THE LIMITS OF THE LAW AND THE MUTABILITY OF THE JUDICIAL SYSTEM

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Abstract

In a liberal democracy, the sphere of law cannot be unlimited. The first category of its limits results from the necessity to temper the mutability of the legal system. Firstly, the law must not be perishable. The passage of time should not, in itself, affect the legal system. Thus, the law must limit the desire for change only for the sake of change and the desire to turn regulations into a performance. The limitation of such tendencies is not legally effective under any circumstances, meaning that the choice of regulatory methods must take into account formal principles and the context of their application as well.

Secondly, law cannot be receptive to all changes. It must shift only under certain circumstances, commensurate with the magnitude of social changes. Any social conflict, change of ideological orientation, or political, economic or structural modification should not determine modifications with respect to the legal order.

Thirdly, the mutability of the legal system may be determined by systemic dysfunctions. However, any structural conflict within the legal order should not bring about systemic changes. Basically, only certain dysfunctions can be classified as systemic, and the reaction towards them should be limited to drawing up structural modifications.

Keywords: *normative performance; legitimate trust; mutability; systemic dysfunctions; liberal democracy*

The fundamental norm of any judicial system is the integration of conflicts. This essential requirement results from the fact that order is a formal condition of the social existence. Consequently, law will regulate all the social conflicts. If no express norm exists to regulate a certain social conflict, then a general principle of the law, derived thus not from the ruler's will, but rather directly from the internal logic of the system, will be held accountable for regulating it.

But from this systemic logic it cannot necessarily be derived the conclusion that all social relations must be regulated. The conflict resulting from the dysfunctionality of a social relation is necessarily regulated, yet not the relation itself. Thus, freedom remains the rule, with the norm intervening only if it necessary to furnish its exercise in order to protect others or if the exercise of freedom has created a conflict. Beginning from this type of understanding of the normativity, all the conflicts tend to be integrated in the system, yet freedom somehow remains outside of it. Some social relations remain unregulated, the individuals being able to configure them through their own will. The law intervenes only later on in case a conflict starts.

"The law always sustains the tension between two contrary exigencies: justice or equity, on one hand, which stir the change of judicial rules and situations in order to constantly improve the judicial order or in order to adapt it to the changing society and which materialise in the mutability principle; on the other hand, the judicial safety requires stability and materialises within the contrary principle, that of respecting the existing condition"[1].

The judicial system must be receptive towards the social environment which it regulates. It has to be an open system. Otherwise, it risks to regulate in vain. Yet the stability of the judicial system itself imposes a relative closure towards the environment. The law must *command* the society, not only follow its changes. A system with a complex dialectic of the opening and closing towards the environment results. This dialectic imposes certain limitations upon the regulation objective.

The principle of the judicial order mutability is always imposed, even if a revolution is required for this. However, until this critical moment of the law evolution, determined by the social changes, the positive law must privilege the stability and, through it, the judicial safety of the persons. All the mechanisms of the lawful state have as aim the assurance of this condition in law, the stability condition imposing a sort of indifference of the judicial institutions towards the social changes. The limitation of the normative object due to this dialectic between the mutability of stability of the judicial system can be viewed upon three planes.

Firstly, the law must not be perishable. The passing of time should not affect through itself the judicial system. Thus, the law must limit the desire for change for the sake of change or in order to transform the regulation into a show. Limiting these tendencies is not judicially efficient in any conditions, meaning that the thinking of the regulation methods needs to take into account the formal principals, as well as the context of their application.

Secondly, the law cannot be receptive to all the changes of the environment. It must change only in certain circumstances and in proportion to the scale of the social changes. Not every social conflict, change of the ideological orientation, political, economic or structural change must determine changes of the judicial order.

[1] M. Fromont, *La justice constitutionnelle dans le monde*, Dalloz, Paris, 1996, p. 178.

Thirdly, the mutability of the judicial system can be determined by the systemic dysfunctions. But not any structural conflict within the judicial order should be able to drive the systemic changes. In principle, only certain dysfunctions can be categorized as systemic, and the reaction towards them must be limited to the achievement of some structural correlations.

1. Limits of the normative show

The present society is based on mass communication. A type of communication which changed the way in which politics are done and, consequently, the way in which are produced the judicial rules which make mandatory the policies. It is not the nature of the political change and neither its fundamental procedures that which changes, but rather the scale on which the phenomenon take place, their scale. This amplification movement seems to be accompanied by a change of the communication sense, which seems to change the nature when it transforms itself from interpersonal communication in mass communication and when the direct contact is replaced by the mediatized relation. This apparent change of nature can be resumed thus: the attempt to change the information is replaced with an attempt to influence the receiver of the information. However, it is about only a change in amplitude. To communicate in the most apparent simple way, through spoken language, should mean the transmission of the message content from one person to another. In reality, he/she who forms in words his/her thought and expresses is does nothing but goad the other into thinking of a certain theme. Firstly, speaking does not have a communication role, but rather the role of stimulus. In the case of the mediatised communication, thinks happen in the same manner. The mass-media does not create opinions, but positions the thinking and action towards certain themes. The mediatized communication is done through thematic positioning and not by imposing some ideas or opinions. The mass-media converts those disposed to be converted. The effects of the mass-media are limited by necessity. The orientation of the themes is the main effect and not at all that of the orientation of the ideas. This vision on the nature of the mediatised communication explains not only the preponderance of the image and the content shape, but also the preponderance of the environment upon the message.

