

REFLECTIONS ON THE PRINCIPLE “JUSTICE IS EQUAL FOR ALL” IN THE ROMANIAN CONSTITUTIONS AND IN COMPARATIVE LAW – SELECTIVE ASPECTS

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Abstract

At the onset of the study it is necessary to mention that its topic will be circumscribed to regulations on the principle Justice is equal for all in the Romanian Constitutions and in comparative law – selective aspects.

By this approach, the proposed study opens a complex and complete vision, but not exhaustive, to the reflections on the principle Justice is equal for all in the Romanian Constitutions and in comparative law. In comparative law analysis, we will keep a symmetrical approach to identifying regulations on the principle Justice is equal for all in the Constitutions of other countries.

The subject of the scientific endeavor will be circumscribed to the scientific analysis of its parts, as follows: 1. Introduction. 2. Identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania and comparative law. 3. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all. 4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects). 5. Conclusions.

Keywords: constitutional, justice, principle, comparative law.

1. Introduction

The object of study of this scientific approach will be circumscribed to the scientific analysis of its three main parts, as follows:

1. Identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania and comparative law.
2. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all.
3. Highlights Romanian doctrine and comparative law on the principle Justice is equal for all.
4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects).

As per the bibliographic research, the principle justice is equal for all is new in its formulation, but it is not new in its existence. Starting from this axiom, and paraphrasing K. Mbaye we may say that: „The history of the principle justice is equal for all is confounded with the history of people”.

Concerning the requirement justice is equal in constitutional doctrine the following specifications are made: "The requirement justice is equal, reflects the principle written down in the Human Rights Proclamation which sets forth that Law should be equal for all, whether it protects, or defends, but also the general provision set out by art. 16 par. (1) of the Constitution according to which Citizens are equal before the law and of public authorities, without privileges or discriminations"

Also referring to the requirement justice is equal, it is worth mentioning that the Constitution of the United States of America, the first Constitution in writing worldwide, which in Section I, entitled

Defining the citizen status; the states' ban to restrict the citizens privileges, of Amendment 14 entitled Citizen rights protection – ratified in 1868 establishes the following principles: "no state can deprive any individual from life, freedom or property without following the natural course of legal procedures; or can it refuse any individual under its jurisdiction equal protection of laws". Moreover, in our opinion, these principles are components of the right to a fair trial.

Further on, referring to the requirement justice is equal, we intend to mention the Constitution of Belgium of 7 February 1831, a constitution recognized as the third written constitution in the world, which in art. 6 par. (1) thesis I establishes the following constitutional principle: "There is no distinction of class within the state, Belgians are equal before the law".

Concerning the requirement justice is equal, I selected for this paper from among the international documents in the line of Human Rights, the Universal Declaration of Human Rights, an iconic document in the history of human rights, which establishes the following principle regarding the requirement, justice is equal, in the contents of art. 7 par. (1) thesis I: "All humans are equal before the law and have, with no discrimination, the right to equal protection of the law".

What seems relevant for us to highlight in this paper is the approach to the requirement justice is equal, in Romanian constitutional and legal system starting with the first document with constitutional value, i.e. The developer Statute of the Paris Convention from 7/19 August 1858 until this day, i.e. The Romanian Constitution revised in 2003, form of republished Romanian Constitution of 1991.

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Considering the debate on this generous topic for over 145 year of constitutional evolution of the requirement justice is equal, in Romania it should be mentioned since the beginning the need of a diachronic approach of this topic by the identification of all the Romanian Constitutions which regulated the constitutional status during this.

Moreover, we should specify that during the mentioned period, Romania experienced several forms of government, i.e., monarchy, people's republic, socialist republic and semi-presidential republic.

In the field of comparative law, in order to maintain a symmetry of approach with the Romanian constitutional system, the regulations at the constitutional level, concerning the requirement justice is equal, were identified in the normative content of the selected constitutions, i.e.: 1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions. 2. The French Constitution of 4 October 1958, in force at the date of constitutional review of 23 July 2008 containing the latest revisions.

