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THE RIGHT TO EDUCATION

– PhD thesis –

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2014

– SUMMARY –

MOTTO: *“Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of farm workers can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.”* NELSON MANDELA

1. INTRODUCTORY REMARKS. The research proposed by this thesis was determined after noticing a paradoxical situation. In the aftermath of the political and constitutional regime change which occurred at the end of 1989, the Romanian legal system went through a twofold process: on the one hand, the recurrence to the Romanian people’s democratic traditions by reintroducing certain principles and legal remedies abolished during the communist period; secondly, the resumption of contact with the legal systems of contemporary western states, and as a consequence, the importation of standards developed in these systems in the aftermath of the Second World War, as well as ratifying and enforcing in a short time span the international provisions in the field of human rights. This double process has created a number of discrepancies, caused either by neglecting the resumption of some functional and, at times, cutting edge solutions of the interwar Romanian legal system, as well as the adoption of certain international norms without an accurate adjustment to the objective circumstances present in the post-communist Romanian society.

Human rights are not just a matter of national, but also international law. The legal analysis in this field implies not only searching to determine their nature, but also their extent and limitations.¹

¹ Ștefan Deaconu, *Drepturile și libertățile fundamentale în sistemul constituțional românesc*, Revista Română de Drept Privat, nr. 4/2011, p. 34.

The present work represents a complex endeavor starting from the theoretical substantiation of protecting the right to education, always taking into account the state of national and international legal sources. One can identify within the content of the right to education various prerogatives, some of which are based on a liberal philosophy, others expressing the social dimension of this right. The main question to which this thesis will provide answers is the following: *Which are the components of the fundamental right to education, in light of the corroborated analysis of constitutional provisions and the rules of international human rights law?*

The research has primarily involved the analysis of legal and doctrinal sources, which have been supported by case law, statistics, opinion polls and press articles. All of these have amply demonstrated the need to deepen the research of the legal sources that underline the right to education, a complex human right with various philosophical foundations, converging nevertheless towards the same purpose, namely extending the protection of this right, so needed for the overall progress of humanity, but mainly for the development of each member of the human family to the fullness of his capabilities.

Furthermore, as a result of the analytical research, the thesis suggests several novel solutions regarding the constitutional protection of the right to education in Romania, through a desired amendment of article 32 of the Romanian Constitution, under the auspices of the ongoing process of constitutional revision.

2. TERMINOLOGY. Concerning the terminology used, one must bear in mind that the object of research is that which the Romanian Constituent Power has chosen to name – with the adoption of the 1991 Constitution – as „the right to learning” (*învățătură*). A historical perspective allows us to observe that – within the Romanian Principalities – the very first regulations in the field of education used the notions of „instruction” and „learning” when regulating the principles applicable towards establishing an educational system. In this background, adopting the term „education” was only recently made, even after the coming into force of the latest Constitution, with the legislator opting for the phrase „right to instruction”, as is the case of the

official translation of the European Convention on Human Rights, together with the Additional Protocol which – in article 2 – provides protection upon this right.

Thus, the 1995 framework law concerning the national education system² makes use of the term „learning”, at a time when the Constitution – as early as 1991 – recognized a „right to learning” (*învățatură*), whereas the European Convention on Human Rights, in effect also in Romania from the 20th of June 1994, makes reference to a „right to instruction” (*instruire*). We notice the inconsistencies of the Romanian legislator who, with the adoption of the Law on national education no. 1/2011, confirms what we consider a just trend towards a modern terminology.

We’ve chosen to use the term „*education*”, even if the Romanian doctrinal approach has considered it as being only a gradual difference concerning equivalent notions³, not merely in light of the proper translation of terms used in international legal sources⁴, but mainly to capitalize on the clearly expanded meaning which the notion of „*education*” entails, in comparison with that of terms like „learning” or „instruction”, issues which shall be clarified in the first part of the paper.⁵

Moreover, the draft law on the revision of the Romanian Constitution, adopted in June 2013, has acknowledged the envisaged amendments regarding the title and content of art. 32, opting for the notion of „right to education”, as we have previously suggested during the public consultation occasioned by the revision process. It can be stated without any reservation that we have anticipated this natural development in

² Law no. 84/1995 – the law of instruction, "Official Gazette" no. 167/31 July 1995.

³ Corneliu Bîrsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe articole*, Ediția a II-a, Editura C.H. Beck, București 2010, p. 1755-1756.

⁴ The official English version of the ECHR uses the phrase "*right to education*", while the French version, which was the source of the Romanian translation uses the phrase "*droit à l'instruction*". The official translations of UN instruments into Romanian language, as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural, use the phrase "*right to education*".

⁵ A concurring opinion, arguing for the use of the term „education” because of the more complex and complete sense of it’s notion, which encompasses the component "instruction", was expressed in the doctrine by Verginia Vedinaș, *Câteva considerații cu privire la Proiectul Legii de revizuire a Constituției României*, Revista de Drept Public, nr. 3/2013, Universul Juridic, București, 2013, p. 22.

regard to the national legislation, as early as the moment of proposing the topic of this study.

3. STRUCTURE. The structure of the thesis is twofold. The initial part aims at presenting the concept of education, the historical development of this activity of the utmost importance for the progress of human society and not least, its legal transposition, from the first attempts to regulate the educational process all the way to the assertion of a fundamental right to education. In the second part of the thesis, we aim to analyze the different aspects and prerogatives embedded by the right to education.

