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## CONTENTS

- TOWARDS A BETTER AND MORE EFFECTIVE PROTECTION OF VULNERABLE PEOPLE NOWADAYS (Irina Moroianu Zlătescu, Claudia Elena Marinică) / 13
- OBLIGATION OF THE EMPLOYER TO INFORM THE PERSON SELECTED FOR THE EMPLOYMENT OR, WHERE APPROPRIATE, THE EMPLOYEE, WITH REGARD TO THE ESSENTIAL CLAUSES WHICH HE INTENDS TO REGISTER IN THE CONTRACT OR TO REGULATE THEM EMERGENCY ORDINANCE 37/2021 (Vlad Barbu, Gheorghe Lucian) / 26
- THE LAW APPLICABLE TO THE SEPARATION OF BODY IN THE ROMANIAN PRIVATE INTERNATIONAL LAW (Nadia-Cerasela Aniței) / 33
- CURRENT ISSUES REGARDING THE ENTERPRISE CONTRACT (Livia Mocanu) / 40
- DOMESTIC VIOLENCE AGAINST WOMEN IN SPAIN. AN JURIDICAL AND ECONOMETRIC APPROACH IN PANDEMIC TIMES (Lavinia Mihaela Vlădilă, Nicoleta Valentina Florea) / 47
- INNOVATIVE ELEMENTS IN THE AREA OF DOMESTIC VIOLENCE IN AGREEMENT WITH THE COMMUNITARIAN REGULATIONS (Elise-Nicoleta Vâlcu) / 59
- PREPARATION OF MARITAL STATUS DOCUMENTS OF ROMANIAN CITIZENS ABROAD (Ramona Duminiță, Andreea Drăghici) / 71
- ANALYSIS OF THE GENERAL PRINCIPLES OF PUBLIC ADMINISTRATION IN THE LIGHT OF THE ADMINISTRATIVE CODE (Ioana Panagoreț, Ivan Vasile Ivanoff) / 78
- ON THE THEORY OF EQUITY, RELY THE ELABORATION OF CODES IN THE CENTURIES XVIII-XIX (Andreea Rîpeanu) / 91
- THE MEANINGS OF THE CONCEPT OF RESPONSABILITY (Maria-Irina Grigore-Rădulescu) / 102
- CODING OF CUSTOM RULES IN DIPLOMATIC LAW (Corina Florența Popescu) / 109
- SOME OBSERVATIONS ON CYBER SECURITY AS A COMPONENT OF THE EUROPEAN UNION SECURITY POLICY (Gianina-Anemona Radu) / 116

- COLLECTIVE REDRESS AND REPRESENTATIVE ACTIONS IN THE COLLECTIVE INTEREST OF CONSUMERS, IN THE LIGHT OF RECENT TRENDS IN EU LAW (Juanita Goicovici) / 127
- RESTRICTION ON THE EXERCISE OF THE FUNDAMENTAL RIGHT OF ACCESS TO CULTURE – A REAL NECESSITY IN A PANDEMIC PERIOD? (Oana Şaramet) / 139
- USE OF ADVANCED ELECTRONIC SIGNATURE OR QUALIFIED ELECTRONIC SIGNATURE IN THE LIGHT OF REGULATIONS INTRODUCED BY EMERGENCY ORDINANCE 36/2021 (Gheorghe Lucian, Vlad Barbu) / 148
- INMIGRANT WORKERS DURING THE PANDEMIC (Nicoleta Enache) / 156
- CIVIL OFFENCE LIABILITY OF PUBLIC AUTHORITIES IN THE PERIOD OF EMERGENCY (Delia-Mihaela Marinescu, Dragoş-Lucian Rădulescu) / 162
- THE RIGHT TO WORK OF INMIGRANTS WORKERS IN SPAIN (Gratiela-Florentina Moraru) / 170
- INFRINGEMENT OF THE RIGHT TO CONSULTATION BY THE OMISSION OF GRANTING/NON GRANTING THIS RIGHT BY ORDINANCE (Denisa Barbu) / 180
- THE ROLE OF PUBLIC INTERNATIONAL LAW IN CONTEMPORARY SOCIETY (Ioana-Andra Pleşa) / 190
- RETURNING TO WORK AFTER „WORKING FROM ANYWHERE” PERIOD, DURING THE COVID-19 PANDEMIC (Florin Valeriu Gilia) / 195
- LIMITATIONS AND DISCONTINUITIES OF OWNERSHIP IN POSITIVE ROMANIAN LAW (Ionuţ Dojană) / 206
- ENVIRONMENTAL POLICY - LEGAL FRAMEWORK AND GENERAL PRINCIPLES (Beatrice Drăghiciu) / 222
- REPAIR OF CONTRACTUAL DAMAGE RESULTING FROM LOSS OF OPPORTUNITY (Raluca-Clarisa Gligor) / 229
- EROSION OF CONSTITUTIONAL LOYALTY IN A STATE SUBJECT TO THE RULE OF LAW DURING A PANDEMIC YEAR (Maria-Nicoleta Morar) / 238
- INTERCURRENT ILLNESSES AS ASSUMPTION ASSIMILATED TO THE WORK ACCIDENT: A JURISPRUDENTIAL REVIEW (Cătălina Smîntînică) / 247

