

**«FAIR TRIAL IN AN OPTIMUM AND FORESEEABLE TIME»  
COUNCIL OF EUROPE'S RECOMMENDATION THROUGH  
EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE  
AND EXPRESS LEGAL PROVISION IN THE NEW ROMANIAN  
CODE OF CIVIL PROCEDURE**

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***ABSTRACT:** An important role, in promoting and assuring the procedural guideline consisting in the fair trial in an optimum and foreseeable time, has the Council of Europe Organization through its special Commission for the Efficiency of Justice/Commission européenne pour l'efficacité de la justice.*

*In its 2011 Activity Programme CEPEJ stated some general responsibilities and specific objectives and also tasks meant to achieve the objectives envisaged. In concreto, CEPEJ has assumed responsibilities concerning the quality of judicial systems and courts in the Member States of Council of Europe. As specific objectives regarding the above mentioned responsibility European Commission for the Efficiency of Justice has assumed to: measure the perception that users have on their judicial system (measuring their satisfaction as regards the public service provided by the justice system); develop tools to assess the performance of the territorial court organization (judicial map); develop indicators to assess the quality of the court work; develop measures to promote the quality of the work of judicial experts; ensure the promotion of the CEPEJ's tools in the field of quality of justice.*

*In this line of thinking, having an in-depth knowledge of the timeframes of proceedings for reaching optimum and foreseeable judicial time is also a responsibility assumed by the Commission for the Efficiency of Justice. As specific objective relating to this responsibility is the commitment of CEPEJ to develop tools for supporting the courts in achieving optimum and foreseeable timeframes and as a specific task on this issue it will be setting up an Observatory of judicial timeframes aimed at collecting quantitative and qualitative data on judicial timeframes and the court management of backlogs.*

*Article 6 paragraph 1 from second chapter - which mentions The fundamental guidelines of the civil trial - of the New Romanian Code of Civil Procedure (Law nr. 134/2010 published in the Official Journal of Romania, part. I, nr. 485/15th of July 2010) - enshrines The right to a fair trial, in an optimum and foreseeable time, meaning that „Every person has the right to a fair examination of its case, in an optimum and foreseeable time, by an independent, impartial and legal established court. In achieving*

*this purpose the court is obligated to take all the measures permitted by law and to assure the celerity of the trial activity”.*

*It is also important to mention the fact that the close related principles of «due process/fair trial» and «the rule of law» are fundamental to the protection of human rights, in general, because such rights can only be protected and enforced if the citizens have recourse to judicial bodies (courts and tribunals) - independent in the «power system» of a State - which resolve disputes in accordance with fair procedures. The protection of procedural guarantee of fair trial is not, in itself, sufficient to protect human rights abuses and violations, but it is the «foundation stone» for substantive protection against state power. So, the due process/fair trial represents only one of the (procedural) instruments adequate to contribute to the protection of human rights in a democratic society.*

**KEYWORDS:** *fair trial, European Convention on Human Rights, Charter of Fundamental Rights of the European Union, optimum and foreseeable time, Council of Europe, European Commission for the Efficiency of Justice, New Romanian Code of Civil Procedure.*

**JEL CLASSIFICATION:** *K 4*

## **1. LEGAL INSTRUMENTS CONTAINING, IN TERMINIS, THE REQUIREMENTS NECESSARY TO PROVIDE THE PROPER BACKGROUND OF EXERCISING THE RIGHT TO A FAIR TRIAL: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, FIRST RANK REFERENCE TO HUMAN RIGHTS RESPECT DUE TO THE SPECIFIC JURISDICTIONAL MECHANISM OF THEIR ASSURANCE**

The European Convention on Human Rights and Fundamental Freedoms<sup>1</sup> (4 November 1950, Rome) represents the first successful attempt focusing on the protection of a certain number of rights and freedoms set forth in the Universal Declaration of Human Rights (adopted by the United Nations in 1948). It has become a model for other world systems, especially for the American Convention on Human Rights and it represents the basis for creating the only mechanism of permanent and independent control from Europe, assuring the states' compliance with a wide variety of fundamental rights (mostly civil and political).

The importance of Convention derives not only from the plurality of the included rights, but also as a consequence of the protection mechanism adopted in Strasbourg, examining the so-called abuse of human rights and assuring the states' compliance with the obligations provided as a result of the application of the Convention<sup>2</sup>.

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<sup>1</sup> Romania ratified the European Convention on Human Rights through Law no. 30/1994, published in the Official Journal of Romania, Part I, no. 135 from 31 May 1994.