4. HISTORICAL EVOLUTION OF THE ASSERTION OF THE RIGHT TO EDUCATION. In order to meet this approach, we have covered, for a start, the evolution followed by the assertion of education as a human right, while observing that the very first regulations of a legislative – constitutional character devoted thereof coincide with the emergence of the nation – states in Europe. The state's concern for education intensified as they needed better trained citizens in order to be able to take part to the development of the society. Nineteen century Europe found itself in a huge discrepancy between the level of education of the higher social classes and that of the vast majority of people, farmers or common workers, in most cases totally lacking any kind of organized education beyond the family environment and without any real possibility of access to literacy. From the research conducted, we identify two main reasons that determined the need for a rapid expansion of the types of education and also for the states to take upon themselves an active role in generalizing access to educational facilities: firstly, the revolutions triggered by the French one in 1789, which asserted the so-called first generation of human rights – civil and political – whose realization was lacking any chances in the absence of a minimal education of citizens in regard to their newly found prerogatives; on the other hand, the industrial revolution and technological development of production, which required workers with adequate technical training in order to meet the new job descriptions.

In Romania, more exactly in the Romanian Principalities, education became a major preoccupation of the newly created state, even before achieving independence. Thus, Law no. 1150 of 25 November 1864 regarding public instruction in the United Romanian Principalities created the legislative framework necessary for the establishment of a generalized system of public schools, also introducing the principle of compulsory primary education. The state's interest in the field of education was subsequently confirmed by the adoption of the Constitution of the United Romanian Principalities, in June 30th 1866, when it introduced the principle of freedom of education, as well as its free of charge character. In comparison with the state of constitutional law across nineteenth century Europe, we unreservedly notice the modern character of these constitutional provisions, which – assumed by the 1923 and 1938 Constitutions – form part of what the 1991 Constitution – in effect today, designates as being „*the democratic traditions of the Romanian people*”.⁶ Even if the principle of freedom of education has not been reaffirmed in the present Constitution, we submit that it clearly results from a corroborated interpretation of art. 1 paragraph (3) thereof, together with the relevant provisions that were contained in democratic Romanian constitutions prior to 1948.

Therefore, since the second half of the nineteenth century, education has ceased to be a "purely private matter", as it was considered in light of classical liberal theories, as John Stuart Mill stated in his work „*On Liberty*”⁷. Nevertheless, the first constitution which the international doctrine recognizes as being essential for asserting education as a human right is the Soviet Constitution of 1936. Its influence went beyond the constitutions of countries within the „soviet bloc”, making so that the adoption of the Universal Declaration of Human Rights under the auspices of the United Nations – shortly after the end of World War II and also in the wake of the Cold War that was to hang over international politics for the next half century – would

⁶ Dan Claudiu Dănișor, *Despre posibilele consecințe ale constituționalizării tradițiilor democratice ale poporului român și idealurilor Revoluției din 1989*, Revista de Drept Public, nr. 1/2007, C.H Beck, București 2007, p. 11-26.

⁷ John Stuart Mill, *On liberty*, first published in 1859.

become an essential reference for the assertion of economic, social and cultural rights, including the right to education.

In this context, the right to education found an initial recognition with art. 26 of the Universal Declaration, and was subsequently developed into articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. The way in which it was defined by the aforementioned legal instruments represented a mutually agreed compromise between western states, adherents of a mainly liberal philosophy, and communist states, whose socialist philosophy paid great attention to economic and social rights. Until the fall of socialist political regimes in Central and Eastern Europe, rights of this category remained largely negligible compared to civil and political ones, their value as fundamental rights being long disputed, and instead were more considered rather progressively achievable goals and certainly not guarantees. This view is strongly supported by some of the most developed countries, such as the United States, which refuses to implement the right to education into formal correlative obligations for the public authorities, adopting the view that "although access to food, health care and quality education are development objectives on the list of any government, to recognize their status as rights would transform citizens of developing countries into objects of development, rather than considering them as subjects in control of their own destiny".⁸

Whereas in the liberal perspective, education was situated within the sphere of individual freedom with their respective legal systems trying to keep its area beyond the decisive control of the state and leaving to the parents' responsibility the education of their children, - in return, the socialist approach made education not just a state responsibility but a means for achieving the goals that society determined and expressed through the will of the state.

⁸ Comments submitted by the United States of America, Report of the Open-Ended Working Group on the Right to Development, U.N. ESCOR, Commission on Human Rights, 57th Session, UN Doc. Nr. E/CN.4/2001/26, citat în Katarina Tomasevski, *Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson*, Human Rights Quarterly, May 2005, 27, 2, p. 713.

5. THE FUNDAMENTAL NATURE OF THE RIGHT TO EDUCATION.

Researching the legal nature of the right to education, we've noticed that, within its complex content, there are specific intertwined aspects in both its liberal (freedom) and social dimensions. International legal instruments try to reconcile these two dimensions, but the implementation of law at the national level has always remained loyal to each country's peculiarities. Thus, socialist states, although considered a model when it comes to respecting economic and social rights during the Cold War, have all but neglected and somehow even „ejected” freedom of education from their internal legal practice. In the mean time, Western states – whose legal systems followed predominantly the liberal philosophy – have conferred upon the right to education prerogatives specific to this line of thought, paying greater importance towards respecting negative obligations and relating to an abstention, in creating legal provisions. In the latter systems of law, positive obligations, involving an active interventionism in education, were considered requirements of due diligence towards the progressive realization of the widespread and free access to education.