- BRIEF CONSIDERATIONS ON THE IMPORTANCE OF EVIDENCE IN CASE OF TRAFFIC OFFENSES IN THE REPUBLIC OF MOLDOVA (Marian Russo, Nicolae Scurtu) / 256
- THE EVOLUTION OF THE PROCESS FOR IMPLEMENTING PUBLIC EDUCATION STRATEGIES AND POLICIES. CURRENT CHALLENGES AND TRENDS (Gabriela Șerbu) / 262
- HISTORICAL PERSPETIVE OVER THE ORIGINS OF EUROPEAN UNION’S COMPETITION POLICY (Andrei Alecu) / 270
- PROMOTION TO PUBLIC FUNCTION, MECHANISM FOR DEVELOPING AND IMPROVING THE PUBLIC SERVICE (Cristina-Georgeta Băjenaru) / 282
- MEASURES TAKEN BY ROMANIA TO PROTECT THE ELDERLY DURING THE COVID-19 PANDEMIC (Alexandra Dobre) / 289
- THE ROLE OF MEDIATION IN THE INSTITUTION OF MARRIAGE (Iulian Hagi) / 297
- FREEDOM OF THE PERSON IN THE CONTEXT OF THE PANDEMIC - COVID 19 (Cristina Dobre) / 305
- CHALLENGES IN THE ROMANIAN LAW CAUSED BY THE SARS-CoV-2 PANDEMIC (Andrada-Georgiana Marin) / 316
- STATUS OF THE CURRENT EFFORTS TO FOSTER BUSINESS RESPECT FOR HUMAN RIGHTS (Christian Töpfer) / 338
- GENDER EQUALITY IN THE CONTEXT OF THE 2030 AGENDA AND COVID-19 PANDEMIC (Ruxandra-Andreea Țuțuianu) / 348
- SOCIAL INNOVATION - EDUCATIONAL POLICIES AND STRATEGIES. CHALLENGES OF PUBLIC ADMINISTRATIONS IN THE CURRENT CONTEXT (Gabriela Șerbu) / 360

## RESTRICTION ON THE EXERCISE OF THE FUNDAMENTAL RIGHT OF ACCESS TO CULTURE – A REAL NECESSITY IN A PANDEMIC PERIOD?

Oana ȘARAMET\*

**Abstract:** *When we are born, we have the same chances to educate and develop so that we can configure our desired personality, in order to be able to project the desired future. In order for each of us to have such chances, we must be able to exercise, in their fullness, rights such as the right to education, the right to a healthy environment, but also the right to culture or, as the Romanian constitutional legislator names it, access to culture. In this paper, we set out to discuss about what this access to culture entails, about how it was possible or, more correctly, it was not possible, to exercise of this fundamental right during the pandemic, during the severe restrictions imposed on access to culture. Culture, through its different dimensions - music, fine arts, theatre, film, literature, decorative arts, design, etc., is so diverse and strongly influenced by the preferences, tastes of each of us, but it is always part of each of us, to a greater or lesser extent. Cultural diversity is specific to every human society, it has existed in any such society and, although sometimes we do not see this aspect, it has shaped our society and helped us to evolve to the present day. In our opinion, to restrict in a discretionary way, little or not at all justified, the access to any form of culture will have undesirable consequences for the development of any human being, whose personality will thus be deprived of an important dimension of it. Such an approach will also affect the mature human being who desires the benefits of enjoying the cultural dimension agreed to meet the challenges of today, even harder and more demanding in a period of pandemic, a period never seen before.*

