

SOME CONSIDERATIONS ON THE BASIS OF THE CONCEPTS OF SUBSTANCE AND EXISTENCE OF FUNDAMENTAL RIGHTS IN THE ANALYSIS OF THE CONSTITUTIONAL COURT OF ROMANIA

Mircea TUTUNARU, Associate Professor, Titu Maiorescu University Bucharest, Faculty of Law and Economic Sciences Târgu Jiu

Romulus MOREGA, lecturer dr., Titu Maiorescu University Bucharest, Faculty of Law and Economic Sciences Târgu Jiu

DOI: <https://doi.org/10.66793/titulaw19proceeding5>

Abstract

The concepts of “substance of rights” and “existence of rights” differ from each other, not being in a relationship of equivalence. Thus, the difference between the concept of “substance of rights” used by the European constitutional legislators and that of “existence of rights” used by the Romanian constitutional legislator is not a terminological or purely formal one. They are based on different philosophical conceptions regarding fundamental human rights and freedoms. The Romanian constituent legislator and the other European constituent legislators use the two terms. We consider that the CCR has taken over the concept of “substance of rights” from the case law of the European Court of Human Rights, without taking into account the specifics of the Romanian constitutional framework provided for in the provisions of art.53 of the Romanian Constitution. The Strasbourg court has developed the concept of “substance of rights” in its case law, and in its analysis the Constitutional Court of Romania has focused on compliance with this standard.

Keywords: fundamental rights, Constitutional Court of Romania, constitutional legislator, substance, existence

1. Introduction

In the theory of constitutional law, terminological precision represents a fundamental and indispensable condition for the correct and efficient delimitation of the sphere of protection of the fundamental rights and freedoms of the person.¹ Each legal concept must be used with rigor and consistency, so that there are no ambiguities or confusions that could jeopardize the interpretation and application of legal norms. Thus, confusion between apparently close terms, such as "substance of law" and "existence of law", is not just a matter of terminological nuance, but can lead to divergent interpretations and, consequently, to contradictory legal decisions. This inconsistency can have direct and significant effects on the legal protection of citizens, affecting the fundamental rights of litigants and trust in the act of justice.

Clarity and terminological coherence in constitutional law is not a simple academic desire, but constitutes a sine qua non condition for ensuring legal certainty in the rule of law.² This means that legal norms must be clear, predictable and uniformly applicable, thus avoiding situations in which citizens or judicial bodies have difficulty interpreting the limits and content of fundamental rights. The use of different concepts to delimit the limits of restriction of these rights can generate not only legal uncertainty, but also a potential negative impact on the effective protection of the individual. In this context, the difference between the “substance” of a right and its “existence” acquires particular relevance, especially in the interpretation and application of constitutional norms regulating the restriction of fundamental rights.

The Constitutional Court of Romania (CCR), as guarantor of the supremacy of the Constitution, has an essential responsibility in ensuring a fair balance between the freedoms and fundamental rights of the individual and the general interests of society.³ In exercising this power, the Constitutional Court is not limited to the strict interpretation of domestic norms, but also takes into account international and European standards in the field of human rights, including the case law of the European Court of Human Rights (ECHR). In the last two decades, the influence of the ECHR case law on the decisions of the Constitutional Court has become increasingly evident, which has led to a partial and sometimes contested adaptation of the concepts used in Romanian constitutional law, in the sense of approaching European terminology and criteria.

¹ Iancu, Gheorghe / *Drept constituțional și instituții politice*, Ed. Lumina Lex, București, 2002, p.16

² Ionescu, Remus / *Introducere în teoria generală a dreptului*, Ed. Scrisul Românesc, Craiova, 2015, p.145

³ Tutunaru, Mircea / *Drept constituțional și instituții politice. Volumul 2. Instituții politice*. Ed. PIM, Iași, 2025, p.203 și urm.