For a full but not exhaustive coverage of the field of study, doctrinal and jurisprudential landmarks are presented on the requirement justice is equal.

It is also worth mentioning that the jurisprudence of the Constitutional Court of Romania will contribute to constitutionalizing the requirement justice is equal.

This research opens by this approach a complex and complete view, but not exhaustive in the current scope regarding the requirement justice is equal.

In our opinion, the studied field is important for the constitutional doctrine, for the doctrine of parliamentary law, for the doctrine of comparative law, for the general theory of law, for the legislative work of elaboration of the legislative measures, for the legislative technique, and for the research in the field covered by the theme of this research.

Even if the regulation and theorization of the requirement justice is equal goes back in time to the first constitutions written in the world, the theoretical interest for resuming it is determined by the fact that the existing field literature has not always paid enough attention to the three aspects, regulatory, theoretical and jurisprudential regarding the requirement justice is equal, analysed in this paper.

2. Identification of constitutional rules on the principle Justice is equal for all in the Constitutions of Romania and comparative law

2.1. Identification of constitutional rules on the principle Justice is equal for all in the Constitutions of Romania

2.1.1. The developer Statute of the Paris Convention of 7/19 August 1858¹

A special discussion is required in relation with the *Developer Statute of the Convention of 7/19 august 1858*. In our opinion, *the Statute* may be considered a Constitution, considering the provisions of art. 17 stating the following: All civil servants, with no exception, on taking office, *are liable to swear allegiance to the Constitution and laws of the country and faith in God (Prince)*.

The systematic analysis of the normative content of the Statute shows that this content includes no provisions regarding the requirement *justice is equal*.

2.1.2. The Romanian Constitution of 1866²

We should state that the Fundamental Law of Belgium of 1831 was a source of inspiration for the constitutions of other states among which the Romanian Constitution of 1866.

The systematic analysis of the normative content of the Constitution shows that the latter includes in art. 10 theses II of Title II, entitled *On the rights of the Romanians* the following principle regarding the requirement, *justice is equal*, under the following phrasing: "*All Romanians are equal before the law....*"

2.1.3. The Romanian Constitution of 23 March 1923³

At the onset of the study it is imperative to specify that the Fundamental Law of Romania of 1866 remained effective for 57 years, while important economic and political transformations occurred.

The systematic analysis of the normative content of the Constitution shows that in art. 8 par. (2) Title III, entitled *On the rights of the Romanians* enshrines the following principle regarding the requirement, *justice is equal*, under the following phrasing: "*All Romanians, irrespective of ethnic origin, language or religion, are equal before the law*"

2.1.4. The Romanian Constitution of 28 February 1938⁴

We should specify in the introduction of the study that the Fundamental Law of Romania of 1923 remained effective for 15 years.

¹ Ioan Muraru and Gheorghe Iancu, *The Romanian Constitutions*, Texts, Notes. Comparative presentation, (Bucharest: Actami, 2000), 7-14.

² Ioan Muraru and Gheorghe Iancu, op. cit. 31-60.

³ *Ibidem*, op. cit. 63-92.

⁴ *Ibidem*, op. cit. 95-119.

Under the historic circumstances of 1938, the new Constitution draft was submitted to plebiscite on 24 February 1938. The Constitution is promulgated and was published in the Official Gazette Part I, no. 48, from 27 February 1938.

The systematic analysis of the normative content of the Constitution shows that in art. 5 par. (1), Chapter I, of Title II, entitled *On the duties of the Romanians*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "All Romanian citizens, *irrespective of ethnic origin and religious faith are equal before the law....*".

2.1.5. The Constitution of 13 April 1948⁵

The systematic analysis of the normative content of the Constitution shows that in art. 16 of Title III, entitled *Fundamental rights and duties of the citizens*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*All the citizens of the People's Republic of Romania, irrespective of gender, nationality, race, religion or cultural background are equal before the law*".

2.1.6. The Constitution of 24 September 1952⁶

The systematic analysis of the normative content of the Constitution shows that it does not enshrine the principle regarding the requirement *justice is equal*.