**Keywords:** *fundamental right, culture, restriction of the exercise of certain right.*

### Introduction

Art. 22 of the Universal Declaration of Human Rights<sup>1</sup> provides that „everyone, as a member of society, has the right to social security”, thus being „entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”, and art. 27 para. (1) of same declaration to provide that „everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. In the same sense are the provisions of the

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<sup>1</sup> This Declaration was adopted by the UN General Assembly on 10 December 1948, by its Resolution 2171 A/III. Romania signed the Declaration on 14 December 1955, when it became member of the United Nation Organization, as it is settled by the Resolution R 955 (X) of the UN General Assembly.

International Covenant on Economic, Social and Cultural Rights<sup>2</sup> which, by art. 15, are „some of the most detailed such regulations on access to culture”<sup>3</sup>. Thus, among the provisions of this article, we find those according to which „States Parties to the present Covenant recognize the right of everyone: a) to take part in cultural life; b) to enjoy the benefits of scientific progress and its applications; c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”, and the steps taken by the these States „will be taken to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture”.

According to the Explanatory Dictionary of the Romanian Language, culture represents<sup>4</sup> „the totality of material and spiritual values created by mankind and the institutions necessary for the communication of these values”, but also „the fact of possessing various knowledge in various fields, all this knowledge, (high) level of intellectual development that someone reaches”. However, the "possession" of such knowledge cannot be achieved if a person does not have access to it, and his development or intellectual well-being, as the case may be, will be affected.

In this article, we intend to analyze aspects of access to culture from the perspective of restricting the exercise of this fundamental right from the perspective of its beneficiary, on the one hand, and, on the other hand, the way in which the state has or not guaranteed access to culture for these beneficiaries. Our choice for this approach was determined by the need to emphasize that the development of every human being, including the intellectual dimension, cannot be arbitrarily and discretionally deprived of contact with its elements, such as culture. In exceptional situations, of extreme crises, such as the periods of the current Covid-19 pandemic, certainly the highest priority is to ensure the protection of all human beings, being admissible even a total restriction of access to culture. However, maintaining such a restriction in quieter times during such periods of extreme crisis, without a scientifically and substantiated justification, not only affects the intellectual development of the human being, but increases his degree of personal discomfort, affecting the well-being of his intellectual life.

## 1. Culture – a complex and diverse concept

Access to culture is considered, from the point of view of the classification of fundamental rights, a socio-economic and cultural right.<sup>5</sup> However, from the perspective of the close link with other fundamental rights, such as: freedom of expression, freedom of thought and conscience, freedom of association, freedom of

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<sup>2</sup> This Covenant was adopted and opened for signature by the General Assembly of United Nations, resolution 2200A (XXI) of 16 December 1966, and entered into force on March 23<sup>rd</sup> 1976, in accordance with Article 49. Romania has ratified the International Covenant on Civil and Political Rights on October 31st 1974, by Decree no 212 which was published in the Official Gazette of Romania, Part I, no 146 from November 20th 1974.

<sup>3</sup> Ioan Muraru, Simina Elena Tănăsescu, coordinators, *Constituția României. Comentariu pe articole*, C. H. Beck Publishing House, Bucharest, 2008, p. 313.

<sup>4</sup> See: <https://dexonline.ro/definitie/cultura>, accessed on: 20.05.2021.

<sup>5</sup> Ioan Muraru, Simina Elena Tănăsescu, coordinators, *op. cit.*, p. 314.

assembly, and its purpose to ensure the participation of any person in society and through culture<sup>6</sup>, it may be considered a socio-political right<sup>7</sup>.

