”, and, of course, by this they will break none but the right of any man to a dignified and free life, hence the obligation of the E.U. States to grant both a protection of a juridical nature, and a social protection against any form of discrimination. (Zlătescu, 2011, pp. 83-88)

Aware of this obvious and urgent necessity, Romania also decreed – in the last 10-13 years – an adequate legislation both in the field of nondiscrimination (Zlătescu, 2011) - for the persons who lost their autonomy inclusively¹ - and with regard to the social policies and to the programs of social protection. (Mărginean, 2004)

And, from these brief specifications, we could notice that the social rights of the persons who lost their autonomy, and, ipso facto, their juridical protection, still remain, to a large extent, a “pium desiderium” (pious wish) also of the generations of today, who might have – sooner or later – the same faith if these ones, that is their rights, will not only make the object of a special legislation, both at an international and at a national level, but also of some practical measures – concrete and effective – regarding their social protection.

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¹ The normative code for these persons was forwarded by the Emergency Ordinance of the Government no. 102 of June 29, 1999 regarding the special protection and the authorization for work of the persons with disabilities (Government Emergency Ordinance (O.U.G.) no. 102/1999). For the other juridical norms, see the work coordinated and taken care of by (Jura, 2003).

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