2.1.7. The Constitution of 21 August 1965, republished⁷

The systematic analysis of the normative content of the Constitution shows that it does not enshrine the principle regarding the requirement *justice is equal*.

2.1.8. The Constitution of Romania of 8 December 1991⁸

The systematic analysis of the normative content of the Constitution shows that in art. 16 par. (1) having the marginal phrasing *Equal rights*, in Chapter I of Title II, entitled *Common provisions*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*The citizens are equal before the law and public authorities, without privileges or discriminations*".

2.1.9. The Constitution of Romania of 2003⁹, the republished form of the Constitution of Romania of 1991

The systematic analysis of the normative content of the Constitution of Romania of 2003, the republished

form of the Constitution of Romania of 1991, includes that *following dual regulations*:

a) in the content of art. 16 par. (1) having the marginal phrasing *Equal rights*, of Chapter I, Title II, entitled *Common provisions*, enshrines the following principle regarding the requirement *justice is equal*, under the following phrasing: "*The citizens are equal before the law and public authorities, without privileges or discriminations*".

We may notice that the text of this article is identical with the text of art. 16 par. (1) of the Constitution of Romania of 8 December 1991.

b) in the content of art. 124 par. (2) having the marginal phrasing *Realization of justice*, in Section I of Chapter VI, entitled *The Courts*, explicitly enshrines for the first time in Romanian constitutional system the principle *Justice is equal for all*.

2.1.10. The Draft Law on revision of the Constitution of Romania¹⁰

The systematic analysis of the normative content of the Draft Law on the revision of the Constitution of Romania shows that art. 124 par. (2) of the Constitution is not proposed for revision.

2.2. Identification of constitutional rules on the principle Justice is equal for all in comparative law.

In the field of comparative law, in order to maintain a symmetry of approach with the Romanian constitutional system, the regulations at the constitutional level, regarding the requirement *justice is equal*, were identified in the normative content of the selected constitutions, i.e.: 1. *The Belgian Constitution as updated following the constitutional revisions of 6 January 2014*, containing the latest revisions. 2. *The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008* containing the latest revisions.

At the onset of the subparagraph, we emphasize that the principle *Justice is equal for all*, is not provided in the above-mentioned in the Constitutions.

2.2.1. The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions¹¹.

The requirement *justice is equal* reflects the principle set out by art. 10 par. (2) thesis I, under the following phrasing: "*The Belgians are equal before the law*".

⁵ *Ibidem*, op. cit. 123-139.

⁶ *Ibidem*, op. cit. 143-166.

⁷ The Constitution of the Socialist Republic of Romania of 21 August 1965, was republished in Official Gazette no. 65 of 29 October 1986.

⁸ The text of the Constitution of Romania was published in Official Gazette of Romania, Part I, no. 233 from 21 November 1991.

⁹ The text of the Constitution of Romania, revised in 2003, was published in the Official Gazette of Romania, Part. I, no. 767, of 31 October 2003.

¹⁰ Draft Law on Revision of the Constitution of Romania, was published in the Official Gazette of Romania, Part. I, no. 100, of 10 February 2014.

¹¹ Accessed, http://www.const-court.be/.../belgian_constitution.pdf (author's translation).

2.2.2. The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions¹².

The analysis of the normative content of the Constitution of France of 4 October 1958 shows that this constitution between the content of the Constitution and the Preamble the following three documents' titles are inserted:

1. The Declaration of the Rights of Man and of the Citizen of 26 August 1789
2. The Preamble to the Constitution of 26 October 1946
3. The Environmental Charter of 2004 This triad was called by the Constitutional Council of France *Block of constitutionality*.

The theory of the *Block of constitutionality* was analysed by the Constitutional Council, by the study regarding *Reflections on the constitutionality by reporting*¹³.

The „*Block of constitutionality*” does not exist; defined as the set of norms with constitutional value, it is not even certain that it would have ever existed. The Rules for Reference of the constitutionality review, which are above all constitutional rules, are not limited to the constitutional rules; they also cover rules outside the Constitution it refers to.