Characterized by this dichotomy, the right to education has not been neglected at a declarative level, finding its appropriate place among several international treaties, declarations and covenants, but most of them being devoid of legally binding force. In this context, achieving the goal of the research was not without difficulty, extracting the essence of the right to education from the totality of human rights sources being a multidisciplinary approach, in which constitutional law had to be blended with strong accents of international law. From such a perspective, we might even say that the proposed work is more of a study of international law, specifically the legal framework of the United Nations; this having to do with the fact that, within the aforementioned organization one can most often find a concern for the right to education. We have tried to overcome the shortcomings owed to the lack of a coherent and effective system for the fulfillment of the rights enshrined in the UN system by applying the principles enshrined in articles 11 and 20 of the Romanian Constitution. Therefore, even without a coercive system aimed at achieving compliance with the obligations

undertaken, we have considered and we will always give preference to higher standards imposed in the protection of human rights by international legal sources, which our state has assumed by way of signature and ratification.

In delineating the content of the right to education, on the line of my research I have awarded special attention to the universal instruments, mainly The Universal Declaration of Human Rights, The International Covenant on economic, social and cultural rights, The Convention on the rights of the child, and secondly to those instruments devoted to a special and particular aim (among others, the fight against discrimination and the protection of the persons belonging to national minorities). Following the same pattern, in my research I referred constantly to the regional instruments as the European Convention on Human Rights and The Charter of fundamental rights of the European Union. In the light of those important sources of law in the field of human rights, I analysed the national legal framework, both historically, in an evolutionary perspective, as well as following the actual constitutional and infra-constitutional framework. This above-mentioned legal framework of protection of the human rights sets the legal framework of the right to education.

In the first part of the paper, I have identified the legal content of the right to education, revealing its intergenerational features and its interdependence with other human rights. So, the right to education is hard to be included in the classic categorization of human rights used in the doctrine of human rights. Even if it is largely accepted that the right to education is included in the category of social, economic and cultural rights, it also has strong connections with rights belonging to other categories⁹. Those connections have been settled, on one hand, by the fact that the right to education must be a precondition in order to exercise other rights¹⁰, and, on

⁹ Manfred Nowak, *The right to education*, in *Economic, Social and Cultural Rights. A Textbook. Second Revised Edition*, Edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, Dordrecht 2001, p. 245.

¹⁰ *Ibidem*; Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration of Human Rights and Beyond*, Martinus Nijhoff Publishers, Leiden – Boston, 2007, p. 148.

the other hand, by the fact that the right to education in itself and by its content, can be considered as a social, economic, civil or political right¹¹. The enjoyment of the right to education is considered to be a premise in order to exert the other human rights. By that we state that not every right recognized to an individual who has not been educated can be properly realized, due to the lack of a minimum level of knowledge, which would be acquired after accessing a primary form of education. It can even be stated that the mere fact of knowing the existence of those rights cannot exist for an individual deprived of a basic education, same reasoning being valid for the possibility to protect those rights. Because of its indivisibility, the right to education is considered to be an instrument for every human right¹², being a genuine *empowerment right*¹³.

6. THE FREEDOM DIMENSION OF THE RIGHT TO EDUCATION. The right to education is partially considered to fall within the category of civil and political rights, due to its freedom dimension. As we saw in the section dedicated to the historical evolution of the right to education, the liberal vision that was dominating the 20th century imposed as a basic principle that the teaching/instruction must be primarily free, as stated even in the Constitution of the Romanian Principalities in 1866. The freedom of parents or legal guardians of the children to choose for them an education in accordance with their personal convictions and also the right to choose other teaching institutions than those provided by the state are both recognized. In this

¹¹ *Idem*, p. 143.

¹² Patrice Meyer-Bisch, *The right to education in the context of cultural rights*, Background paper submitted at the CESCR Committee on Economic, Social and Cultural Rights Nineteenth session, Geneva, 16 November-4 December 1998, U.N. Doc. no. E/C.12/1998/17, para. 4.

¹³ Fons Coomans, *Clarifying the core elements of the right to education*, in: Fons Coomans and Fried van Hoof, *The Right to Complain about Economic, Social and Cultural Rights*, SIM Special No. 18, SIM, Utrecht, 1995, p. 9-26; Mustapha Mehedi, *The Realization of the Right to Education, Including Education in Human Rights. The Content of the Right to Education*, UN Doc. no. E/CN.4/Sub.2/1999/10, 1999, para. 1-4; Katarina Tomaševski, *Annual report of the Special Rapporteur on the right to education*, UN Doc. no. E/CN.4/2001/52, 2001, para. 11-14; Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*; Martinus Nijhoff Publishers, Leiden Boston 2006, Dissertation: Zugl.: München, Univ., Diss., 2005, p. 28.

regard, we are in the presence of a negative obligation bounding the state to respect those freedoms. Moreover, the freedom of education implies not only the freedom of those who receive education, but also some degree of freedom for the providers of educational services. We here refer on one hand to the right recognized to every person to establish and direct educational institutions, other than those organized by the state, respecting certain standards regarding the quality of education and, on the other hand, the academic freedom of the teachers and institutions, especially of those functioning at the higher education level.

After analysing the said aspects of the right to education, we can state that we are in the presence of a right that cannot be excluded from the first generation of human rights. The right to education plays out as a free act of the individual, of the holder of the right. The right to education is also a *freedom forming act*,¹⁴ as long as its aim is the full development of the human personality and the fact that *education shall enable all persons to participate effectively in a free society*, as stated by the International Convent on economic, social and cultural rights. What designates the right to education a first generation right, at least partially, is not only the fact that it implies negative obligations for the state, but the fact that we are in the presence of a *liberty*, as a common feature of other rights included in this category.

7. THE SOCIAL DIMENSION OF THE RIGHT TO EDUCATION. We have also seen that the right to education has a strong social dimension. Firstly, the right to free and compulsory education for every person creates an essential positive obligation for the state, namely to create a national educational system. This system must consist of public institutions created and financed by the state, whether it is at the national level or at the regional level. The connection between the right to education and the economic rights stems from the role which education has as a promoter of social movement and as a condition for the integration of the individual in the modern economy.