<sup>2</sup> The contracting states are bound to assure that every person under their jurisdiction, regardless of sex, race, nationality, ethnicity, etc. can enjoy the rights and freedoms provided by the European Convention on Human Rights. Human rights protection system must firstly be applied at national level. Each member state must be aware that any person under its jurisdiction can enjoy these rights. In the absence of this primary guarantee, any

The right to a fair trial represents one of the components of the principle of assuring the right's supremacy in a democratic society<sup>3</sup>. Concerning an efficient performance of the previously mentioned requirement, the member states of the Convention for the protection of human rights and fundamental freedoms are bound to take all the measures necessary to assure and defend the rights and values mentioned in the Convention. *In concreto*, these measures include the organisation of a proper administration of justice – to enjoy a series of attributes, like credibility, safety, objectivity, independence – *extremely useful for those standing before state institutions specialised in the optimum settlement of special litigations present in the society*<sup>4</sup>.

At the same time, the right to a fair trial is an essential component of another fundamental principle deriving from the dispositions of the Convention applied in its «judiciary bodies» jurisprudence, namely that of assertion a public European order of human rights<sup>5</sup>. Within this specific public order, the signing countries (members of the Council of Europe) assumed obligations to assure that the rights provided by the Convention are to be concrete and effective, not theoretical and apparent<sup>6</sup>.

Article 6, first paragraph thesis I of the Convention highlights the following aspect, namely:

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person can, under certain circumstances, to lodge a complaint to the European Court of Human Rights. Also, complaints can be lodged between states (state against state).

<sup>3</sup> The countries, which have signed the Convention for the Protection of Human Rights and Fundamental Freedoms, decided to adopt the measures compulsory for the effective defence of human rights ruled by the Universal Declaration of Human Rights „due to their true commitment to the principle of the supremacy of law (ECHR, 21 February 1975, case *Golder against the United Kingdom*).

<sup>4</sup> See the case *McGonnell vs United Kingdom* mentioned and explained by Alastair Mowbray, in *Cases and materials on the European Convention on Human Rights*, Oxford University Press, second edition, 2006, pp. 429-443. In the present case, the situation of Mister McGonnell is the following: in 1982 he purchased a wine-growing region in Guernsey, and in 1988 he intended to develop it, elaborating in this purpose a detailed development plan of that region. He encountered a series of difficulties when he presented his claim before the competent authorities. One of his first attempts was denied by the territorial inspector authorised to approve the development plan of the region. At a subsequent period, in 1990, although the Parliament of Guernsey approved the development plan of the region, it continued to maintain the interdiction of building on the land because of its agricultural purpose. Lodging an appeal to the Royal Court, composed of persons who were in the Parliament of Guernsey and 7 juries, his petition was unanimously denied. Pursuant to this fact, the petitioner considered that the European Commission notification would be necessary because his petition had not been examined by an independent and impartial court, particularly because of the cause judgement belonging to a person who represented the Parliament before the legislative authority from Guernsey. Regarding this case, 25 persons from the Commission voted for and 5 against the violation of art. 6 (1) of ECHR. To examine a similar case, see *Case Procola vs Luxembourg*, Decision from 28 September 1985, [www.echr.coe.int](http://www.echr.coe.int).

<sup>5</sup> C. Bîrsan, *The European Convention on Human Rights, Commentary on Articles*, Ed. CH. Beck, vol. I, Rights and Freedoms, Bucharest, 2005, p. 394 et sequens.

<sup>6</sup> The Court has decided that states enjoy a great freedom in choosing the means of allowing legal systems comply with the imperatives of art. 6. Being an obligation of result, it is incumbent on states, and the Court's mission strictly refers to investigate whether the ways they had chosen in this particular field lead to results compatible with the provisions of Convention. In the light of article 19 of the Convention, the Court's responsibility consists in assuring the observance of the commitment assumed by the contracting parties. Thus, it results the control mechanism's subsidiarity (of the Court), related to national systems assuring human rights. The settlement of this principle is legitimate as long as national authorities are the best established, *a priori*, in order to judge the evidence presented before them. If the Court must ultimately make its judgement with reference to the observance of the Convention's requirements, it cannot replace an analysis of national authorities with another one of what could be the most proper resolution. The objective of the Convention is not to replace national rights, but to reduce possible deficiencies.