Answering these changes of amplitude, the information transmitted through the mass-media will be short since it needs to incite and not to explain; it will be based upon the image since the visual stimulation is the most powerful; it will be centred upon the sensational details which will spin a fine network of suggestions and it will not be centred upon the capitalization of the event, which would divide the audience and would polarise the opinion. On the other hand, once the content of the message is secondary in proportion to its shape, it is obvious that the way of transmitting will achieve an overwhelming importance; the message is the medium (*medium is*

message)[2]; that is why the same information will have distinct effects, whether it is televised, printed, posted on the internet etc.

The norming is transformed in order to answer the communication requests. It will be one which will sketch a general framework, integrated by the application bodies, will answer the requests of the moment, being overriding reactive, without placing in the foreground its fundamental values; it will be introduced in the system by the best placed body in order to create the communication, the body which has the best image and not necessarily the most competent with regard to the strict logic of the power separation; it will adopt the shape with the greatest media impact in favour of that which norms and not necessarily the regulation form which results from the internal logic of the judicial system.

Limiting these tendencies is necessary in order to guarantee the judicial security of the persons. The general limit is that of the regulation necessity. Within our law system, it is provided as a limit of the norming by Article 53 of the Constitution, which regulates that the exercise of the rights and freedoms can be restricted only through law and "only if it is imposed". Later on, Article 53 details the reasons. But the general condition states that the freedom cannot be affected by law unless it is necessary. In the case of any regulation, the first condition which must be controlled for is that it is necessary in order to judicially frame certain social phenomena or it was done only for the sake of the show, in order to achieve a political result from the communication with the shape of norming. The first cause for the unconstitutionality of a regulation is its uselessness.

Thus, the first limit of the law comes into view, resulting from the limitation of its mutability: the creation or change of the judicial norms must be necessary. The necessity of norming must be proportioned to the human rights since the law, in itself, is a limitation of the freedom. The law must respect the priority of the freedom, norm only to the degree in which the regulation is necessary for the protection of the others' freedom. In a liberal democracy, the system of the rights' exercise is principally the repressive one, namely it lets the subjects free to exercise their rights or freedoms and reprimands only the overstepping of certain limits. Thus, this type of law begins from the idea that the judicial system does not regulate freedom, but only its abusive implementation. Thus, norming is necessary only to the degree in which it has as direct or indirect objective the protection of the persons' freedoms and rights. It is not necessary if it has as objective only the general, abstracted and otherwise generalised interest. Thus, in our judicial system, the regulation necessity must be judged based on the conditions imposed by Article 53 of the Constitution, even if it does not directly tend to operate with a restriction of the exercise of an actually determined right or freedom. In this view, a useless norm is a norm contrary to freedom, thus unconstitutional.

The second limitation of the sphere of law resulted from the medialization of the communication is that of the adopting the law framework, namely the laws which

[2] M. Mcluhan, *Pour comprendre les média*, Mame/Seuil, Paris, 1968, pp. 25-40.

sketch only the general normative framework and leaves the task of completing this framework to the bodies normally assigned with the application of the norm. The later no longer resume itself to making application acts of some judicial norms which frames the activity, but they themselves create these norms, being constrained only by the general framework sketched by the competent body to regulate them. Thus, it is about an informal transfer of competences. The limitation of this procedure is necessary in order to guarantee the separation of power and, through its intermediation, the rights and freedoms of the subject. Thus, firstly, the clarity of norming means that the norm establishes all its application condition without informally transferring the competences to the bodies which should only just apply it. The limitation of the normative show is a guarantee of the general principle according to which the delegated competence cannot be delegated again.

A third limitation of the area of law resulting from its necessity to limit the norming as a media show, is that of the necessity to motivate the norming. The exposition of motives is required not only in order to determine the legislator's intention, as a mean of interpretation, but also to determine the necessity of norming. Thus, the normative act which is introduced in the system without being motivated is unconstitutional. Likewise, a normative act whose formal motivation, existing formally, does not answer some precise content exigencies. In our judicial system this problem is pressing. With regard to the emergency decrees, only the requirement of motivating the norming necessity is general, applicable thus to all the normative acts, even if this is not expressly regulated.

2. Limits of the regulations resulted from the passing of the time

Nothing can be indifferent to the passing of the time. The judicial system is no exception. The area of the law has certain time limits. Firstly, these limits regard the possibility of regulating through the past, namely to dispose with regard to events which already took place at the time of norming. Secondly, even if the law naturally regulates for the future, some limits are imposed also upon this type of norming in order to guarantee the persons a certain order continuity, which they expect in a legitimate way.