¹⁴ Mustapha Mehedi, *The Realization of the Right to Education, Including Education in Human Rights. The Content of the Right to Education*, UN Doc. no. E/CN.4/Sub.2/1999/10, 1999, para. 61.

In its social dimension, the right to education implies correlative obligations for the state that can be divided into two principles: availability and accessibility.¹⁵ The availability of the right to education implies the state obligation to assure the access to schools, teachers and teaching materials. Founding more schools, training more teachers and granting more didactic materials and resources improve the availability. The availability means that schools, teachers and materials are available for everyone.

The accessibility to education, on the other hand, refers to the state's obligation to maximize the individual's chances to be admitted in a school, once that school has been made available. This is improved by clearing the obstacles that preclude the admission. The general accessibility means that all those admission obstacles must be eliminated so the education must be available to everyone. The school tuition fees are often considered to be an obstacle and this is why it is submitted that the most powerful way to improve accessibility is by adopting measures that make education free of charge. Another option is establishing a scholarship system, a measure that in most cases is addressed in conjunction with the free of charge principle, as stated also in the Romanian Constitution by article 32, paragraph 4. In this way, it is guaranteed not only the accessibility requirement but also the principle of non-discrimination and equality of chances, both meant to abolish another obstacle in the way of accessibility that is the discrimination.

The First UN Special Rapporteur for the Right to Education, Katarina Tomasevski, proposed the analysis of the content of the right to education based on a 4- *A scheme* on study of states' obligations resulting from art. 13 para. 2 of the International Covenant on Economic, Social and Cultural Rights. According to this pattern of the obligations, beside the requirements subsumed to the principles of availability and accessibility of education, the States also have the obligation to enforce for the right to education the following requirements: acceptability and adaptability¹⁶.

¹⁵ Fons Coomans, *The right to education as a human right: an analysis of key aspects*, UN Doc. no. E/C.12/1998/16, 1998, para. 4.

¹⁶ Katarina Tomasevski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, Right to Education Primers No. 3, 2001.

According to the proposed conceptualization of Tomasevski, availability embodies two different governmental obligations: the right to education as a civil and political right which requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right is the one that requires the government to establish or fund them, or use a combination of these and other means so as to ensure that education is available.¹⁷

Accessibility is defined differently for different levels of education. The government is obliged to secure access to education for all children in the compulsory education age-range, but not for secondary and higher education. Moreover, compulsory education ought to be free of charge while post-compulsory education may entail the payment of tuition and other charges and could thus be subsumed under „affordability”¹⁸.

One important facet of the acceptability of education has been highlighted by the addition of ‘quality’ before education as of the 1990s in the „policy” documents, thus urging governments to ensure that education which is available and accessible is of good quality. The minimum standards of health and safety, or professional requirements for teachers, thus have to be set and enforced by the government. The scope of acceptability has been considerably broadened through the development of international human rights law. Censorship of school textbooks is no different from any other censorship, except that it is exposed as a human, rights violation infrequently. The focus on indigenous and minority rights has prioritized the language of instruction, which often makes education unacceptable if the language is foreign to young children (and also often to the teacher). The prohibition of corporal punishment has transformed school discipline in many countries further broadening the criteria of acceptability. The emergence of children themselves as actors vindicating their right to education and rights in education promises to endow the notion of acceptability with their vision of how their rights should be interpreted and applied.¹⁹

¹⁷ *Idem*, p. 13.

¹⁸ *Ibidem*.

¹⁹ *Idem*, p. 13-15.

Adaptability was best conceptualized as a result of many disputes regarding the right to education of children with disabilities. The national courts ruled that schools should adapt to the special needs of children, applying the principle of the superior interest of the child enshrined in the Convention on the Rights of the Child²⁰. This reconceptualization implicitly contradicted the practice of forcing children to adapt to any school available to them, schools having until then the right to reject a child who could not adapt. Moreover, a conceptual dissociation between ‘school’ and ‘education’ took place in the attempt to provide education to imprisoned or working children²¹.

Due to the historical context and to the normative evolution of the right to education, the study and analysis of the right was frequently emphasized in terms of its social dimension, to the detriment of its liberal/freedom dimension.²² This approach can have a negative impact on the full recognition of the freedom of education, with everything that this freedom implies. A proof of this is the current constitutional provision of art. 32 of the Romanian Constitution, which, as we have seen, fails to make a direct reference to the principle of freedom of education, that existed in all previous constitutions until 1948.

The multi-sectoral nature of the right to education was also formally recognized by an interpretative instrument of the International Covenant on Economic, Social and Cultural Rights: „The right to education has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights”.²³

²⁰ Adopted by the UN General Assembly on 29 November 1989. It entered into force on 2nd September 1990. Romania ratified it through the Law no. 18/1990, published in the ‘Official Gazette’, 1. Part, no. 109 of 28th September 1990 and republished in the "Official Gazette", 1. Part, no. 314 of 13 June 2001.

²¹ Katarina Tomasevski, *cit.work*, p. 15.

²² Klaus Dieter Beiter, *cit.work*, p. 40.

²³ Committee on Economic, Social and Cultural Rights, Twentieth session, *General Comment 11, Plans of action for primary education*, 1999, U.N. Doc. E/C.12/1999/4.

The doctrine of human rights identified three levels of obligations for the states: *to respect, to protect* and *to fulfill*.²⁴ The right to education implies state obligations on all the above mentioned levels.

8. THE UNIVERSALITY OF THE RIGHT. The right to education is an universal human right recognized to every person, regardless of age, language, social or ethnic origin or of any other status.²⁵ The universal nature of the right to education was analyzed by checking the following conditions: universal validity and universal acceptance of the right, on the one hand, and formal universality and material universality of the right to education on the other hand.²⁶ The study concludes that the right to education fulfills all these conditions needed in order to be recognized as an universal human right.