Even though we have identified a definition of culture in the above mentioned, this is one of the many definitions that can be given to it, „culture being a vague and broad term”<sup>8</sup>. Thus, for example, the Cambridge Dictionary defines culture as „the way of life, especially the general customs and beliefs, of a particular group of people at a particular time”<sup>9</sup>, but, at the same time, meanings of this term are identified from different perspectives, such as arts, biology, social sciences, work environment, etc. The difficulty in identifying the content of the definition of the term culture is also highlighted in an article published in the Stanford Encyclopedia of Philosophy which states that „most definitions characterize culture as something that is widely shared by members of a social group and shared in virtue of belonging to that group. As stated, this formulation is too general to be sufficient (a widespread influenza outbreak would qualify as cultural). Thus, this formulation must be refined by offering a specific account of what kind of shared items qualify as cultural, and what kind of transmission qualifies as social.”<sup>10</sup>

Therefore, the identification of the content of the concept of „culture” involves a complicated and complex approach whose purpose has little chance to materialize in a unanimously accepted definition or, at least, majority embraced at the academic level and not only. The diversity of humanity, in general, and, implicitly, of our needs as members of diverse and multiple communities, as well as of those we have as individuals, each one, will determine a diversity of definitions given to culture..

In our opinion, in defining the term culture we must take into account its multiple dimensions, keep in mind that it is a baggage of information, of specific elements from a variety of fields that is transmitted through various means, such as writing, various art forms, the media, modern electronic resources, and which characterize a community, a human society, and which must be preserved, developed, if necessary, and passed on to future generations..

## 2. Access to culture

But, no matter how we conceive a definition of culture, it is more important to recognize and enshrine the freedom of forms of expression and its manifestation, within the limits of good morals and public order, as well as access to it.

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<sup>6</sup> *Ibidem*.

<sup>7</sup> *Ibidem*.

<sup>8</sup> As underlined by UN Economic and Social Council (ECOSOC), Commission on Human Rights, in *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd Session, Annex, UN Doc. E/CN.4/1987/17, 8 January 1987, paras 11–58, quoted by Caterina Sganga, *Right to culture and copyright: Participation and access*, p. 4, in C.Geiger (ed.), “Research Handbook on Human Rights and Intellectual Property”, Edward Elgar, 2015, pp. 560-576, available at: [https://www.researchgate.net/publication/298524056\\_Right\\_to\\_culture\\_and\\_copyright\\_Participation\\_and\\_access](https://www.researchgate.net/publication/298524056_Right_to_culture_and_copyright_Participation_and_access), accessed on: 05.04.2021.

<sup>9</sup> See: <https://dictionary.cambridge.org/dictionary/english/culture>, accessed on: 20.05.2021

<sup>10</sup> Jesse Prinz, *Culture and Cognitive Science* in *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.), available at: <https://plato.stanford.edu/archives/sum2020/entries/culture-cogsci/>, accessed on: 20.05.2021.

On the other hand, analyzing international, regional and national regulations regarding a fundamental right recognized to any person regarding culture, we will be able to observe a different approach. Such a finding seems logical to us given the diversity of ways in which the term culture can be explained, the diversity of angles from which it can be viewed. In fact, in the specialized doctrine it was emphasized that „cultural rights have always been difficult to conceptualize”<sup>11</sup>, the reasons being related to: the appreciation of these rights as individual or collective rights; „their ‘transversal nature’, since they include entitlements that can be also classified as civil, political or social rights”<sup>12</sup>; the diversity of regulations in this field, diversity determined by the diversity of cultural dimensions, of the fields in which we can discuss about a culture of a certain type, but also by the neglect by states, especially, of enshrining such fundamental rights to the detriment of those considered more important for every person.

Thus, for example, by art. 13 of the Charter of Fundamental Rights of the European Union, at the level of the European Union is enshrined the freedom of arts and sciences, being provided only that the arts and scientific research are free. Constitutions, such as that of Slovenia<sup>13</sup> do not enshrine a right to culture, but enshrine rights that protect the cultural heritage of that nation, but also of the minorities of that state. Thus, according to art. 5, Slovenian state „shall provide for the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia”, but, at the same time, by art. 61, it is admitted that „everyone has the right to freely express affiliation with his nation or national community, to foster and give expression to his culture and to use his language and script”.

In the same sense are the regulations of the Latvian Constitution<sup>14</sup> which in its preamble states that „the State of Latvia, proclaimed on 18 November 1918, has been established ... in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries, to ensure freedom and promote welfare of the people of Latvia and each individual”, and, by art. 114 it is recognized that „persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity”. However, the Latvian constitutional legislator also enshrined artistic freedom, providing in art. 113 that „the State shall recognise the freedom of scientific research, artistic and other creative activity, and shall protect copyright and patent rights”.