”Every person is entitled to enjoy a fair and public trial, within a reasonable time, by an independent and impartial tribunal established by law, which shall decide either upon the violation of his or her civil rights and obligations, or upon the reliability of any criminal charge against his or her”<sup>7</sup>.

This very important article derives from the text included in art. 10 of the Universal Declaration on Human Rights. Of course, in article 10 it is mentioned that „every person has complete equality to a fair and public trial, by an independent and impartial tribunal, which shall decide either upon the violation of his or her civil rights and obligations, or upon the reliability of any criminal charge against his or her”.

The provisions of art. 6 of the Convention can be found, also, in art. 14 of the UN International Covenant concerning Civil and Political rights (1966, in force from 1976), with some writing differences of texts and, under no circumstances, to the fundamental guarantees of the right to a fair trial. Thus, in the first paragraph of art. 14 of the Covenant it is mentioned that *all persons are equal before tribunals and courts of law*, a provision which cannot be found in art. 6 of the European Convention, but it is included in the dispositions of art. 14 (of the European Convention), which forbids any form of discrimination in the exercise of the rights and freedoms it enshrines, and, so, with reference to the right to a fair trial as well. *In concreto*, regarding the requirements imposed by the right to a fair trial, art. 14 of the UN International Covenant brings the following aspect into light: ”(...) any person has the right that his or her litigation to be fairly and publicly heard, by a competent, independent and impartial tribunal established by law, which shall analyse it, concerning the specific rights and obligations demanded in justice, or in a criminal cause, with reference to the charges against him or her”. Article 14 makes also a distinction between the categories of fair hearing necessary for civil and criminal cases, the greatest part of its content focusing on the minimum necessary guarantees for criminal charges. This article refers to significant guarantees regarding the protection of fair trial right and, that is why, they (the guarantees) should be included in the category of those where no derogation is accepted, even in «emergency state situation»<sup>8</sup>.

From the same perspective, the Inter-American Convention of Human Rights<sup>9</sup>, in article 8 and the African Charter on Human and Peoples’ Rights<sup>10</sup>, in articles 7 (first paragraph, letters a-d) and 26, include provisions related to the fair trial. Of course, art. 8, first paragraph settles as imperative the following aspect: “every person has the right to a

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<sup>7</sup> All phrases within the article are autonomous notions specific to the Convention, independent of the meanings and applications they have within national law systems of contracting states, particularly to avoid meaning differences (of notions) which might occur in different law systems (Roman-German, common-law).

<sup>8</sup> The reason of imposing a certain absolute character is justified by the fact that the fair trial right has a privileged place within the system of complying with fundamental rights, because it is placed at the «fusion» of all other (fundamental) rights.

<sup>9</sup> Although article 27 of the Inter-American Convention authorises the suspension of assurances (guarantees) during wars, public danger, or other emergency threatening the Government’s independence of safety, non-imposing an absolute character of the fair trial right settled by art. 8, yet art. 27 extends the status of compliance with legal assurances inherent to the protection of such rights, like the right to live, human treatment. So, it can be said that a particular aspect of the fair trial right and a remedy obtained an absolute character by means of the Inter-American Convention.

<sup>10</sup> It is worth mentioning the fact that this international document does not contain any condition allowing the states to be excepted from the obligations assumed in the Treaty in situations specific to «emergency state».

hearing, accompanied by legal assurances and, within a reasonable time, by a competent, independent and impartial tribunal, (previously) established by law, within a trial regarding the important aspects of any criminal charge performed against him or her, or upon (his or her) civil rights and obligations, labour law, tax, or any other charges”<sup>11</sup>. Regarding the same fair trial, art. 7 letter a) of the African Charter highlights that “every person is entitled to have a hearing of his or her cause. This means: a) the right to appear before national competent authorities with an appeal against the actions considered an intrusion of his or her fundamental rights, recognised and assured by conventions, laws, regulations and legally recognised traditions; b) the right to be considered innocent until his or her guilt is proven by a competent tribunal; c) the right of self-defence, including the right to legal counselling at his or own choice; d) the right to be judged within a reasonable time by an impartial court/tribunal”<sup>12</sup>. The difference between the two general regional instruments is represented by the extension of rights included in both international documents, namely the Inter-American Convention is much wider (in rights content) than the African Charter, due to the fact that the current African system of human rights protection does not have an operational Court to uphold the observance of contracting states’ commitment.