A. The law cannot regulate the past – non-retroactivity

The first time limit of the law derives from the fact that you cannot order a law subject after he/she did something. The norm can only regulate for the future, namely only after the law subject was able to know what is required from him from the respective norm. Regulation of the past is not allowed because the subjects would be required to comply with a norm that did not exist at the time in which they had a certain behaviour, thus they could not objectively know it. This limit of norming is called the non-retroactivity. Our present judicial system is imposed by Article 15 para. (2) of

the Constitution: "The law regulates only for the future". Thus, we are in the presence of a system which principally forbids all the retroactive norms, imposing upon that who regulates. In other systems, this principle is imposed only upon the application bodies who cannot offer through their acts of applying the retroactive effects of a law, but not on the legislator who can adopt, with some limitations, general criminal laws, retroactive laws.

In our system, the exceptions from the non-retroactivity principle are regulated also by Article 15 para. (2) of the Constitution: the more favourable criminal or contraventional law retroactivates itself. Our constitutional regulation has two main effects in terms of the regulation area: the legislator cannot refuse the retroactive effect of a more favourable criminal or contraventional norm and the retroactive interpretable laws are not possible since these are not expressly provided for in the Constitution, and the exceptions are of strict interpretation. It is the reason for which the Civil Code regulates in Article 9 para. (2) that the "interpretative norm produces effects only for the future".

In our judicial system, the non-retroactivity is precisely and imperatively regulated. The issues raised by this principle are due rather to the excessive rigidness of the judicial system through the general constitutionalisation of the non-retroactivity rather than the excess mutability. That is why they will not be addressed within this paper.

B. Regulation limits for the future

The law regulates the future. However, is there any limit to the changes in the judicial system even if these changes operate in the future? Can the law be changed anytime and anyhow or do some limits impose themselves upon he/she who regulates in order to guarantee that, in the future, the change of the norms does not affect the rights and freedoms of the subjects of the judicial order?

The constitutional state citizens need to be guaranteed by the judicial security through the assurance of the state action continuity. This guarantee is transposed in the person's right to be respected. The rightful trust in the continuity of the public power's action, not only from the judicial point of view, but also from the point of view of the opportunities of the administrative activity. In other words, any unforeseen change of the judicial framework is contrary to this aspect of the constitutional state, as well as any conspicuously untimely administrative measure.

The consequence with regard to the limits of the law of this way of understanding the judicial security of the persons, foreseen in our present judicial system, in Article 23 para. (1) of the Constitution, is that the state needs to temper the changes for the future of the judicial order, ensuring a correct and efficient informing with regard to such changes before they are produced. According to this logic, an untimely norm is a norm contrary to the freedom and safety of a person. Thus, the continuity of law is no longer a systemic requirement, but a condition of the freedom and judicial safety of the persons, their fundamental right, a formal limit of the normative power. It implies the

right to maintain a norm as long as the imperative motives do not require its change and the right to correct and effective informing, namely it is done so that the change is understood by the subject of law without speciality training. The law, besides the fact that it needs to use the common sense of the words when it expresses itself, it needs to change only if the meaning of the change itself is accessible to the subject averaged trained. In other words, the change in terms of norms must be reasonably predictable. For example, if the Parliament discusses for a couple of years a code it is not expected that, after a couple of days from its coming into force, it is modified. Such a change is, in itself, without discussing the content of the comprised norms, contrary to the rightful action of the state, thus contrary to the person's safety.

The subject's trust in the continuity of the law must be *legitimate*. This legitimacy of the trust can result in the law itself. For example, a law regulates that it cannot be changed for a period of time. If we apply the principles resulting from the guaranteeing the normative hierarchy, the norm which regulates the prohibition not being supra-legislative, a change of the law within the deadline cannot be unconstitutional. However, it is unconstitutional because it breaches the constitutional regulation which guarantees that Romania is a constitutional state, thus the persons' judicial security, thus their legitimate trust that a law regulates itself the fact that it cannot be changed for a period of time will be impose upon the regulator itself. The same rational can be done also with regard to the laws which regulate a public procedure of informing before being changed or with regard to the laws which regulate that they can be changed for a limited number of times within a given period. It is not about a law which breaches itself, but about a law which breaches the fundamental right to respect the legitimate trust of the subjects in the continuity of the state's action, derived from the constitutional norm which imposes the constitutional state.