9. THE LINK BETWEEN THE RIGHT TO EDUCATION AND THE CONSTITUTIONAL VALUES. The relationship between the right to education with two supreme values enshrined in the Romanian Constitution, i.e. human dignity and the free development of human personality, contributes to shaping the legal nature of the right to education. The two values are closely tight to education under two aspects. Firstly, the right to education must be interpreted in the light of the values of human dignity and the free development of personality. In addition, the means of exercising this right have to respect and to be in harmonization with the above-mentioned values. Secondly, the right to education is not constrained by these values, but it must be

²⁴ Fons Coomans, *Clarifying the core elements of the right to education*, in: Fons Coomans and Fried van Hoof, *The Right to Complain about Economic, Social and Cultural Rights*, SIM Special No. 18, SIM, Utrecht, 1995, p. 23; Asbjørn Eide, *The Right to Adequate Food as a Human Right*, UN Doc. no. E/CN.4/Sub.2/1987/23, para. 66-71.

²⁵ Fons Coomans, *The right to education as a human right: an analysis of key aspects*, UN Doc. no. E/C.12/1998/16, 1998, para. 4.

²⁶ Fons Coomans, *De Internationale Bescherming van het Recht op Onderwijs (The International Protection of the Right to Education)*, Ph.D Thesis, Maastricht University, Leiden, 1992, p. 258-268, cited in K.D. Beiter, *cited above*, p. 32.

exercised in order to emancipate the person, so that he or she can freely develop his sense of dignity and personality.

10. THE AIM AND OBJECTIVES OF EDUCATION. Any legal rule finds its foundations in foreshadowing its purpose and objectives. Regarding the right to education, its purpose and objectives are not only reasons behind regulation, but are also expressly established as distinct rules, which must be considered in the interpretation of all other particular issues associated with the right. The learning objectives are to be pursued not only in the implementation of an educational system; they are necessary features to be found in the entire construction of a democratic and liberal state. The full development of the human personality and the sense of its dignity, the goal to enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, the goal to strengthen the respect for human rights and fundamental freedoms, to develop and transmit cultural identity, to develop values, a sense of moral and social responsibility, - all these aims of education are principles required by the human rights system to be the purpose of the educational system, without which the existence and the realization of other rights would remain mere ideals.

In the second part of the present research, the aim is to analyse the different aspects and prerogatives covered by the right to education, of course, without claiming the exhaustion of all implications of the right, as were set forth in the first part. Such an approach would require a much longer study, both in time and breadth.

11. THE RIGHT OF ACCESS TO EDUCATION. The right to education necessarily implies a right of access to all forms of education existent at a given moment, this right being correlated with a set of obligations assumed by the State in achieving its educational function. First, the State must have already created a

widespread educational system, which must be continuously sustained and developed. The right of access to education requires the State to provide this service free of charge, within certain limits and certain prescribed standards, differently for each level of education. Also, the legal sources of the right to education are constantly referring to the compulsory character of education, necessary to achieve a minimum level of education for all people. Finally, when analysing the obligations of the state in education, we must not forget that the state is an abstract legal entity and part of its obligations are fulfilled by local administrative entities in the spirit of decentralization and sharing functions between the central government and local communities.

12. RECONCILING THE RIGHT TO EDUCATION WITH THE RIGHT TO IDENTITY. A generalized education provided at the initiative and under the coordination of a single national will tends to standardize the educational process at the expense of personal identity of individuals who are recipients of this education. To avoid such a result contrary to the purpose of education in a pluralist political and legal system, there are certain aspects that also fall within the sphere of the right to education with the purpose to reconcile the right to identity of persons with obligations that the State will undertake in this area. On the one hand, the State assesses the official language of the educational process, but according to the liberal dimension of the right to education, persons with a distinct linguistic identity should have the prerogative to claim from the state the realization of their right to education with respect for their right to difference, in some limits. The current legal framework guarantees the right of persons belonging to national minorities to study and be educated in their mother tongue at all levels and forms of education, and to establish and manage their own private educational institutions. Moreover, the Constitution recognizes and protects 20 regional or minority languages. One of the remaining problems for the educational policies in Romania regards the integration of the Roma children into the Romanian school system. Despite the progresses made by several programs - which saw results both in the number of people declaring themselves as Roma and in the number of Romani classes - the cases of segregation of Roma

children in schools continue to be frequent. The problem is not that these programs fail to give the expected results. The problem seems to be related to the perception and treatment of Roma by the majority population; if that will not change, the results of the programs for Roma integration, in schools or in society, will be limited.²⁷

On the other hand, the right to identity also implies other prerogatives than those resulted from the linguistic difference, characteristics of cultural identity, issues dealt with in the same chapter. Education should be provided in such a way as to ensure, preserve and transmit cultural identity of persons belonging to national minorities. Correspondingly, the state has the obligation to refrain from any action resulting in forced assimilation of these people by imposing a single national culture and without ensuring pluralism, a target that is not enough guaranteed only by ensuring linguistic rights. Following article 6 of the Constitution, the content and legal relationship inherent in the right to identity can be determined.²⁸ From the phrase "*the State recognizes and guarantees*" the right to identity, it follows that the legislative cannot introduce any statutory provision restricting the right of persons belonging to national minorities to preserve, develop and express their cultural identity. Any assimilation measure is prohibited.²⁹ Moreover, the state has positive obligations arising from this legal relationship. It is required to take protective measures for the preservation, development and expression of persons belonging to national minorities. Protective measures should therefore not only allow the specific identity of minorities, but to be likely to develop. Preservation, transmission and development of cultural identity can be achieved through education. For this reason, the state is obliged to provide the necessary education system to achieve these goals. Article 32 of the Constitution does

²⁷ Raluca Bigu, *Language Rights in Education in Romania*, in vol. *Draft of the Proceedings of the Workshops on Linguistic Rights in the in Education*, Second World Conference on the Right to Education, Bruxelles, 2012, p. 170.