## 2. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE RIGHT TO A FAIR TRIAL

The original Treaty founding the European Community did not contain provisions regarding the phrase «fundamental rights». Starting the Treaty of Maastricht (1992), which inserted the second paragraph of article 6 in the Treaty of the European Union, a special mention was made with reference to the assurance of fundamental rights observance, respect – provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the constitutional traditions of Member States through main general principles of community right. The European Court of Justice pronounced, *illo tempore*, that fundamental human rights are settled by the general principles of community law, being therefore protected by the Court, and the continuous consolidation of protecting these rights is necessary, because the respect for human rights represents a condition of legality in the European Community documents<sup>13</sup>.

The reunion of the European Council, from June 1999, in Koln, considered that the elaboration of a Charter of Fundamental Rights is essential in order to increase the awareness of the European Union Citizens regarding the importance and relevance of their rights at international and regional levels. One of the European Council’s conclusions is that the Charter should contain both *fundamental rights and freedoms* and the *main procedural rights* assured by the European Convention of Human Rights and derived from

<sup>11</sup> [www.oas.org/juridico/english/treaties/](http://www.oas.org/juridico/english/treaties/)

<sup>12</sup> [www.africa-union.org/root/au/Document/Treaties](http://www.africa-union.org/root/au/Document/Treaties). Although art. 7, first paragraph of the African Charter on Human and Peoples’ Rights, refers only to a competent (letter b) or impartial (letter d) tribunal or court, article 26 of the Charter settles as imperative the legal obligation of states to assure the independence of courts of law (courts or tribunals).

<sup>13</sup> J.-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Foreword by Angela Merkel, Chapter IV Fundamental Rights, Section 18 The origins of the EU Charter of Fundamental Rights, Cambridge University Press, 2010, p. 146.

common constitutional traditions of Member States, as from the general principles of community law and as from social and economic rights provided by the European Social Charter (issued by the international organisation Council of Europe) and by the Charter of Fundamental Social Rights of Workers (issued by the European Community).

At the Reunion of the European Council, from 7 December 2000, in Nice, the European Parliament, Council and Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union (published in the Official Journal 2000/C-364/01 from 18 December 2000). The objective of the Charter involved “the enhancing of visibility with regard to the protection of human rights within the legal order of the European Union”, with the amendment that by means of this classification process of main specific rights (in this field of human rights protection), no new rights are generated.

It must be pointed out that nowadays there are two versions of the Charter, the original version proclaimed in Nice (2000) and the updated one – solemnly proclaimed by the three political institutions of the European Union on the 12<sup>th</sup> of December 2007 (published in the Official Journal C303/01 from 14 December 2007). There are no essential differences between these two versions (except the content of the 7<sup>th</sup> Title), being important to mention that the updated version received compulsory legal power once the Treaty of Lisbon came into force, on 1<sup>st</sup> of December 2009<sup>14</sup>.

The Charter of the Fundamental Rights of the European Union includes a Prologue and 7 Titles.

The first Title called *Dignity* affirms the protection of personal dignity, the right to life (including the interdiction of death penalty), the right to personal integrity, interdiction of torture, nonhuman treatment or degrading punishments, and the interdiction of slavery and forced labour. Most articles of this Title derive from the European Convention on Human Rights (4 November 1950, European Council), the Universal Declaration of Human Rights (10 December 1948, UN) and the UN Convention of Human Rights and Biomedicine.

The second Title called *Freedoms* provides the right to freedom and safety, respect for private and family life, personal data protection, the right to marriage and family building, freedom of perspectives, conscience and religion, freedom of expression and information, freedom of meeting and association, freedom of art and science, the right to education, profession choice and work, economic freedom, the right to property, asylum and protection in case of displacement, expulsion or extradition. Articles from this title, also, correspond mostly to freedoms enshrined by the European Convention on Human Rights, having as inspiration the Constitutions of the EU Member States, secondary European Community legislation, the jurisprudence of the European Court of Justice (Luxembourg) and the Convention of Geneva regarding the rights of refugees.

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<sup>14</sup> The document called *Fundamental Rights in the European Union: explanations relative to the complete text of the Charter*, published by the Office for Official Publication of the European Communities (Luxembourg, 2001) was also updated, having a clarification purpose - regarding problems which can be interpreted - of the provisions present in the Charter (pursuant to 7<sup>th</sup> paragraph of art. 52 from the Charter *The law courts of the Union and Member States take into account the explanations written for orientating the interpretation of this Charter*). Also, art. 152 from the Charter refers to the *Extension and interpretation of Rights and Principles* (Title VII of the Charter General Dispositions regulating the interpretation and application of the Charter). For the complete text of the Charter see the website [eur-lex.europa.eu/.../C2007303RO.01000101.htm](http://eur-lex.europa.eu/.../C2007303RO.01000101.htm).