The legitimacy of the subject's trust in the continuity of the law can result also from the fact that the effects of the committed deeds and acts, foregone or produced under the ruling of the law will remain those which the subjects had in view at the specific time because they result not from their will, but from the law. It is the reason for which Article 6 para. (2) of the Civil Code regulates that "the judicial acts and deeds foregone or, as the case may be, committed or produced before the entering into force of the new law cannot generate other judicial effects than those foreseen by the law in force at the time of the closure or, if the case may be, of their commitment or production". Furthermore, the new law cannot, even for the future, consider valid or efficient the null or cancellable judicial acts or those affected by other causes of inefficiency according to the law in force at the time of their conclusion [Article 6 para. (3) of the Civil code]. In our judicial system, in the present Civil code, the dispositions are foreseen in the Civil Code, thus they are not super-legislative, thus they seem to refer only to the applicability of the civil law, asserting themselves only those which apply the law, but not the legislator as well. However, taking into consideration that they legitimise the expectation of the law subjects with regard to the continuity of the law's action, the

principles contained within them assert themselves through the relation with Article 1 para. (3) of the Constitution, which regulates that Romania is a constitutional state and that the legislative power is constituted upon a limit of the law.

Moreover, the subjects of law are entitled to expect that a legal disposition has a normative value. Consequently, a law which has an uncertain normativity is contrary to the legitimate trust of the persons[3]. It is a natural limit of the tendency to use the regulation only as a political show and not in order to really norm.

In some systems, such as the German one, the retroactive laws are distinct from the retrospective ones. The distinction is due to the German federal Constitutional Court and it replaces the older and critical distinction between the *true retroactivity* and *false retroactivity*[4]. According to the Court, a law is retrospective if it produces the effects in the future, but is applied in some issues of fact which have appeared in the past. A law is retroactive if it produces the effects in the past. It is not about the fact that it is applied to an issue of fact produced before its coming into force, but also about the fact that it produces the effects before that date. The distinction has as effect the restricting the retroactivity notion. Principally, the retrospective laws would be constitutional, while the retroactive ones would be principally affected by the unconstitutionality. In the German system, this main constitutionality of the retrospective laws is moderated by the "absolute prohibition of retroactivity in the criminal law"[5] and by the application of the constitutional principle of the legitimate trust of the citizens. If the constitutional principle of the retrospective laws is absolute for the procedural laws, "on the other hand, the requirement to protect the legitimate trust of the citizens puts into perspective the principle when it is applied to the underlying dispositions of a retrospective law. Indeed, it may happen that the citizens have a certain type of right earned upon maintaining the previous situation. This remark is true, especially when the law covers a fundamental right which is, essentially, a right to preserve the benefit of what was previously won"[6].

3. Limits of the law transformation resulted from the social changes

A. Can the disappearance of certain social relations have an effect upon the norm's existence?

Can the disappearance of certain social relations, regulated by the judicial system, lead to the restriction of the area of the law through the removal of the said norms from the system? In other words, a judicial norm. In other words, can a judicial norm be

[3] See the French Constitutional Council, Decision no. 2004-500 DC.
[4] See M. Fromont, *Le principe de non-rétroactivité des lois*, in Annuaire International de Justice Constitutionnelle, 1990, pp. 321-325.
[5] BverfGE 30, 367, quoted in "Selecţie de decizii ale Curţii constituţionale federale a Germaniei", C.H. Beck, Bucharest, 2013, p. 552.
[6] M. Fromont, *Le principe...*, *cited paper*, p. 324.

removed from a system only based upon the authority who introduced it or based upon the social change, in which case, the disappearance of the regulation's object would have a direct effect upon the norm? And as a corollary, what happens if the said social relations reappear? Must it be that the state readopts the norm or the social change by making it come back into force?

A judicial norm is always proclaimed while having into view the existence and necessity of the regulation of certain social relations. Principally, the disappearance of the regulated relations connotes the disappearance of the regulation which, although formally in force, no longer has any applicability. For example, a law which regulates the situation of a specific historical monument. The disappearance of the historical monument puts an end to the mandatory effect of the norm[7]. Therefore, although the regulation is conceived in general terms, the circumstances of fact are determined by its adoption. Their disappearance brings about the *caducity* of the norm[8].

But is the caduced norm removed from the system? The notion of caducity is used as an example by the Greek Constitution in Article 100 para. (4) which stipulates that "a legal disposition declared unconstitutional will become caduced". It is a way of avoiding the formal removal from law's force through the constitutional judge's decision, as it happens in the case of Romania through the usage of the notion of cessation of the judicial effects in Article 147 of the Constitution. Thus, the norm seems to subsist its own caducity, but no longer has applicability. This means that the reappearance of the regulated social relations makes the norm regain the applicability without it being necessary a form of re-entering into force undertaken by the state.

The central problem of the regulation's caducity when it is not expressly regulated is who and how it is decided that the regulated social relations have disappeared or have reappeared. The physical disappearance of the regulation's object does not create issues, but this situation is exceptional, usually being the case of the immaterial social relations whose disappearance is a social, not physical fact. The caducity of the norm intervenes when the necessity of the distinct judicial qualification of a category of social relations disappears. For example, this happened with the commercial relations in Romania during the communist regime.