²⁸ The doctrine noted the restriction of the right to identity which operates frequently, by referring to it especially in relation to the rights of persons belonging to national minorities. I concur with those stating that the right to identity qualifies to be a right in its own, which bears universal meaning. See Laura-Maria Crăciunean, *Despre drepturile culturale în dreptul internațional: clarificări conceptuale*, *Revista Română de Drept Internațional*, nr. 12/2011, C.H. Beck, București 2011, p. 49-67.

²⁹ Dan Claudiu Dănișor, *Constituția României comentată. Titlul I. Principii generale*, Editura Universul Juridic, București, 2009, p. 240.

not contain any particular provision concerning the legal status of cultural identity in education. We believe, however, that such status can be identified by systemic interpretation, the provisions contained in Art. 6 - the right to identity -, the provisions on access to culture, and those that require equal rights of citizens and the principle of non-discrimination.

Regarding the infra-constitutional provisions, apart from rules on mandatory language of study and the students' obligation to learn Romanian language, Law no. 1/2011 contains provisions on promoting history learning and cultural traditions of national minorities. The same provisions also require mandatory "reflection of the history and traditions of national minorities in Romania" in curricula and textbooks on history lessons. The new regulatory framework seems to take better account of the current trend in international law in terms of promoting diversity, tolerance and understanding, both among people and among all ethnic groups or other minorities.

13. THE RIGHT TO EDUCATION AND THE FREEDOM OF RELIGION.

Freedom of religion is another aspect to be considered when analysing educational provisions, because the right to education implies a prerogative recognised not only for the receivers of education, but also, in particular, for the parents of pupils enrolled in public schools, and that is to have their convictions respected by being provided with education in accordance with their personal choice. Moreover, the European Court of Human Rights' jurisprudence proves the importance of this freedom, most of the case law regarding the right to education concerning alleged violations of the prerogatives recognized to parents. A majority of these cases also regard a breach of art. 9 of the European Convention, which protects freedom of thought, conscience and religion. In the educational area, the violation of religious freedom can be of two kinds: by denying a person's right to religious education or by providing religious education in a particular faith against his will. The two forms are diametrically opposed, but both represent a violation of the freedom to choose a specific religious education, being used at one time or another by various states. UN Special Rapporteur on religious intolerance extracted the following rules on religious education: the existence of a

right to choose religious education in the area of education, the prohibition to compel students to follow a certain religious education and the right to obtain an exemption from the obligation to follow certain courses with religious content. The sense of religious identity of the child stands out, i.e. whether the child is considered to be part of a religious community, and whether religious education is aimed at keeping the child within that community. However, the Rapporteurs observe that through the lens of parental rights, not children's rights.³⁰ Unfortunately, we consider religious education seems to be considered only a right of the parents against the state, as stands out in the light of the grammatical interpretation of the texts of international legal instruments, quoted above, and thus not a right of the child itself.

In its case law, both the former Commission and the current European Court of Human Rights have been repeatedly called to decide upon the violation of Art. 2 of the First Protocol to the Convention, in regard with its last sentence, which recognizes parents' right to request the State to respect their religious and philosophical beliefs in the education of their children, by virtue that such a right would be an attribute of parenthood.³¹ The European court senses that the purpose of this provision is intended, in particular, to ensure the existence of an educational pluralism, prerequisite for the functioning of a democratic society, as it is conceived by the Convention.³² Former Commission ruled that states have a large margin of appreciation in regulating public education, but "must refrain from practicing any form of indoctrination that might affect parents' religious and philosophical convictions"³³. We have cited and analysed, in particular, the following cases: *Folgerø and Others v. Norway*³⁴, *Hasan and Eylem*

³⁰ Sylvie Langlaude, *The Right of the Child to Religious Freedom in International Law*, International Studies in Human Rights, Volume 93, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 170.

³¹ European Commission of Human Rights, 12 December 1977, application no. 7911/1977, X v. Sweden.

³² Corneliu Bîrsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe articole*, Ediția a II-a, Editura C.H. Beck, București 2010, p. 1766.

³³ European Commission of Human Rights, 9 March 1977, application no. 6853/1974, X v. Sweden, cited by Corneliu Bîrsan, p. 1766.

³⁴ EctHR, 29 June 2007, Grand Chamber judgment, Application no. 15472/02, Case of *Folgerø and others v. Norway*.

Zengin v. Turkey³⁵, Johanna Appel - Irrgang and Others v. Germany³⁶, Lautsi against Italy.³⁷

We agree that education must fulfil the role to transmit, not just information but also values. However, we believe that education, rather than to convey something, must create capabilities so that people become able to develop their own values, forged on a pluralistic knowledge.

In the area of religious education, the neutral role of the state can be achieved in two ways: either the state reduces to a common ground all religious doctrines and will include in its public education only that common core³⁸; either it has a more active approach, providing students with comprehensive and equidistant information about all recognized religious movements. In this respect, we believe that neutrality and pluralism have divergent meanings. Analysing the national law we can say, without reservation, that it complies with the standards imposed by international law on freedom of religion, providing for each person enrolled in public education a right to choose his/her religious education. However, in terms of practical implementation of this right, an issue frequently raised was that of a real lack of choice in most public schools because of religious education made available did not sufficiently meet the requests of persons choosing other religions faiths than the Christian Orthodox one.