Consistent provisions on the protection of cultural heritage and a fundamental right to it are found in the Constitution of Croatia<sup>15</sup> which through its preamble recognizes an important role for culture in shaping the Croatian state, stipulates that

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<sup>11</sup> Caterina Sganga, *op. cit.*, p. 3.

<sup>12</sup> Caterina Sganga, *op. cit.*, pp. 3-4.

<sup>13</sup> The Constitution of Slovenia is available at: [https://www.constituteproject.org/constitution/Slovenia\\_2016?lang=en](https://www.constituteproject.org/constitution/Slovenia_2016?lang=en), accessed on: 20.05.2021.

<sup>14</sup> The Constitution of Latvia is available at: [https://www.constituteproject.org/constitution/Latvia\\_2016?lang=en](https://www.constituteproject.org/constitution/Latvia_2016?lang=en), accessed on: 20.05.2021.

<sup>15</sup> The Constitution of Croatia is available at: [https://www.constituteproject.org/constitution/Croatia\\_2013?lang=en](https://www.constituteproject.org/constitution/Croatia_2013?lang=en), accessed on: 20.05.2021.

„the Republic of Croatia is hereby founded and shall develop as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted”, as and to „members of all national minorities shall be guaranteed freedom to express their nationality, freedom to use their language and script, and cultural autonomy”. But, by the provisions of art. 68, the Croatian constitutional legislator enshrines the freedom of scientific, cultural and artistic creativity, as well as the correlative obligations of the state to ensure the exercise of this freedom, as well as: „to stimulate and to assist the development of science, culture and the art, to protect scientific, cultural and artistic goods as national spiritual values”, guaranteeing „the protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative activities”.

The Constitution of Brazil<sup>16</sup> also contains multiple regulations regarding culture, the protection of cultural heritage, and access to culture. In this sense, a dimension of the right to education is provided, by art. 210 para. (1) being established that „minimum curricula shall be established for elementary education so as to assure a common basic education and respect for national and regional cultural and artistic values”. By three other articles, art. 215 - 216 A, the Brazilian constitutional legislature settles out different rights related to culture, obligations incumbent on the Brazilian state and authorities in the exercise of this right, including by creating a National Cultural Plan spread over several years for „seeking the cultural development of the country and the integration of public actions that lead to: defence and valorisation of Brazilian cultural patrimony; the production, promotion and diffusion of cultural goods; formation of qualified personnel for the multiple dimensions of cultural management; democratization of access to cultural goods; valorisation of ethnic and regional diversity”. The constitutional provisions also identify the elements of the Brazilian cultural heritage, as well as the principles according to which the National Cultural Plan should be developed, thus the federal government „shall guarantee to all full exercise of cultural rights and access to sources of national culture, and shall support and grant incentives for appreciation and diffusion of cultural expression”.

But, the Romanian constitutional legislator chose „to guarantee access to culture”<sup>17</sup>, in accordance with the law, for each person, „the freedom of the person to develop his/her spirituality and to get access to the values of national and universal culture cannot be restricted”<sup>18</sup>, the state being obliged, among other things, „to support national culture and stimulate the arts”<sup>19</sup>. Therefore, our constitutional legislator chose to guarantee the right of each of us to access culture, the state binding itself not to restrict this right, but also to support the national culture.

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<sup>16</sup> The Constitution of Brazil is available at: [https://www.constituteproject.org/constitution/Brazil\\_2017?lang=en](https://www.constituteproject.org/constitution/Brazil_2017?lang=en), accessed on: 20.05.2021.

<sup>17</sup> Art. 33 of Romanian Constitution, republished.

<sup>18</sup> *Ibidem*.

<sup>19</sup> *Ibidem*.

### 3. Restriction on the exercise of access to culture and the principle of proportionality

Indeed, guaranteeing access to culture is conditioned by the limits of the law, and if by law we mean any normative act, not just the normative act with this name adopted by the Romanian Parliament, we could appreciate that during the state of emergency, as well as at large part of the state of alert, the guarantee of this fundamental right could no longer be ensured, the priority of state authorities being the ensuring of other fundamental rights, such as the right to life or the right to health care. However, the restriction of access to culture was not provided, *expressis verbis*, nor by Decree no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania<sup>20</sup>, nor by Decree no. 240 of April 14, 2020 on the extension of the state of emergency on the territory of Romania<sup>21</sup>, both issued by the President of Romania, the exercise of this right not being restricted. Both decrees, by the same art. 2, provide for the restriction of the exercise of the following fundamental rights: freedom of movement, the right to intimate, family and private life; inviolability of domicile; the right to education; freedom of assembly; the right of private property; the right to strike; economic freedom. Even if these decrees did not expressly provide the access to culture among the rights whose exercise was restricted, indirectly by restricting the exercise of rights such as freedom of assembly or the right to intimate, family and private life, we could appreciate that it was also taken into consideration the access to culture. The complexity of cultural rights, including access to culture, requires correlation with other fundamental rights such as those mentioned, and not only, as we have shown above.