B. Limits of the judicial system's transformation due to the ideological changes

The current societies are ideologically oriented. The universality of the ones made out of the ideology a real standard, imposed and defenced by the judicial order. In the liberal states, the ideologies are multiple, this type of state framing a society based on the pluralism fact, namely on a political concept of a "justice which governs its basic institutions [justice which] is accepted by each of the comprehensive, moral,

[7] D. Ciobanu, *Introducere în studiul dreptului*, Hiperion XXI, 1992, p. 66.
[8] J. Falys, *Introduction aux sources et principes du droit*, AEDL UCL, Louvain-la-Neuve, Bruylant, Bruxelles, 1981, p. 66.

philosophical and religious doctrines which last within this society along the generations"[9]. The law based upon such a type of justice concept can only arbitrate between the ideologies without being able to transform either of them into the official, mandatory judicial doctrine. The correct procedure of arbitrage between the different systems of ideas, values and beliefs which determine the people to believe that a certain evolution of the society is the good one and it has priority in front of any of these systems. Thus, the liberal law is a law neutral from the ideological point of view because, although inevitably influenced by the changes in the dominant ideology upon a given moment in the society, it limits this influence.

The first limit has already resulted in the fact that the law cannot transform neither one of the ideologies present in the society into a mandatory judicial ideology. This transformation can be direct or indirect. The first method assumes that the law adopts as obligation an ideology (it has no relevance if it is a moral, religious, political or comprehensive doctrine) and forbids all the others. The second method assumes the removal of some doctrines or ideas as being *a priori* incompatible with the said society even if there is no official statement or ideology. In itself, this method is incompatible with the right to a liberal democracy. For example, the Romanian courts have thus acted when they have refused the registration of a political party because it stated that it is communist, its statute showing that "it is a revolutionary workers' formation acting in an organized and acquainted manner, within the constitutional framework, in order to eliminate the effects of the counter-revolution and for resuming the construction of the most humane and democratic societies the history has ever known – Socialism". The rational of the Romanian courts is, essentially, the following one[10]: "From the examination of the documents submitted in the file, it results that, in the party's statute, in the chapter which establishes its objective (…), it is mentioned that it acts for the conquering of the political power with the aim of establishing a humane and democratic society. Thus, from its political statute and program it results that the party aims to establish a human state based on the communist doctrine, meaning that the constitutional and judicial order following 1989 is inhumane and is based upon the real democracy. Thus, the party breaches the dispositions of Article 2 para. (3) and (4) of the Decree-law no. 8/1989 according to which «through its objectives, the political parties must respect the national sovereignty and the means used in order to achieve it must be according to the constitutional and judicial order of Romania»".

The Court in Strasbourg eloquently explains why this rational is not according to the fundamentals of the liberal democracy: "According to the Court's opinion, one of the main features of the democracy lies in the fact that it offers the possibility to

[9] J. Rawls, *Justice et démocratie*, Seuil, Paris, 1993, pp. 245-283.

[10] This summary is reproduced from the European Court of Human Rights' decision, Troisième section, *Affaire Partidul Comunistilor (nepeceristi) et Ungureanu c. Roumanie, (Requête nº 46626/99),* 3 février 2005, final upon 6th of July 2005.

debate, through dialogue and without resorting to violence, the problems raised by the different currents of political opinion, even when they disturb or worry. Indeed, the democracy feeds itself from the freedom of expression. From this point of view, a political formation which respects the fundamental principles of democracy (…) cannot be sanctioned just because it has criticized the constitutional and judicial order of the country and because it wants to debate this issue in a public way on the political scene (…). Or, in this case, the internal jurisdictions have not proved in what way the PNC programme and statute could be contrary to the constitutional and judicial order of the country and, especially, the fundamental principles of democracy.

From this point of view, the Court cannot receive the Government's argument according to which Romania cannot accept the fact that the emergence of a communist party would make the object of a democratic debate".

The essence of democracy being procedural, for the Court in Strasbourg it is obvious that, once the party accepts the democratic procedures, it can have any doctrine. On the other hand, the Romanian courts and the Romanian Government consider that the democracy is incompatible with the communist doctrine. This doctrine is eliminated from the debate because of the presumption of incompatibility with the democracy. Thus, the democracy becomes dogmatic because the incompatibility is stated before any experience. The democratic substantialization imposes an official doctrine which eliminates the competition considered contrary, without it being necessary the debate. It is what the government declares clearly and what the courts declare it euphemistically: The establishment of a communist party "cannot make the object of a democratic debate". Stating this issue, the Romanian state proves that it is the follower of the essence of doctrine which it eliminates: the imposition of a unique truth controlled by the state.