Although old, this situation has experienced these last years a considerable expansion, so that today it is allowed to distinguish three sources of constitutionality:

- a) the first – in every sense of the term – refers to the constitutional rules set forth by the Constitution of 4 October 1958 as well as those set forth by texts, old or modern, provided in its Preamble.
- b) the second category contains norms with no original constitutional value, but which serve as the foundation of the constitutionality review because the Constitution imposes it.
- c) the third regroups the general principles, unsolicited in the constitutional texts, but inferred from certain constitutional provisions by the judge. It is not useful to go back to the first category of such sources so long as their existence is known; it is more interesting instead the enrichment of the sources of constitutionality based on certain constitutional provisions which aim at norms outside the Constitution which are deprived, at least initially, of constitutional value. This technique is not new and it is actually the source of the expression „block of constitutionality”.

3. Highlights of Romanian doctrine and comparative law on the principle Justice is equal for all.

3.1. Highlights of Romanian doctrine on the principle Justice is equal for all.

We will select from the Romanian doctrine the opinions of certain well-known, reputed authors, who studied the principle *Justice is equal for all*

3.1.1. A first opinion¹⁴ mentioned for this study analyses the principle *Justice is equal*.

The requirement *justice is equal*, reflects the general provision set forth by art. 16 par. (1) of the Constitution according to which "Citizens are equal before the law and public authorities, without privileges or discriminations".

The idea is resumed in Law no. 304/2004 which, in art. 2 par. (1), sets forth that justice is equal for all, in art. 7 par. (1) provides that all persons are equal before the law, without privileges or discriminations, and in art. 7 par. (2) which sets out that justice is served equally for all persons, irrespective of race, ethnic origin, language, religion, gender, sexual orientation, opinion, political affiliation, wealth or origin or social status or other discriminatory criteria.

Moreover, art. 4 par. (1) of Law no. 304/2004 sets out for the judges and prosecutors the obligation to assure a non-discriminatory legal treatment for all the participants in legal proceedings.

The principle of equal justice means that all persons having equal vocation should be judged by the same courts and according the same legal provisions, either substantive or procedural.

Equality does not mean uniformity, so that the existence of special legal provisions or provisions of certain jurisdictional bodies, even courts, specialized does not mean disregarding this principle.

If from the legal point of view the principle of equality is enshrined, the more delicate issue is to actually achieve equality before the law, because starting and running a trial involve costs and specialized knowledge.

3.1.2. A second opinion¹⁵ mentioned for this study analyses *equal justice*.

Equal justice implies the same procedural rules and granting procedural rights equally to all the parties involved in a trial. Equality is one of the principles of law enshrined both in the international legal documents and in the domestic legislation of the states.

The Constitution of Romania provides in art. 16 that "Citizens are equal before the law and public authorities, without privileges or discriminations". Based on the principle of equal justice, all persons are entitled to be judged by the same courts and according to the same legal proceedings.

¹² Accessed, <http://www.conseil-constitutionnel.fr/...constitutionnel...> (author's translation).

¹³ Accesare: <http://www.conseil-constitutionnel.fr/...> Cahier n° 22 (author's translation).

¹⁴ Coordinators: I. Muraru and E. S. Tănăsescu, The Romanian Constitution, Comment on articles, op. cit. 1220 - 1221.

¹⁵ Ștefan Deaconu, *Political Institutions* (Bucharest, CH Beck, 2012) 378-379.

Any provisions which would make a person unable to benefit from the same procedural rules as another person would be incompatible with the principle of equal justice. The jurisprudence of the European Court of Human Rights mentions about "equality of arms" before the courts.

But equality does not mean uniformity because every litigation brought before the courts has its own characteristics.

3.2. Highlights of comparative law doctrine on the principle Justice is equal for all

3.2.1. A first opinion¹⁶ mentions this study analyses the *Block of constitutionality*.

The Constitutional Council of France and the constitutional judge cannot exercise control on the norms presented in the confrontation with the reference constitutional norms, which are as a whole the block of constitutionality.