If during the state of emergency, declared as a result of the Covid-19 pandemic, an exceptional situation never encountered in recent times, restriction on the exercise of access to culture to the maximum, by ceasing all cultural activities we can consider it appropriate, and from certain points of view even constitutional<sup>22</sup>, we consider that during the state of alert, the restriction on the exercise of access to culture was ordered with “superficial observance” of the principle of proportionality as provided by art. 53 para. (2) of the Constitution.

According to the principle of proportionality, in accordance with the provisions of art. 5 of Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration<sup>23</sup>, any state „shall impose measures affecting the rights or

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<sup>20</sup> This decree was published in the Official Gazette of Romania, Part I, no. 212 of March 16, 2020.

<sup>21</sup> This decree was published in the Official Gazette of Romania, Part I, no. 311 of April 14, 2020.

<sup>22</sup> We consider that a broader analysis is needed on the constitutionality of such a restriction on the exercise of certain rights by, restrictions imposed by an emergency ordinance, such as the Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, approved by Law no. 453/2004, with the subsequent amendments and completions, also considering the decisions of the Constitutional Court of Romania, as well as Decision no. 152 of 06 May 2020, published in M. Of. of Romania, Part I, no. 387 of 13 May 2020, but such an analysis could be the subject of another specialized work that we already plan to write.

<sup>23</sup> Council of Europe, *Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies, available at: <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c>, accessed on: 20.05.2021.

interests of private persons only where necessary and to the extent required to achieve the aim pursued”. Article 5 para. (3) of the same Recommendations emphasizes that „when exercising their discretion, they [rulers, s.n.] shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive”.

The Constitutional Court of Romania ruled in the same sense, when, by Decision no. 462/2017, stressed out that „according to the principle of proportionality, any measure taken must be adequate - able to objectively achieve the purpose, necessary - indispensable for the achievement of purpose and proportionate – to ensure the right balance between concrete interests to be appropriate to the purpose pursued”<sup>24</sup>.

Moreover, in the same sense are the provisions of art. 2 of Law no. 55/2020 on some measures to prevent and combat the effects of the Covid-9 pandemic<sup>25</sup>, according to which „the alert state represents the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set measures of a temporary nature, proportionate to the level of severity manifested or forecasted and necessary to prevent and eliminate imminent threats to life, human health, the environment, important material and cultural values or property”. Through its other provisions, art. 44,<sup>26</sup> et seq., this normative act provided, generally, only that the concrete measures by which cultural institutions will carry out their specific activities will be established concretely by regulations provided by common order of the Minister of Health and the Minister of Culture<sup>27</sup>.

Although institutions from different spheres of the cultural field have proposed various solutions by which they could have carry out, at a minimum level, their specific activity, and in the short periods in which they were allowed to carry it out, respecting of the restrictions mentioned by law, there has not been an increase in the number of cases of infection specific to this pandemic<sup>28</sup>, the state authorities have preferred to apply drastic and disproportionate measures, in our opinion, without pursuing a fair balance between concrete interests and purpose, namely to protect human health and life.

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<sup>24</sup> Point 33 of the Decision of the Constitutional Court of Romania no. 462/2014 regarding the exception of unconstitutionality of the provisions of art. 13 para. (2) second sentence, art. 83 para. (3) and art. 486 para. (3) of the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, no. 775 / 24.10.2014.

<sup>25</sup> The law was published in the Official Gazette of Romania, Part I, no. 396 / 20.05.2020.

<sup>26</sup> Art. 44 para. (1) of Law no. 55/2020 stipulates that “during the state of alert, the activity of museum institutions, libraries, bookstores, cinemas, film and audiovisual production studios, performance and / or concert institutions, cultural centers and / or homes and other cultural institutions, as well as outdoor cultural events and public and private festivals may be held in accordance with regulations providing for health protection measures established by joint order of the Minister of Culture and the Minister of Health”.

