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THE CONSTITUTIONAL JUSTICE IN RELATION TO THE PRINCIPLE OF THE RAWLS' SOCIAL JUSTICE

1. The Constitution and the social justice according to Rawls

The socially-based justice depends mostly by the way how the main rights and obligations are appointed. It also depends on the economic possibilities and social conditions that it itself determines in different sectors of the society. In essence, distributive justice aims at achieving a state of ideal separation of wealth, which is justified on the basis of different principles such as merit, services, needs, and so on and so forth².

Rawls treats the social justice as a continuous request that is attributed to the Government in order for it to reduce the social and economic inequalities in the society³. But according to the latest definition, Rawls defines justice as follows:

He says that justice serves in promoting a fair society, by challenging injustice and by assessing diversity. It exists when all people that live within a common social context are treated equally, get support for their human rights and they also get a fair division regarding the available resources in their community⁴.

In the Constitution of the Republic of Albania, this form of justice is embedded both within the concept of the social State⁵ and the constitutional

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² Szigeti P., Takas, P., *A jogállamiság jogelmélete*, Napvilág Kiadó, Budapest, Hungary, pg 260, (2004).

³ J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts, (1973)

⁴ Toowoomba of the catholic education, (2006)

⁵ In the preamble of the Constitution of the Republic of Albania it is stated that: " We, the people of Albania, are very proud for our history and we take full responsibility for the future, having faith in God and other universal values...we are determined to create and form a social... State..."

principle of social justice⁶. Therefore, the constitutional principle of social justice requires that, through the law, the social balance be achieved, the interests of different groups within the social structure are harmonized and a state of social welfare is built.

A fair society is the one that at the foundation of its organization has set the protection and respect for human rights and dignity⁷. Both the Universal Declaration of Human Rights, the Constitution of the Republic of Albania and the European Convention on Human Rights and Fundamental Freedoms state in their preamble that “human rights constitute the foundation of justice in the world”⁸.

That’s why, the human rights, just as the principle of the social justice, serve as inspirational and guiding resource for the creation of a fair society.

Rawls thinks that the two principles, the principle of freedom and the one of the differentiation, must be executed in every society and that they must be the guiding principles of the creation and the actions of the institutions that compose the basis of the society⁹. The first principle¹⁰ prevails over the differentiation principle because living in a fair society means that the basic rights and freedoms of the people must always be ensured and later on we can treat the issue on how the goods should be delivered among the people¹¹. Firstly, every person thinks about his or her freedoms before dealing or thinking about the distribution of their rights, wealth or power because he knows that by being free, he will be able to ensure his other priorities come true.

The question that arises is as follows: Can human rights and fundamental freedoms be restricted? What does the constitution anticipate regarding the

⁶ The article no: 3 of the Constitution of Albania sanctions that: “The independence of the state and the entirety of its territory, human dignity, its rights and freedoms, social justice ... are the basis of this state, which has the duty to respect and defend”

⁷ MARTINEZ T, *Diritto Costituzionale*, Giuffrè Editore, Milano, 2010 pg. 250

⁸ The Preamble to the Declaration of Fundamental Human Rights and Freedoms states: “Given that the dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, the ECHR states”: Reaffirming the deep belief that human rights and fundamental freedoms constitute the foundations of justice ... “while in the Constitution of the Republic of Albania, Article no:3 provides: human dignity, his rights and freedoms , of this state, which has the duty to respect and protect them.

⁹ IKONOMI L, *The philosophy of fairness (a series of lectures)*, Ekspes publishing house, Tirana, pg. 247.

¹⁰ The freedom principle: Every person shares equal rights over the fundamental rights that he possesses which are the kind of rights that are equally shared even with the other people of the society.

¹¹ It is explained in the sentence itself.

limitations of the constitutional rights and freedoms?

In answering this question, Rawls has developed his theory of justice to the extent that he thinks that for the correct application of this theory, the policies of the liberal state must be established and implemented. Only this philosophical argument for Rawls is a condition for creating social security for all people. This form of state, Rawls thinks, is right because it is solved by people who act in a reasonable, stable, tolerant way, who will have the opportunity to conclude a social contract with essentially equal conditions. Rawls, perceiving all his attention to the primary goods, pays a great importance to the contractual theory. According to him, this can be achieved by:

- Achieving personal and political freedom
- Having the possibility to get the necessary education
- Being wealthy.