About this, the Constitutional Council plays an essential role. Indeed, the norms of reference certainly derive from the Constitution, but it often happens that this might need an interpretation. It is the Council which must do it, which determines it to phrase a certain number of constitutional norms and in so doing established the contours and limits of the block of constitutionality.

The admitted norms will be examined, the excluded ones and the problems which might cause potential divergences among some of these norms.

a) Accepted norms

They all originate in the Constitution noticing that if many are expressly set out here, others are present implicitly or abusively, which requires an intervention of the Constitutional Council.

1) *The norms set out by the constitutional text* – These norms are the most numerous ones and are found not only in the body of the Constitution itself, but also in the texts referred to by its Preamble.

In relation with the constitutional text proper, the fact that every article integrates, irrespective of its content, in the *block of constitutionality* belongs to the obvious truth.

Besides, the Constitutional Council quotes a certain number in its decisions. In relation with this subject, we will hold that certain provisions act more often than others due to their content as norms of reference and it happens to the Council to assess globally the conformity with the Constitution, without referring to a specific article.

As regards the preamble and the texts it refers to, i.e the Declaration of 1789, the preamble of 1946 and henceforth the Environmental Charter of 2004, it is important to point out that they are an important part of the block of constitutionality.

2) The norms set by the Constitutional Council – three hypotheses may be distinguished.

Most often the Council limits itself to specifying the meaning of the constitutional text, a meaning unknown until then, and which can be quite different from that resulting from simply reading.

b) Non-accepted norms

They are in particular the regulations of the parliamentary meetings and international or community norms.

c) Potential divergences and contradictions among the constitutional norms.

These divergences and contradictions may actually produce because it often happens that this reference of the Constitutional Council should discuss several norms with constitutional value.

3.2.2. A second opinion¹⁷ mentioned for this study analyses the principle *Justice is equal*.

The general principles of public law are no longer enshrined in a written rule. This is their very originality. It could be them, such as the principle of *equality before the law*, put in relation with a constitutional text similar to that of art. 10 of the Constitution, that it would lose what is the clearest in their utility: *to be a source of subsidiary law*.

By definition, these principles apply only in the absence of an express text. Among the general principles of public law which have no relation with any text of positive law, the principle of consistency was highlighted which affects the state, public services and public function as well as that of their adaptation to the needs of the mission it assumes.

Two issues draw the attention in relation with that. The first is related to the delimitation of the general principles of public law.

It is jurisprudence which highlights them and expresses them and, in its absence, the doctrine.

The second problem refers to the juridical value of these principles. Where these fundamental principles find their juridical value expressly or implicitly enshrined by the Constitution – as in the preamble to the French Constitution of 1946 – their authority could not be questioned: they have the same value as the other constitutional provisions.

Where, just like in Belgian law, the value of the fundamental principles remains undetermined, their authority raises discussions.

It would seem advisable to recognize their identical value to that of the written rules from where they are induced.

The general principle will be conferred, where the case may be, the value of a constitutional text, of legislative provisions or of a regulatory measure.

¹⁶ Pierre PACTET and Ferdinand MELIN-SOUCRAMAINEN, *Constitutional Law*, (Paris: Sirey, 2007) 503-507. (author's translation).

¹⁷ Francis DELPÉRE, *The Constitutional Law of Belgium*, (Brussels: General Library of Law and Jurisprudence, 2000) 55-56.

4. Jurisprudence of the Constitutional Court on the principle Justice is equal for all (selective aspects).

In the decision of the Constitutional Court, selected for this study, I mentioned only the motivations of the Court which are directly related to the principle *Justice is equal for all*, regulated by the fundamental law.

4.1. Decision of the Constitutional Court no. 711/2016 regarding the exception of unconstitutionality of the provisions of art. 18 par. (2) third thesis of Law no. 2/2013 regarding certain measures for relieving the courts, and to prepare the enforcement of Law no. 134/2010 regarding the Code of civil procedure, as published in the Official Gazette of Romania, Part I, no. 166 of 7 March 2017¹⁸.