Regarding the neutrality of the state, expressly stated in the provisions of Law no. 489/2006, we have some doubts that such neutrality exists in the famous case of the orthodox icons school classrooms.³⁹ Although the ECtHR practice proves that, in terms of the Convention, the margin of appreciation of the state is very large, we

³⁵ EctHR, 9 October 2007, Former Second Section, Application no. 1448/04, Case of Hasan and Eylem Zengin v. Turkey.

³⁶ EctHR, October 2009, Court (Fifth Section) judgment, Application no. 45216/07, Case of Johanna Appel - Irrgang and Others v. Germany.

³⁷ Case of Lautsi and Others v. Italy, no. 30814/06, initially settled by the Second Section of the Court, decision of 3 November 2009, and then overturned by the Grand Chamber on 18 March 2011.

³⁸ Option criticized by José De Sousa E Brito, *General aspects of religion and education in the secular state*, in the vol. edited by Gerhard Robbers, *Religion in Public Education*, European Consortium for Church and State Research, Proceedings of the Conference Trier, 11 – 14 November 2010, p. 16.

³⁹ See the case of Professor Emil Moise, presented in the extended paper.

believe that the Romanian state could still do more to implement their own standards imposed at the legislative level. For policy makers, it will be a challenge finding the right balance between respecting the right of voluntary communities formed around common religious beliefs to educate their children in these beliefs and taking measures to ensure that children evolve into citizens capable to work through cooperation and communication with fellow citizens educated in other religious beliefs.⁴⁰

14. THE RIGHT TO EDUCATION IN HIGHER EDUCATION. Higher education represents a particular level of education, which benefits from an increased attention due to its specific historical evolution in comparison with primary and secondary education. Thus, without having been explicitly under the protection of the right to education as a result of the adoption of the first international legal instruments, the principles of university autonomy and academic freedom have been a big concern for the academics in the last half century. Due to these initiatives, using interpretative means, and as a result of the fact that many states have chosen to award to these principles constitutional protection, a specific legal protection of human rights in the field of higher education has evolved.

As a result of the constant reality that the academic community (professors, researchers, students) was constantly a target for repression in some states⁴¹, especially in totalitarian regimes, the members of the academic community have fought to increase the protection of their rights by specific means in the field of human rights law. Therefore, the concepts of university autonomy and academic freedom have been developed.

⁴⁰ Charles L. Glenn, *Educational Freedom in the Context of Religion*, in vol. Charles L. Glenn, Jan De Groof (eds.), *Balancing Freedom, Autonomy, and Accountability in Education. Volume 1*, Wolf Legal Publishers, Nijmegen 2012, p. 80

⁴¹ Manfred Nowak, *The right to education*, în *Economic, Social and Cultural Rights. A Textbook. Second Revised Edition*, Edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, Dordrecht 2001, p. 267.

Academic freedom and university autonomy guarantee the preservation of the appropriate climate for the search for truth and knowledge enrichment.⁴² Principles of university autonomy and academic freedom represent fundamental values of our system of higher education, being the first two principles enshrined in Article 118 of Law no. 1/2011 on National Education.

University autonomy is currently the principle which gives a degree of independence that universities must benefit of, so that these institutions can fulfill their role as supplier of best higher education, research and other services for the use of the society. We must be aware and accept that the false simplicity of the concept includes various systems which existed in the past and some still exist today. This considerable variation explains the key differences between educational systems, for example in the British and French educational models. For these reasons, we can say without any doubt that there is still a major hindrance in outlining a comprehensive concept, which could be universally valid.

The current degree of autonomy in different systems should, therefore, include what is useful and necessary for the institution to best fulfill its duties. This grade still depends, and depended to a greater extent in the past, on national traditions and on trust or conflict issues of the universities with the governments and the society.⁴³

Academic freedom appears to be a simple concept, and it is actually a simple one, but it is also difficult to define it. Since medieval times, the academic freedom has been defined as being the freedom of the teacher to do his job without any external control, and it also involved the freedom of the student to learn. The concept was further defined when the Humboldtian concept was born. This concept brought on scene the universities oriented towards research in the early nineteenth century in

⁴² CEPES, *Academic Freedom and University Autonomy. Proceedings of the International Conference 5th -7th May 1992, Sinaia, Romania*, Bucharest, 1992, p. 35.

⁴³ Justin Thorens, *Liberties, Freedom and Autonomy: A Few Reflections on Academia's Estate*, Higher Education Policy vol. 19, no. 1, 2006, p. 105.

Germany. The Humboldtian concept recognizes the ideas of *Lehrfreiheit* and *Lernfreiheit* - Freedom to teach and to learn.⁴⁴

Many issues, included by the international legal doctrine in the concept of academic freedom are not just individual by nature, as they have a collective or institutional dimension, which in Romania was separated in the distinct notion of „university autonomy”. This implies the matter that the departments, the faculties and also the universities as a whole have the right to preserve and promote the principles of academic freedom in their internal and external conduct. Institutional autonomy is a *sine qua non* condition for the individual rights of academics to teach, to research, to publish and to attend to public debates. When this institutional dimension of academic freedom conflicts with individual dimension (academic freedom *stricto sensu*), a balance between the two dimensions will be established, but a special attention should be given to the individual freedom.

15. FREEDOM OF EDUCATION – STATE NEGATIVE OBLIGATIONS.

The freedom of education, in addition to the above mentioned, also implies other more general prerogatives, but which are lively contested in a world where the state's role in the lives of people is becoming more and more active. In addition to its positive obligations, the state must not disregard negative obligations and interfere to the smallest detail in the right to choice in education. In this context, a new worldwide trend is represented by *home-schooling*, recognized or tolerated in some states, expressly forbidden in others. This new challenge gradually makes its place in Romanian social reality, as long as the current legal framework remains sufficiently vague so as to generate an interesting legal debate.