These ideologisation methods of the law are extreme. Yet, even if we are in the presence of a direct or indirect statement of the mandatory feature of an ideology, there is a limit of the law's permeability towards the ideologies and, thus, towards their alternations within a democratic society. The law will be marked by the change of the majority's ideology, but the influence of this change must remain limited. Otherwise said, the ideology of the political majority in a given time may position the judicial system only to a point, within the interior or certain limits. This idea is transposed within the principle of equality, namely in the impossibility to create differences of judicial treatment between the persons if, at their basis, there is the political opinion (no matter its nature) or belonging. Including these criteria, which are linked to the social mutability of the individuals, together with the fixed cut-outs (such as the racial, ethnic, sexual etc.), among the non-discrimination criteria have as fundamental element exactly the limitation of the influence of the ideological changes upon the law.

C. Limits of the judicial system's mutability determined by the economic changes

The law cannot be indifferent towards the economy. The available public resources can influence the way in which it is applied. But how permeable must the law be towards the economic conditions?

The first limit of this permeability is the continuation within the economic plan of the ideological neutrality of the state: the judicial order cannot impose an economic doctrine. Thus, the economy is based, as the Romanian Constitution states, upon the "free initiative and competition". This means that the limited judicial order assumes the transposition in terms of the relations of the law with the economy, of the fair upon the good, namely of the procedural arbitrary mechanisms. The market economy, which the Romanian Constitution states, does not represent an economic doctrine per se, but an arbitrary procedure. Between the economic doctrines and the fact that the state needs to remain neutral towards the economic actors. Thus, the law cannot transform, directly or indirectly, an economic doctrine into a mandatory doctrine and it must be equidistant towards the economic actors, category in which itself is included. Thus, the state cannot summon its quality of sovereign power in order to institute for itself an economically differentiated regime.

The second limitation of the norming relates to the limitation of the changes' influence of the actual economic state upon the limitation through the law of a right or freedom. In a democratic, constitutional and liberal state this limitation cannot ever be done in relation to the economic context. This means that such limitation cannot be done pleading the costs which the society can afford or for the re-establishing of the economic equilibria.

In our judicial system, these principles were breached, for example, upon the occasion of introducing the Local public administrative law with some rights regarding the usage of the minority languages in the relation with the administration before such rights were constitutionally[11] guaranteed. This law was indicted before the Constitutional Court pleading the issue of its compliance with Article 4 of the Constitution which implicitly forbids the collective rights, and with regard to Article 16 regarding the equality of rights since the said rights depended upon the proportion of the minority group and upon the situation of the citizens in the territory. The Court's answer is that "such criteria takes into account the *practical possibilities to ensure*, within the guaranteeing of the linguistic identity, of the usage «also of the mother tongue» in the association with the local public administrative authorities, *taking into account also the costs which the society would be able to afford*"[12] (our emphasis).

[11] Article 17: "Within the administrative and territorial units in which the citizens belonging to the national minorities have a proportion of more than 20 % of the number of inhabitants, the local public administration will ensure the usage, in the association with them, also of the maternal language, in accordance with the regulations of the Constitution, present law and of the international conventions to which Romania is a part".

[12] Decision no. 112/2001.

The Court pleaded opportunity arguments in order to support a wrong decision of principle, however, seeming to have noticed that the solution was not according to the nation's unity as a state fundamental and of its own jurisprudence in terms of equality of rights. In translation, the Court's arguments look as follows: from the financial point of view, within a state which could afford to respect the constitutional principles, the legal dispositions would be more closely checked. In other words: constitutionality as long as we do not have the money, unconstitutionally if the Treasury is full.

The real misunderstanding of the fact that the individual is the finality of the social system and of the fact that the general interest, even materialized in the concepts limitedly used by Article 53 of the Constitution, cannot be pleaded for except to defend the rights and freedoms of the persons[13], makes the Court accept the Governmental motivations which justify the restraining of the rights through the economy's quantum done by the state budget through its imposition, such as: "the measures foreseen are absolutely necessary in a democratic society, taking into account that, through their applicability, savings are done to the state's budget in the amount of 7.814,9 million lei"[14]. With the same logic, if the savings achieved would be higher, the state might give up not only our rights but also ourselves; it would thus save democracy.

The fundamental limit which our judicial system and Constitutional Court do not seem to understand is that the rights and freedoms of the persons cannot be made dependent upon the economic circumstance. The macrostructural answers, necessary at the economic level, cannot be superimposed on the individual freedom itself. It is the application in the economic field of the fact that a freedom cannot be limited unless to guarantee another freedom and never just in the name of the general interest[15].

4. Limitations of the judicial system changes due to the systemic dysfunctions

As any system, the law can know certain dysfunctions. The attempt to correct these dysfunctions can generate changes of the system. Taking into account the principle of respecting the legitimate trust of the persons in the continuity of the judicial action, the question is if any law dysfunction can determine its change or if the dysfunctions must accomplish certain conditions in order for the judicial security of the persons to be affected by the change of the normative framework.