The Constitutional Court was notified by the High Court of Cassation and Justice – First Civil Division, on the exception of unconstitutionality of the provisions of art. 483 par. (2) Code of civil procedure.

Considering the elements held by the Constitutional Court, the court finds that it cannot be argued that the provisions which regulate only the possibility of phrasing the appeal in the case of labour disputes would contravene the constitutional provisions of art. 124 par. (2) according to which "*Justice is unique, impartial and equal for all*".

For the above-described, the Court overrules as groundless the exception of unconstitutionality.

4.2. Decision of the Constitutional Court no. 635/2016 regarding the exception of unconstitutionality of the provisions of art. 22 par. (2) of Law no. 85/2006 on the insolvency procedure, as published in the Official Gazette of Romania, Part I, no. 37 of 12 January 2017¹⁹.

The Constitutional Court was notified by the Insolvency Consultant - S.P.R.L. and YNA Consulting - S.P.R.L. (the trustee of Izometal Magellan - S.R.L.), with the exception of unconstitutionality of the provisions of art. 22 par. (2) of Law no. 85/2006 on the insolvency procedure.

The Court deems that as it is groundless and the criticism of the authors of the exception of unconstitutionality according to which the possibility of replacing the trustee by the syndic judge, ex officio, would contravene the provisions of art. 24 and of art. 124 par. (2) of the Constitution, as this duty of the syndic judge circumscribes, in accordance with art. 11 par. (2) of Law no. 85/2006, the judicial review of the trustee's and/or liquidator's activity, a review exercised by the syndic judge.

Considering the above, the Court overrules as groundless the exception of unconstitutionality.

5. Conclusions

5.1. The objective of the study entitled: Reflections on the principle Justice is equal for all in the Romanian Constitutions and in comparative law – selective aspects, was in our opinion attained.

5.2. The main directions of study to attain the proposed objective were the following:

1. The identification of constitutional rules on the principle Justice is equal for all in the Constitution of Romania. I approached this theme, for the reason that the fundamental law of Romania – the Constitution, sets out the fundamental principles referring to the principle Justice is equal for all, which will be developed in the legislation or other subsequent regulations.

Moreover, I proceeded to the diachronic approach of the identification of these principles in the Romanian Constitutions, to turn to good account the evolution of the Romanian constitutional system for a term of over one hundred years, starting with *The developer Statute of the Paris Convention of 7/19 August 1858*, and ending with the work *The Constitution of Romania as revised in 2003, the republished form of the Constitution of Romania of 1991*.

2. *The identification of constitutional rules on the principle Justice is equal for all in comparative law.* Approaching the principle of symmetry, I proceeded to the *identification of constitutional rules on the principle Justice is equal for all in comparative law*.

I selected from comparative law the following: The Belgian Constitution as updated following the constitutional revisions of 6 January 2014, containing the latest revisions. **2.** The French Constitution of 4 October 1958, in force at the date constitutional review of 23 July 2008 containing the latest revisions. This selection may be motivated considering that these states are deemed in the doctrine among the first three states in the world which elaborated a written constitution.

3. The highlights of Romanian doctrine and comparative law on the principle Justice is equal for all.

In this paragraph, we highlighted the Romanian contributions in the line of comparative law, concerning *the principle Justice is equal for all*, in the Romanian, Belgian and French doctrine.

4. The jurisprudence of the Constitutional Court of Romania on the *principle Justice is equal for all*. In this paragraph, the last Decision of the Constitutional Court were selected, which in our opinion, contributed to the constitutionalization of the subsequent regulations *on the principle Justice is equal for all*.

5. The four parts of the work may be considered a contribution to the extension of the research in the matter of *Reflections on regulation of the principle Justice is equal for all, in the Romanian Constitutions and in comparative law*, in accordance with the current trend in the field.

¹⁸ Decision no. 711/2016 was published in the Official Gazette Romania, Part I, no. 166 from March 7, 2017.

¹⁹ Decision no. 635/2016 was published in the Official Gazette Romania, Part I, no. 37 from January 12, 2017.

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