In the complex architecture of the modern rule of law, the Constitutional Court is called upon to ensure, on the one hand, respect for the supremacy of the Constitution, and on the other hand, to protect the fundamental rights of citizens, ensuring that these are not reduced or limited beyond the limits that can be accepted in a democratic society.⁴ In this delicate process of interpretation and control, the CCR cannot ignore international standards, especially those established by the European Convention on Human Rights and the case law of the Strasbourg Court, which have shaped and defined in depth the concept of the protection of fundamental rights. This jurisdictional dialogue between the national and European systems has led to the emergence of phenomena of taking over and adapting certain legal concepts, of which that of “substance of the law” is one of the most relevant and controversial.

However, although the Constitutional Court has sometimes adopted in its reasoning the concept of “substance of the law” as used in the case law of the ECHR, the Romanian Constitution explicitly enshrines another formulation: that of “existence of the law”. This terminological difference is not a purely formal one, but indicates a conceptual discontinuity that raises serious problems regarding the compatibility and coherence of the Romanian constitutional system with the European one. More precisely, between “substance” and “existence” there is an essential difference in legal and axiological content, which influences the way in which the permissible limits of the restriction of fundamental rights are interpreted and applied.

The central issue analyzed in this paper lies precisely in this fundamental difference between the concepts of “substance” and “existence” of fundamental rights, as well as in the way in which the import of a foreign concept into the jurisdictional practice of the CCR can affect the coherence and stability of the national constitutional framework. This is a topic of paramount importance, as it determines not only legal certainty, but also the citizen's confidence in the effective protection of his fundamental rights, in the context of a plurality of normative sources and a complex jurisdictional dialogue.

2. The philosophical and legal foundation of the concepts

The term “substance” has its roots in the Aristotelian philosophical tradition, where the Greek expression *ousia* designates the essence or fundamental, immutable nature of an object or thing.⁵ In this philosophical context, substance represents the essential core, the defining element without which an object can no longer be considered the same. The adoption of this concept in the field of law has led to a legal interpretation whereby the “substance of the right” designates the minimal, inviolable and indispensable core of a fundamental right, which cannot be affected or restricted without compromising the very nature of the right in question. Thus, the violation or impairment of this “substance” is equivalent to a fundamental infringement of the right, transforming any interference into incompatible with the legal order and the principles of the rule of law.

In the case law of the ECHR, the “substance” is equivalent to the “essence” of the right, and its violation transforms the restrictive measure into an automatically punishable violation, regardless of the legitimate aim pursued.⁶ Thus, the concept of “substance” is treated as synonymous with the “essence” of the protected right. This means that any restrictive measure that affects this essence – that is, the fundamental core of the right – is considered a serious violation, automatically punishable by the Court, regardless of the legitimate aim or justification invoked by the authorities for the restriction. For example, if an administrative or legislative restriction completely eliminates the individual's ability to exercise a certain essential right, the ECtHR will declare it incompatible with the obligations assumed under the Convention. Thus, the “substance” standard is absolute, imposing a stringent and inviolable protection of the core of fundamental rights, without allowing for derogations or justifications for its infringement.

On the other hand, in the Romanian constitutional tradition, the concept of “existence” of a right has a different connotation, influenced by the positivist philosophy of law. This concept emphasizes the recognition of the right as an effective legal reality, enshrined in the constitutional text and protected in a concrete way. Thus, the “existence” of a right means that the right continues to be recognized and exercisable, even if the modalities or conditions of its exercise may be subject to temporary or conditional limitations. Article 53 para. (2) of the Romanian Constitution expressly provides that any restriction on the exercise of a right or freedom “may not affect its existence”⁷ This text reflects a concern for keeping the fundamental right alive, that is, in the effective sphere of exercise, even when certain limits are imposed on the manner or intensity in which it can be used.