Freedom of education means not only freedom for the receivers of education, but also a freedom for the providers of educational services. Thus, we have:

- a) On the one hand:

⁴⁴ Philip G. Altbach, *Academic freedom: International realities and challenges*, Higher Education vol. 41, 2001, p. 206.

- i. The right recognized to every person to choose which educational institution to follow;
 - ii. The ones right to be educated in accordance with their religious, philosophical and moral convictions;
 - iii. The ones right to learn their mother tongue and be trained in the same language;
- b) and, on the other hand:
- i. The right to establish educational institutions other than those provided by the state;
 - ii. The academic freedom, *lato sensu*, of teachers and educational institutions, especially those functioning in the higher education area.

In conclusion: it does not seem to be contradictory to state that the increasing delegation of powers to the institutional level is accompanied by an increasing power and number of norms of the central authority. States should guide the education sector through a framework of general rules, policy objectives, funding mechanisms and incentives for quality education, equal opportunity norms and standards. In return for being freed from over-regulation and micromanagement, schools should accept full institutional accountability for their results to society at large.⁴⁵

16. PROPOSAL TO AMEND THE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO EDUCATION. Finally, in the context of current discussions on amending the constitutional framework, this paper contributes with a proposal *de lege ferenda*. Thus, following the relevant results of research conducted for the purpose of the thesis, in the context of public initiatives to revise the Constitution, we propose a restructuring of the constitutional text of art. 32 – the right to education – so that, in our view, to better achieve a strong protecting for the right to education.

⁴⁵ Jan de Groof, *Legal Framework for Freedom of Education*, in Charles L. Glenn, Jan De Groof (eds.), *Balancing Freedom, Autonomy, and Accountability in Education. Volume 1*, Wolf Legal Publishers, Nijmegen 2012, p. 28 – 29.

Firstly, as we have said since the introduction of the paper, we opt to use the terminology "right to education" rather than the one used by the 1991 Romanian Constitution "right to instruction".

We consider to be necessary to introduce a general provision guaranteeing the right to education (*The State recognizes and guarantees to everyone the right to education*), given that the current provision of art. 32 only refer to the forms in which the state guarantees the right to instruction, the institutionalized form of education. Such a rule does restrict the scope of the right to education.

Freedom of education is guaranteed, to the extent that the exercise of this right shall not prejudice public order or morality. Introducing the principle of freedom of education is a necessity in the desire to resume the democratic traditions of the Romanian people. The first Constitution of the Romanian Principalities of June 30, 1866 provided in Art. 5 the first item in the section "*Romanians' rights*" that "*Romanians enjoy freedom of conscience, freedom of education, freedom of the press, freedom of assembly.*" Moreover, art . 23 dedicated to the right to education stated: "*Education is free. Freedom of education is guaranteed as long as it does not infringe with good morals or public order.*" These provisions, with minor alterations imposed by linguistic reasons, were also present in Article 24 of the 1923 Constitution, and in Article 21 of the Constitution of King Carol the Second of 1938. Paradoxically, an express provision guaranteeing freedom of education, as it was present at the constitutional level between 1866 and 1948, was not reinforced even by the Constitution of 1991, as amended in 2003. We believe that freedom of education is one of the principles that fall under the term "democratic traditions of the Romanian people", included in art. 1 para. (3) of the Constitution, thus reaffirming the need to be expressly introduced.

Since the Romanian State is built on the principles of liberal democracy and pluralism, it is necessary to impose ideological neutrality as a fundamental principle in the formation of educational message, in this regard proposing a separate provision in art. 32. Regarding strict religious education, a rule providing for its optional nature is a natural consequence of the evolution of recent constitutional principles, including

recent Constitutional Court decisions, rules also recognized and enforced by the European Convention on Human Rights.

Finally, in addition to other changes intended to reconcile constitutional provisions with recent developments in international law, we consider that the principle of academic freedom should be followed by the recognition of the principle of university autonomy at the constitutional level.

17. CONCLUDING REMARKS. The need to develop the content of the right to education was emphasized and strengthened by the uncertain fate that this fundamental right seems to have worldwide. Promoters of globalization oppose education to be provided by the state, considering that education should be traded just like any other service and its financing by the government would be defined as an illegal state subsidy. In contrast, human rights advocates portray in their writings the right to education as defined in international human rights treaties whereby most, if not all education, would be provided or at least financed by government. Because of the position where the right to education was placed down in the main international legal instruments, half a century ago, the full realization of this right has been delayed by terms such as "*should*" rather than "*is*", specific to a progressive realization of human rights⁴⁶. In this context, the multitude of international legal instruments should be interpreted in a way that enables real implementation of the standards set forward, even though in many cases at the inter-governmental level those instruments are accepted and signed without being followed by an intense concern to meet those goals.

Like any other fundamental right, the right of education should be promoted by engaging all actors of society. In this respect, it is to be appreciated the concern expressed by the judiciary, such as the Constitutional Court when using in its review of the constitutionality of national legislation the international instruments signed and ratified by the state, even if many of them are not of a "binding character". Only

⁴⁶ Katarina Tomasevski, *Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004*, Human Rights Law Review, Vol. 5/2005, p. 207.

through such enforcement, the right to education can become a reality, not just a declaratively stated and undisputed ideal.

This work was supported by the strategic grant POSDRU/CPP107/DMI1.5/S/78421, Project ID 78421 (2010), co-financed by the European Social Fund – Investing in People, within the Sectoral Operational Programme Human Resources Development 2007 – 2013.