<sup>27</sup> In this sense, see for example, Order no. 3.245/1.805/2020 regarding the measures for the prevention of contamination with the new coronavirus SARS-CoV-2 and for ensuring the development of activities in conditions of sanitary safety in the field of culture, published in the Official Gazette of Romania, Part I, no. 986 / 20.10.2020.

<sup>28</sup> We did not identify statistics to the contrary, but institutions in various countries, such as the United Kingdom, but also Romania, with the consent of the authorities competent in managing the situation generated by the Covid-19 pandemic, have only recently started this pilot cultural event to test the level of SARS-VOC-2 virus infection in such conditions.

## Conclusion(s)

Each of us encounters throughout our lives with various dimensions of culture, some we like more, we look for them because they give us the opportunity to develop our personality, because they give us spiritual well-being. Thus they give us the opportunity to educate ourselves constantly and continuously, which is why we can see culture and cultural rights as a dimension of the right to education.

From our point of view, cultural rights, regardless of how they are enshrined in normative acts, such as freedom of art or access to culture, for example, are third generation rights not only because they have been more recently enshrined in fundamental international normative acts or national. Another argument is that in the preamble of these normative acts, we can find different specifications to „the cultural, religious and humanist heritage [of Europe], from which developed the universal values that constitute the inviolable and inalienable rights of the person, as well as freedom, democracy, equality and the rule of law”<sup>29</sup>, the signatories of these acts wishing „to strengthen the solidarity between their peoples, while respecting their history, culture and traditions”<sup>30</sup>.

Cultural rights are complex fundamental rights for the accomplishment of which it is necessary to exercise other fundamental rights such as freedom of expression or freedom of conscience, as we already mentioned above, rights that are at the intersection of two broad categories of fundamental rights - the rights socio-economic and cultural rights, on the one hand, and socio-political rights, on the other hand.

On the other hand, if such rights can be exercised without the support of the state, the state is still obliged „to ensure the preservation of spiritual identity, support national culture, stimulate the arts, protect and preserve cultural heritage”, as it is provided by art. 33 para. (2) of our Constitution, as does even the international community, protecting the cultural and natural heritage of humanity<sup>31</sup>. These aspects reinforce our assertion that cultural rights are part of the category of third generation rights.

Unfortunately, in some states, such as the Romanian state, cultural rights, as well as other rights, are not given priority, and they are not targeted by policies intended with priority. Perhaps this is also the reason for which in cases of major public health crisis, such as a pandemic, they are easily and among the first rights sacrificed, by the disproportionate restriction on their exercise.

Therefore, we consider that such a restriction is clearly disproportionate to the benefits to each person who would have the opportunity to enrich spiritually, especially in a pandemic period full of unprecedented challenges and restrictions on the exercise of rights that profoundly affect the social character of any person, through measures that

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<sup>29</sup> These provisions are from the Preamble to the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union C 326, 26/10/2012 pp. 0001 - 0390.

<sup>30</sup> *Ibidem*.

<sup>31</sup> See, for example, *the Convention concerning the Protection of the World Cultural and Natural Heritage*, adopted by the UNESCO General Conference at its seventeenth session, Paris, 16 November 1972, available at: <https://whc.unesco.org/en/conventiontext/>, accessed on: 20.05.2021

have made it impossible or at least quite limited, maybe by using electronic means and computer applications, to access to culture, and is not necessary in a democratic society.

Cultural rights, but also other rights among which we mention the right to education, are rights through the exercise of which it is almost impossible to obtain some tangible benefits, financially quantifiable as soon as they are exercised, which is why restricting on their exercise even to affect their existence is at handy for the authorities, at least apparently, in the exercise of real discretionary power.

Such discretionary regulations adopted by government and local public authorities confirms us the assertion according to what „among human rights, cultural rights have always been considered as a sort of Cinderella”<sup>32</sup>.

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<sup>32</sup> Yvonne Donders, *The Legal Framework of the Right to Take Part in Cultural Life*, in: Yvonne Donders and Vladimir Volodin (eds), *Human Right in Education, Science and Culture: Legal Developments and Challenges* (Ashgate Publishing 2007), p. 232, quoted by Caterina Sganga, *op. cit.*, p. 3.