⁴ Tutunaru, Mircea / *Probleme teoretice și practice în edificarea statului de drept*, Ed. Scrisul Românesc, Craiova, 2010, p.28-30

⁵ Aristotel / *Metafizica*, traducere și comentarii, Ed. Humanitas, București, 2007

⁶ Hotărârea CEDO Sporong și Lönnroth c. Suediei, 23 septembrie 1982, § 63

⁷ Constituția României, art. 53 alin. (2)

From this positivist perspective, the “existence” of the right has a more flexible and pragmatic character, allowing for broader restrictions than those permitted by the “substance” standard. Therefore, the restriction of a right is constitutional as long as it does not suppress the right entirely or does not eliminate it as a legal possibility, but only limits certain aspects of its exercise. This concept highlights a minimal protection of fundamental rights, focusing on maintaining them as active and viable legal entities in the legal system. This formulation leaves room for a broader restriction than that allowed by the concept of “substance” within the meaning of the ECHR: as long as the right is not completely suppressed, the restriction may be constitutional.⁸

This divergence between the concepts of “substance” and “existence” derives from a different philosophical foundation, which reflects two distinct approaches to the protection of fundamental rights. The concept of “substance” implies the existence of an immutable axiological core, an absolute standard of protection that does not admit of derogations under any circumstances, even for legitimate purposes. In contrast, the “existence” of the right expresses a minimal normative dimension, which must be preserved even under conditions of legitimate restriction, which implies a relative standard, which accepts limitations as long as the right is not eliminated in its entirety.

This conceptual difference results in significant practical implications in the matter of constitutional review of restrictions on fundamental rights. The “substance” standard requires courts, such as the Constitutional Court or the European Court of Human Rights, to carry out a stringent analysis of the impact of the measure on the core of the right, with a maximum protection that does not allow the essence of the right to be affected. In contrast, the “existence” standard offers a wider margin for the intervention of the legislator or authorities, accepting restrictions that do not suppress the very possibility of exercising the right.

In conclusion, the two concepts essentially define different levels of legal protection of fundamental rights: one absolute, of axiological nature, and the other minimal, of normative nature. This distinction is essential for understanding how national legal systems, such as the Romanian one, relate to international standards, such as those developed by the ECHR, and for assessing the impact of these differences on legal certainty and the effective protection of fundamental rights.

3. The perspective of Romanian constitutional law

The Romanian Constitution establishes a rigorous and well-defined framework for restricting the exercise of fundamental rights and freedoms, imposing a series of cumulative conditions that must be respected for any limitation to be considered constitutional and legitimate.⁹ Thus, according to the provisions of art. 53 of the Constitution, any restriction must be expressly provided for by law, meet a genuine need in a democratic society and be proportionate to the legitimate aim pursued. These conditions reflect a delicate balance between the protection of individual rights and the general interest of society, representing fundamental guarantees against arbitrary or excessive interference.

In addition to these requirements, art. 53 introduces an essential criterion, namely that the restriction of the exercise of a right or freedom “may not affect its existence”. This provision functions as an additional protective filter, designed to ensure that the fundamental right is not totally suppressed by restrictive measures, thus preserving the effective possibility of exercising the right, even if certain aspects of its use may be limited. In this sense, the condition of the “existence” of the right offers a minimal guarantee, which differs substantially from the stricter standard imposed by the case law of the European Court of Human Rights (ECHR), where the emphasis is on the protection of the “substance” or “essence” of the right.

The Constitutional Court of Romania (CCR), as the supreme body guaranteeing the supremacy of the Constitution, has consistently applied these cumulative criteria in the analysis of the constitutionality of restrictions on fundamental rights. In Decision no. 872/2010, concerning the reduction of salaries in the public sector, the Court held that the temporary reduction of the amount does not affect the “existence” of the right to a salary. Thus, the reduction was not considered a total suppression or denial of the right, but a temporary, proportionate and justified limitation, which did not eliminate the effective possibility of individuals to benefit from remuneration for the work performed.¹⁰ Also, in Decision no. 308/2012, the Court held that the absolute prohibition to run for certain positions may affect the “existence” of the right to be elected, exceeding the limits of the restriction allowed by art. 53. Therefore, such an absolute and unjustified prohibition was considered unconstitutional because it completely eliminates the exercise of the fundamental right, thus violating the minimal condition of its “existence”.¹¹