The first condition for the judicial system to be changed is that the dysfunction is systemic. A dysfunction is systemic if it affects one of the systematic features of the law:

[13] See my studies "Justificarea necesității restrângerii exercițiului drepturilor ori libertăților într-o societate liberală", in "Revista Română de Drept Privat" no. 1/2014, pp. 48-59, and "Garantarea disponibilității interesului general – limită a restrângerii exercițiului libertăților", in "Revista de Ştiinţe Juridice", vol. 26, no. 1/2015, pp. 111-118.
[14] Decision no. 872/2010.
[15] See J. Rawls, *Libéralisme politique*, PUF, Quadrige, Paris, 2007, p. 351.

clarity, coherence, consistency or completeness[16]. Any change in law which does not appertain to such a dysfunction is contrary to the judicial safety of the persons. Thus, the reasoning for the adoption of a regulation must relate to the correcting of such a dysfunction, otherwise the regulation is not necessary.

The second limitation is given by the fact that the reaction to a structural problem cannot be but structural. In the economic field this issue is well understood. If the economy enters a crisis, we automatically think to re-establish the macroeconomic equilibria. In the judicial area this simple truth does not seem to be understood. If the judicial system enters a crisis, the reaction cannot re-establish the macro-judicial equilibria, but the change of some detailing laws and the replacement of the persons to ensure the functionality of the system. The reaction is rather the de-structuring rather than the restructuring. Under the appearance of the creation of some new judicial structures hides a chaotic reaction of sticking up an old framework, to which three more planks and a couple of nails are added. The restructuring of the judicial restructuring is mimicked[17].

Thus, in order to avoid the trap of change for the sake of change we must establish some principles of the structural reaction to the structural issues of the judicial system.

As in the economic field, any system restructuring in the area of the law assumes the re-establishing of the macroequilibria. However, what meaning do these judicial macroequilibria have? The first aspect which must be taken into account is that such equilibria regards the judicial system altogether and not one or another judicial institution. Thus, it is about a restructuring which has as aim a better assurance of one of the law system's features: clarity, coherence, consistency or completeness[18]. Any reaction of assumed restructuring which does not have as finality one of these systemically aspects is not a real restructuring.

The second principle which must be taken into view is that the judicial system's restructuring assumes the re-establishing of some equilibria. This means that there must exist a disequilibrium and that the chosen means of action are adequate to the re-establishing of the system. If there is no disequilibrium, then the restructuring reaction is not necessary. For example, the validity of the introduction within the judicial system of an interpretative law is conditioned upon the existence of an interpretation conflict in the jurisprudence[19]. If the chosen means for correcting a disequilibrium are not

[16] D.C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, 2nd ed., C.H. Beck, Bucharest, 2008, pp. 38-41.
[17] Part of the text which follows was published with the title "*Mimarea restructurării juridice*", in "Pandectele Române" nr. 8/2011, pp. 15-21.
[18] D.C. Dănişor, I. Dogaru, Gh. Dănişor, *cited paper*, pp. 38-41.
[19] Court of Ilfov, Journal no. 119 dated 2nd February 1912, Right no. 12 dated 12th February 1912, p. 93: "Considering that, in order to indeed have an interpretative law, it must be that it solves interpretation difficulties which have a serious feature; that, similar to the laws, it intervenes especially in the case in which there vexation of decisions within the interpretation of the laws, in order to put an end to the jurisprudence variations; that, therefore, it is not enough for a law to have an interpretative form in order to really be interpretative; (...) that, presently, it being an applicable law to a unique contract, with regard to which no judicial issue was until now solved by justice, it cannot be said that it have arrised interpretation difficulties which would have placed the

adequate for the aimed purpose, then the restructuring is disproportioned. For example, if a Minister's order is used in order to correct a Government decision affecting the rights gained. Or if the problem of the law's applicability in time is settled through a Government decision.

The judicial restructuring must be projective, a fact which assumes, first of all, that it is not a pure and simple reaction to the dysfunctionality, more or less proved, of the existing social or normative system, but a project necessary for a new social reality, subordinated the achieving of the social aim based upon philosophic, ideological, economic or social principles.

Firstly, it must be that the change of the present social datum is necessary. Thus, it must be that it is not satisfactory. With regard to the society's aim: in the case of a liberal democracy, the protection of the persons. A restructuring of the system without the proving this inadequateness of the old system with the social aim is but a change for the sake of change: the positing of the permanent reform as a necessity in itself – another type of totalitarianism[20].

Determining the finality is essential. And this determination, in order to be valid, needs to create a procedural consensus, namely to transgress the particularity of all the moral or comprehensive doctrines in the given society and to use the means of application neutral from the ideological point of view. The lack of a new finality or the lack of its neutrality or of the means of achieving it makes the restructuring unreal.