Rawls continuously states that it is really difficult to achieve any existential priority for the human society without the help of freedom, wealth or even educational opportunities. According to Rawls, the distribution of the main goods is highly affected by the fundamental institutions like the Constitution that decides about the distribution of the political rights as well as about the inclusion of the social and economic legislation. Sharing the rights of primary goods Rawls sees it as a realization that can be made through a social contract that will be done voluntarily, without violence, without the pressure and the threat of others in its adoption, towards the distribution of primary goods. Rawls always thinks that people collaborate to legislate, to develop economic activities as well as during these collaborations, they find ways in achieving the development of the material and cultural values. Therefore, in sharing this result of the created goods, all together should be of a concern, because the contract is made up of equal people, and that no one can win in discussions just based on their superiority. According to this theory, the distribution of the goods is conducted based on the justice and the reasonable conditions. All talks are made in a symmetric initial phase. Hence, the principles from this initial symmetric phase are initially acceptable from the moral point of view. According to Rawls, the parties must be equally represented, as moral individuals, everything must be conducted in an ethical way and in compliance to the self-consciousness of the individual. The whole information regarding education, work and income must be kept confidential (hidden) because as Rawls says, the natural abilities and talents are not as nature-related as we think. These abilities and talents are a product of our continuous work and learning process.

2. The restriction of the fundamental human rights and freedoms according to the Constitution of the Republic of Albania and John Rawls

The list of the fundamental rights and freedoms can be found as a whole in the Constitution and it is divided into chapters such as:

- Individual rights and freedoms (2nd chapter)
- Political rights and freedoms (3rd chapter)
- Cultural, social and economic rights and freedoms (4th chapter).

In the Constitution of the Republic of Albania (1998), human dignity, rights and freedoms are sanctioned as the basis on which the entire juridical order is built¹²; sanctioned the inalienable, indivisible and inalienable character of the fundamental human rights and freedoms¹³; it is the obligation of the public authorities to protect and guarantee the exercise of these rights¹⁴. Can the fundamental human rights and freedoms be restricted?

The Constitution, when affirming the general principles of the fundamental human rights and freedoms, states that these rights are limited. When can they be restricted?

The actual Constitution disciplines that these restrictions may be imposed in cases when it comes to protecting a public interest or protecting the rights of others¹⁵.

Following the analysis of the article no: 17 of the constitution, we also have to mention the fact that there are new conditions enforced in this article, besides the classic ones, when it comes to the limitations of freedoms and rights. Even though these limitations are only adopted by the law, it also states that:

- The limitations of the rights should be attributed to the condition that has caused this limitation.
 - These limitations cannot violate the essential part of freedoms and rights.
 - The limitations that have been imposed by the law cannot overcome the limitations that have been enforced by the European Convention for Human Rights.

These are the three conditions that the Albanian State must take into account when it comes to laws that restrict human rights and that's why they are presented

¹² Look up the article no: 3 of the Constitution of the Republic of Albania.

¹³ Look up the article no: 15/1 of the Constitution of the Republic of Albania.

¹⁴ Look up the article no: 15/2 of the Constitution of the Republic of Albania.

¹⁵ Look up the article no: 17 of the Constitution of the Republic of Albania.

as three conditions for guaranteeing rights¹⁶.

According to Rawls, freedoms cannot be restricted just for the sake of goods, despite the fact that this might be for the best of the whole society. Rawls considers this as the “*supremacy of freedom*”. He thinks that freedoms can never be restricted except in the cases when these restrictions can lead to a better organization of the whole society¹⁷.

3. The restriction of the right to the private property according to the Constitution of the Republic of Albania and John Rawls

The Constitution states that the right to private property is guaranteed, but this guarantee is not absolute. Although the right to private property is listed in the catalog of freedoms and constitutional rights in the grouping of personal rights, it cannot be absolutized as a completely individual right because it has an important social character.

It directly influences the general social well-being and must therefore be restrictive. The public interest or social function of property is a constitutional concept that justifies the external limitation that has been imposed on the right to property through the law¹⁸. In the state of law, the state cannot intervene in the private property because according to the constitution, the individuals are guaranteed that they will always be treated equally and that their property is theirs only.

The restriction of a fundamental right, such as property, through the law, is an expression of the right and obligation that the legislator enjoys, in the name of a legitimate aim in the public interest, to respond to the dynamics of the country's development as well as the realization of time-consuming reforms.

If we analyze the article no: 41 of the Constitution, we come to the conclusion that the constitutional criteria of an expropriation policy, which also serves as the restrictive criteria about the right to the private property, are:

- The expropriation should be provided by the law;
- Be undertaken for the public interest or in defense of the rights of other people.

¹⁶ ANASTASI A and OMARI L, *the constitutional right*, Pegi publishing house, Tirana, 2010, pg 79-86.

¹⁷ IKONOMI L, *the philosophy of fairness* (a series of lectures), Ekspres publishing house, Tirana, pg 248.

¹⁸ The Constitution of the Republic of Albania, Article 41, paragraph 3, stipulates that: “The law may provide for expropriations or restrictions on the exercise of property rights solely for public interest”.