⁸ Muraru, Ioan; Tănăsescu, Simina / *Drept constituțional și instituții politice*, vol. II, Editura C.H. Beck, București, 2011, p. 294

⁹ Remus Ionescu, *op.cit.*, p.196-197

¹⁰ Decizia CCR nr. 872 din 25 iunie 2010, publicată în M.Of. nr. 433 din 28 iunie 2010

¹¹ Decizia CCR nr. 308 din 28 martie 2012, publicată în M.Of. nr. 309 din 9 mai 2012

From these and similar decisions it emerges that the CCR clearly operates with a criterion of total impairment, not that of affecting the essence of the right, so that restrictions that do not completely suppress the right remain within the admissible scope, provided that the other legal requirements are respected. This approach translates into the fact that the CCR analyzes whether the right continues to exist as an exercisable legal entity, without going into details regarding potential limitations of its essential content. Therefore, the standard of protection is a relative one, focused on preserving the fundamental possibility of exercising it, while the “substance” standard – much more restrictive – requires the protection of the inviolable core of the right, regardless of the circumstances.

This difference in approach between the CCR and the ECHR underlines the particularities of the Romanian constitutional system, highlighting the need for a balanced and contextual interpretation of fundamental rights, which takes into account both the national specifics and the international obligations assumed by Romania. Moreover, the social relations regulated by the Romanian Constitution concern the essence of the state, its foundations, the social phenomena that lie at the foundation of state power and can only be regulated in the constitution and constitutional law.¹²

4. The concept of “substance of rights” in the case law of the ECHR

The concept of “substance of rights” represents one of the fundamental pillars in the protection of fundamental rights in the case law of the European Court of Human Rights (ECHR). This doctrine was developed starting in the 1970s, in a context in which the Court sought to establish clear and effective limits for state interferences with the rights guaranteed by the European Convention on Human Rights. During this period, the idea crystallized that the protection of fundamental rights is not limited to their formal existence, but must ensure their integrity and essential content.

From a theoretical perspective, the concept of “substance” or “essence” of law can be understood as the fundamental, immutable core or content that gives the law its meaning and intrinsic value. This idea has deep philosophical roots, inspired by the Aristotelian tradition, which designated *ousia* as the “essence” of an object, what makes it what it is, and without which it cannot exist as such.¹³ Applied in international human rights law, this concept has been adopted as a standard of maximum protection, ensuring that no restrictive measure or governmental interference can touch the inviolable core of the protected right.

In the case law of the ECHR, this principle has been crystallized in numerous relevant cases. A landmark is the judgment in the case of *Sporrong and Lönnroth v. Sweden* (1982)¹⁴, where it considered that urban planning measures preventing the use of property for a long period of time constituted an infringement of the “substance” of the right to property. The Court examined restrictions on the right to property in the context of urban planning measures preventing the use of property for a long period of time. The ECtHR considered that these measures constituted an infringement of the “substance” of the right to property, because they deprived the applicants of the effective possibility of using their property, that is, of the essential content of the right. The judgment emphasises that the protection of the right cannot be reduced to a mere formal form, but must also include guaranteeing its effectiveness, in particular its fundamental core.

Another emblematic case in defining this standard is the judgment of *Sunday Times v. United Kingdom* (1979), in which the Court analyzed the restrictions imposed on freedom of expression. Here, the ECtHR established that measures restricting freedom of expression must not be such as to empty the right of content, thereby affecting its substance. This was a clear reaffirmation of the principle that, regardless of the justifications invoked (such as the protection of national security or public order), the right must retain an absolute minimum of meaningful content, which ensures its viability and effectiveness.¹⁵

From a procedural point of view, this standard functions as an absolute filter in the judicial review of restrictions on fundamental rights: once the “substance” of the right has been found to have been affected, the justifications invoked by the State become irrelevant and the interference is considered incompatible with the obligations assumed by the Convention. This rule ensures robust protection and prevents arbitrary or excessive derogations, highlighting the imperative nature of this standard.