The judicial restructuring must be considered as a close system with regard to the action judicial means. In order to better understand this idea, we take as example the analysis done by the Constitutional Court with regard to the diminishing of the salary rights. It is based upon the idea of the national security, cause pleaded by the Government on the basis of Article 53C, comprises the economic security and that it presumes that the executive can thus balance the budget by cutting the expenses by cutting the salaries. The Court analysis the concept of «national security» using economic reasons. Thus, it considers the concept from the point of view of an open system. Or, that which it should do is start by taking into account the economic cause of the governmental measures – the global economic crisis –, and then, later on, to analyse the restriction of the exercise of some rights from the judicial point of view, namely within a closed system. However, by considering that the Government must take a *certain economic measure*, it makes economic selection. The judicial analysis of the issue presumes the admittance of the crisis as an extrajudicial cause, but the analysis of the constitutionality of the limitation within the judicial system, namely only

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regulator within the position of clarifying the meaning of the law; (...) law dated 18th December 1911 is not, in reality, interpretative". See also the Commercial Court of Ilfov, Sentence no. 623 dated 7th May 1912, Judicial Courier no. 40 dated 27th May 1912, p. 472.

[20] For the analysis of the relations between the totalitarism and the permanent modernisation, see J.-P. Le Goff, *La démocratie post-totalitaire*, La Découverte, Paris, 2002 (Romanian translation: J.-P. Le Goff, *Democrația post-totalitară*, Universul Juridic – Universitaria, 2011, translation by I. Lazăr).

based upon judicial grounds, is, thus, placed in a system which closes itself and which alone regulates the production. Thus, it would need to define the «national security» from the judicial point of view, taking into account its purpose: the adequate judicial protection of the rights and freedoms of a person. Then to analyse if the legislator summons this cause in order to protect another fundamental right or freedom of the persons, if the measure is necessary within a democratic society, in proportion to the aimed objective etc., as Article 53C obliges it. Because it did not undertake the analysis from the point of view of the selfproduction of the judicial system, anybody can accuse it of partisanship: why did the Government, which call forth the inefficiency of the tax collection observed by the IMF and EU, did not choose making it increasingly efficient the collection of the budget income?

That which matters from the analysed point of view is that the analysis of a norm's constitutionality must be only judicial, without operating economic analysis or analysis of another extrajudicial kind, namely an analysis of restructuring the normative system within a closed system, opaque to the extrajudicial considerations. The extrajudicial causes are the thesis and, however, the judicial anti-thesis must be constructed in association with the measurement's finality, as Article 53C regulates, and the analysis of these new normative realities, which tend to change the existing social reality must be judicial, thus it must be done within a self-productive system.

The judicial restructuring must be considered as an open system with regard to the stability of the purpose. The purposes' stability of the new normative system must be based upon the reopening of the system. If the analysis of the judicial restructuring with regard to their necessity and proportionality must be done within a system closed within its own juridicism, the establishment of the purposes in association with which this reorganization is done must be done metajuridically. What matters from the juridical point of view in this metajuridical determination is the neutrality of the of the purpose selection procedure. Thus, in the above example, the Constitutional Court should have analysed only the neutrality condition, namely to decide if the legatees, who had more possibilities of action with the aim of achieving the proposed purpose, have chosen one of them following a procedure clear and neutral from the ideological point of view, the actual establishment of the purposes not being of its competence. Thus, it makes political economy, not justice.

The judicial restructuring must insure the adequateness of the organic action means with the sequencing principle of the normative system. A restructuring of the normative system which does not determine the organic means of action with the aim of transposition in practice of the normative system is but a mimicking of the restructuring. For example, the coming into force of a new Civil Code without the adequate restructuring of the judicial bodies' system in association with the new judicial institutions is not only inefficient, but also dangerous. This organic restructuring must be made so that the new sequencing principle, which acknowledges the validity of the new

normative system, can be efficient, a fact which assumes that the judicial restructuring must insure the adequacy of the organic means of action with the metajuridical purpose of the system and to insure the hierarchy of these means of action.

To conclude, the area of the law is by necessity limited. To presume that the law must be fully regulated or that it must immediately react to the social changes can be destructive for any normative system. Within a liberal democracy, the law is relatively indifferent to the mutability of the social relations, from this closing of the system resulting the general limits of the law sketched above.

On the other hand, the area of the law is outlined also in association with the necessary limits of the closure of the judicial system itself. The judicial system must be stable in order to guarantee the judicial security of the persons. From this necessity results a particular way of the judicial system of processing the social reactions towards itself, a fact which leads to the possibility of some excesses in the stabilization process of the normative system, which can immobilize the society. Therefore, this stability must, in itself, be limited. In other words, there are certain limits of the indifference of the law towards the social changes. The issue of any judicial system is how to recognize the moment in which to determine a change of its institutions before the necessity for social changes to become an open conflict, namely when one refuses the integration in the given system: a revolution.

Exactly because the mutability principle of the judicial order imposes itself always, even if a revolution is required for this, usually, the positive right tends to privilege the situation. All the mechanisms of the constitutional state have as aim the insurance of this judicial safety of the persons. To determine the limits of the indifference of the law towards the social changes, the limits of its closing, equate, thus, to determining the limits of the constitutional state. But this problem will make the objective of another paper.