- The existence of a fair remuneration¹⁹.

The socially-based character of the right to the private property is also highlighted by the decisions of the constitutional court. The Constitutional Court, by its Decision No. 30, of the date 01.12.2005, decided that the process of restitution and compensation of property in post-communist transition countries is not based on property rights but on the principle of fairness and justice and, moreover, in the principle of the social state. The principle of fairness requires that not only the interests of former owners and their heirs, but also those of other members of society, as well as the public interest as a whole, be taken into consideration. Thus, the principle of justice and that of proportionality do not require them to repurchase property rights for all former owners or their heirs or to compensate them with full value²⁰.

The objective of returning property rights is not to erase all injustices, but to reduce them. Restitution of property rights should not cause other injustices. The regulation of property restitution and compensation in its origin aims to correct, to the greatest extent possible, “within the country’s economic opportunities and conditions” the pastoral injustices committed to the detriment of private property through nationalization, expropriation, confiscations or any other unfair manner. The complete reinstatement of previous property rights would be contrary to the principle of equality²¹.

The right to property is not the same as the right to return it. Any interference towards property may be justified only if it is in the public or general interest. Acquiring property on the basis of an estimated policy for achieving social justice within the community can be precisely described as a policy in the public interest. Therefore, a lawmaker is recognized who, because of the existence of the public interest, may limit the space of disposition of private property. In order for such an interference with the property right to be justified, it is necessary to have a relationship of proportionality between the means used and the aim sought to be realized²².

That’s why Rawls includes the right to property in the first principle of freedom²³. He doesn’t show us an all-inclusive list of freedoms, but instead

¹⁹ The article no: 41 point 2 and 3 of the Constitution of the Republic of Albania.

²⁰ The decision of the Constitutional Court of the Republic of Albania no: 30, of the date 01. 12. 2005

²¹ The decision of the Constitutional Court of the Republic of Albania no: 4, of the date 08. 04. 1994

²² The decision of the Constitutional Court of the Republic of Albania, no: 30, of the date 01. 12. 2005.

²³ Every person has equal rights over his fundamental rights which are the shared rights for every

he categorizes some of them as political freedoms, speech and organization freedom, the freedom to own private property, etc. He says that these freedoms must be equally enjoyed by everyone because living in a fair society means that everyone has fundamental rights and freedoms²⁴. According to Rawls, the freedoms can never be restricted, except in cases when this restriction would lead to a better organization of the whole society²⁵. Rawls continuously states that: it is difficult to achieve any existential priority in society without the help of freedom, education and money. The distribution of primary goods according to Rawls is influenced to a high degree by fundamental institutions such as the Constitution, which decides on the division of political rights as well as the inclusion of social and economic legislation. Sharing the rights of primary goods, Rawls sees it as a realization that can be made through a social contract that will be done voluntarily, without violence, without the pressure and the threat of others in its adoption, towards the distribution of primary goods. Rawls always thinks that people cooperate to draft new laws in order for them to develop their economic welfare and during these collaborations, they also try to find different ways in improving their cultural and material values. Therefore, in sharing this result of the created goods, all together should be of a concern, because the contract is made up of equal people, and that no one can gain from their superiority when it comes at negotiating. According to this theory, the distribution of the goods is held based on: the justice that is held on reasonable conditions. The negotiations are always held in a symmetric phase. Hence, the principles from this initial symmetric phase are initially acceptable from the moral point of view. The parties, according to Rawls, should be equally represented, as moral persons, anything should be done in an ethically blameless manner, with full reasons and high degree of self-responsibility. The whole information about the education, the work, the incomes and fortunes must be kept confidentially hidden. Rawls says that our abilities and talents are not fully natural. They have been cultivated by us thanks to our education, professional life and other conditions that help in our overall achievements.

Hence, we can say that Rawls' theory is based mostly on the modern constitutional democracy, of the critical thinking and of the alternative thinking when it comes to the creation of the stable institutions in a pluralist society. Rawls' theory of justice appeals in the fact that the social institutions must be adopted in such a way that it would be possible for people to have a place in society and to

citizen of the society.

²⁴ IKONOMI L, *The philosophy of fairness* (a series of lectures), Ekspres publishing house, Tirana, pg 245-247.

²⁵ At the same place, pg 248-251.

have better living conditions. According to this theory, says Nozick, a very close rule is created if there is a need to wipe out the impacts of old injustices and to establish justice from the beginning. From this approach, all of which must be consistent, reflect tolerance, eliminate frictions and disagreements. Rawls is right when he says that the institutions that rely on these two principles apply a systematic democratic applicability, thus creating a political collaboration, a better understanding and as well as a compromising spirit when it comes to reaching a social agreement.

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