From a doctrinal perspective, this position of the ECHR has been interpreted as a way of maintaining a balance between the need to limit rights in certain circumstances and the need to protect their core in order to guarantee the effective respect of fundamental rights. The Court’s case-law has been interpreted by many authors as an effort to combine normative pragmatism with an axiological principle of rights protection, imposing minimum standards

¹² Ciongaru, Emilian / *Teoria generală a dreptului*, Ediția a doua, Ed. Scrisul Românesc, Craiova, 2012, p.76

¹³ Aristotel, *Metafizica*, traducere și comentarii, Ed. Humanitas, București, 2007

¹⁴ Hotărârea CEDO, *Sporrong și Lönnroth c. Suediei*, op. cit., § 73

¹⁵ Hotărârea CEDO, *Sunday Times c. Regatul Unit*, 26 aprilie 1979, § 65

that are not negotiable.¹⁶ This has been seen as a manifestation of the "inviolable core theory" of fundamental rights, in which rights cannot be considered respected if their essence is distorted.¹⁷

In conclusion, the concept of "substance of rights" in the ECHR jurisprudence represents a standard of absolute protection, intended to guarantee that fundamental rights are not merely formal, but contain an effective core, which cannot be sacrificed in the name of legitimate interests or purposes.¹⁸ This approach has profound implications in European and international constitutional law, constituting a fundamental benchmark in the evaluation of permissible restrictions on fundamental rights and freedoms.

5. Concept transfer and adaptation in CCR practice

After Romania's accession to the European Convention on Human Rights (ECHR) and especially after its integration into the European Union, the Constitutional Court of Romania began to invoke, more and more frequently, the concept of "substance" in the analysis of the restriction of fundamental rights, alongside the traditional one, enshrined in the Constitution, of "existence" of the right. This jurisprudential takeover was accompanied by a gradual adaptation of the national interpretative framework, in order to align it with European standards.

For example, in Decision no. 467/2023¹⁹ The Court explicitly adopted the idea taken from the ECHR jurisprudence according to which the reduction of pensions must not affect the "substance" of the right to a pension. Thus, the CCR positioned itself as a guarantor not only of the national constitutional text, but also of European standards, operating a complex jurisdictional dialogue.

However, this introduction of the concept of "substance" in the analysis of the Romanian Court raises important conceptual and practical problems, given that, from the perspective of domestic law, the relevant and explicitly regulated constitutional criterion is that of the "existence" of the right. As provided for in Article 53 para. (2) of the Constitution, the restriction cannot affect the "existence" of the right, which means that the right must continue to remain a "core" of effective possibility of exercise, even if certain modalities or conditions of exercise may be limited. Thus, in Romanian law, the "existence" of law is a concept with a more flexible and pragmatic connotation than "substance" in the sense of ECHR jurisprudence, which imposes a stricter standard of protection of the immutable axiological core of law.

This difference between the two standards – constitutional "existence" and European "substance" – leads to an area of legal uncertainty. In practice, the Constitutional Court oscillates between the application of the more permissive standard of the Romanian Constitution and the more restrictive one, taken from European case law. This duality of criteria can generate confusion and lack of predictability in the interpretation and application of restrictions on fundamental rights. From the perspective of the principle of legal certainty, which requires clarity, predictability and normative stability, such a fluctuation between standards can be problematic.

From the perspective of constitutional review, an approach that alternates between two standards with different degrees of rigidity can directly influence the effective protection of fundamental rights. In some cases, the application of the "substance" standard can lead to a broader and stricter protection, while in others, the application of the "existence" standard allows for wider restrictions. This discrepancy raises questions related to the uniformity of jurisprudence and the predictability of decisions, essential aspects in a consolidated state of law.

In conclusion, the transfer of the concept of "substance" into the practice of the CCR is an eloquent example of the complexity of integrating European law into domestic law. In order to ensure both compliance with European standards and the maintenance of constitutional coherence, a clear and consistent delimitation between the two standards is necessary, as well as a solid legal argumentation of the reasons for choosing one of them in each specific case. In this way, a possible legal uncertainty that may affect the security and protection of fundamental rights in Romania can be avoided.

CONCLUSIONS

1. The CCR should clarify, through a decision of principle, the exact meaning of the "existence" of a right, in order to avoid confusion with the "substance" of the right within the meaning of the ECHR.

2. The Romanian constitutional law doctrine should develop interpretative instruments to harmonize the two standards, preserving the national specificity.

¹⁶ Miroiu, Adrian / *Teorii ale dreptății*, Editura Altemative. 1996, p.253

¹⁷ Vasak, Karel / *The International Dimensions of Human Rights*, vol. 2, UNESCO. Paris, 1983

¹⁸ Safta, Marieta / *Drept constituțional și instituții politice. Volumul 1. Teoria generală a dreptului constituțional. Drepturi și libertăți*. Ed. Hamangiu, București, 2014, p.3-5

¹⁹ Decizia CCR nr. 467 din 2 august 2023, publicată în M.Of. nr. 727 din 7 august 2023

3. The jurisdictional dialogue with the ECHR must be maintained, but with discernment, in order to avoid the mechanical import of concepts without adaptation.

Such clarification would contribute to strengthening legal certainty and the coherent protection of fundamental rights in Romania.

REFERENCES

- [1] Aristotel / *Metafizica*, traducere și comentarii, Ed. Humanitas, București, 2007
- [2] Ciongaru, Emilian / *Teoria generală a dreptului*, Ediția a doua, Ed. Scrisul Românesc, Craiova, 2012
- [3] Deleanu, Ion / *Instituții și proceduri constituționale în dreptul român și comparat*, Editura C.H. Beck, București, 2006.
- [4] Iancu, Gheorghe / *Drept constituțional și instituții politice*, Ed. Lumina Lex, București, 2002
- [5] Ionescu, Remus / *Introducere în teoria generală a dreptului*, Ed. Scrisul Românesc, Craiova, 2015
- [6] Miroiu, Adrian / *Teorii ale dreptății*, Editura Altemative. 1996
- [7] Muraru, Ioan; Tănăsescu, Simina / *Drept constituțional și instituții politice*, vol. II, Editura C.H. Beck, București, 2011.
- [8] Safta, Marieta / *Drept constituțional și instituții politice. Volumul 1. Teoria generală a dreptului constituțional. Drepturi și libertăți*. Ed. Hamangiu, București, 2014
- [9] Tutunaru, Mircea / *Drept constituțional și instituții politice. Volumul 2. Instituții politice*. Ed. PIM, Iași, 2025
- [10] Tutunaru, Mircea / *Probleme teoretice și practice în edificarea statului de drept*, Ed. Scrisul Românesc, Craiova, 2010
- [11] Vasak, Karel / *The International Dimensions of Human Rights*, vol. 2, UNESCO. Paris, 1983
- [12] Constituția României din 1991, (revizuită prin Legea nr.429/2003, aprobată prin referendumul național din 18-19 oct. 2003), publicată în Monitorul Oficial nr.767 din 31 octombrie 2003
- [13] Hotărârea CEDO Sporrang și Lönnroth c. Suediei, 23 septembrie 1982 // <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57580%22%7D>
- [14] Hotărârea CEDO Sunday Times c. Regatul Unit, 26 aprilie 1979 // <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57584%22%7D>
- [15] Decizia CCR nr. 872 din 25 iunie 2010, publicată în M.Of. nr. 433 din 28 iunie 2010
- [16] Decizia CCR nr. 308 din 28 martie 2012, publicată în M.Of. nr. 309 din 9 mai 2012
- [17] Decizia CCR nr. 467 din 2 august 2023, publicată în M.Of. nr. 727 din 7 august 2023