The third Title stating *Equality* promotes equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, children's rights, old persons' rights and the integration of disabled persons. This Title is inspired from the Member States Constitutions, jurisprudence of the European Court of Justice, the European Convention of Human Rights, UN Convention on Human Rights and Biomedicine, the Treaty of the European Community, Community legislation, the European Social Charter and the Convention from New York for Child's Rights .

The fourth Title *Solidarity* creates a series of social rights for workers, like the right to action and collective negotiation, the right to employment services on the labour market, protection in case of unjustified dismissal, fair labour conditions, the interdiction of children's submission to work and young's protection at workplace, social security, social assistance, access to general economic interest services, health protection, environmental and customer's protection. Its sources are found mainly in the European Social Charter and the Community Charter regarding the Rights of Workers.

The fifth *Title*, called *Citizenship*, includes the right to vote and participate as candidate to the elections for the European Parliament, the right to vote and participate to local elections, the right to an efficient administration, access to documents, the right to present petitions to the European Ombudsman, European Parliament, freedom of movement, consular and diplomatic protection. The origin of articles is found in the jurisprudence of the European Court of Justice and the Founding Treaty of the European Union.

Treated within the sixth Title, intitled *Justice*, this proclaims procedural guarantees, like the right to a fair trial and an effective remedy, presumption of innocence, right to defence, principles of legality and proportionality of charges and penal sanctions and the right of non-responding twice for the same action (*non bis in idem*). The dominant source of these rights is represented by the European Convention on Human Rights and the International Covenant on Civil and Political Rights and the jurisprudence of the European Court of Justice.

The last Title of the Charter, General Provisions concerning the Charter's interpretation and application, establishes the Charter's domain of application, its purpose, the interpretation of rights and principles mentioned in the Charter, level of protection and interdiction of abuse regarding the rights proclaimed by the Charter. The horizontal provisions of the Title refer to the explanation of the relationship between the Charter and the European Convention on Human Rights and the maintenance of the latter's position with regard to human rights protection and respect.

## **2.1 Legal status of the Charter of Fundamental Rights of the European Union**

After the Reunion from Nice, 2000, the Member States decided it should be neither introduced within community Treaties nor represent a source of general principles of human rights (art. 6 founding Treaty of the European Union), but to have a declarative character. An agreement was made concerning the future status of the Charter of Fundamental Rights, during the Declarations on the Future of Europe from Nice (December 2000) and Laeken (December 2001). In December 2004 the Charter's insertion within the content of the Treaty stating a Constitution for Europe, and the provision of certain compulsory legal power once the Constitutional Treaty came into

force were considered useful. The problem consisted in the fact that the latter Treaty had not been ratified by all Member States. But after a period of reflection, at the initiative of the European Council, the Reform Treaty, latter called the Treaty of Lisbon, was created in June 2007. It clearly stated that it shall have the same legal value as the Treaties.

*In concreto*, from the 1<sup>st</sup> of December 2009, once it came into force, the Lisbon Treaty contains a disposition clearly stating that *the Charter of Fundamental Rights shall have the same legal value as primary Treaties*, a claim providing compulsory legal power within the community legal order.

Although, initially the Charter did not have compulsory legal power, because it did not represent a legal source, the rights it provided had the same compulsory legal value within the European legal order. The reasons consisted in the fact that it had, as multiple sources, other legal instruments already regulating human rights. Of course, the Charter's articles originated in Community Treaties, secondary Community legislation and the jurisprudence of the European Court of Justice, as well as in the European Convention on Human Rights and other international instruments on human rights that the Member States adopted. Hence, all these «documents» bound the European Union even before the adoption (proclamation) of the Charter and its enforcement, and those which did not bind legally the Union, served as guideline for general principles of human rights community law. At the same time, the European Court of Justice had jurisdiction upon checking the compatibility of community institutions documents and «actions» with the rights defended by the European Convention on Human Rights and common constitutional traditions of Member States, pursuant to art. 6, second paragraph of the EU Treaty (article F)<sup>15</sup>.

### **3. «FAIR TRIAL WITHIN OPTIMUM AND FORESEEABLE TIME» – EUROPEAN COUNCIL'S RECOMMENDATION THROUGH CEPEJ (COMMISSION EUROPÉENNE POUR L'EFFICACITÉ DE LA JUSTICE) AND THE NEW CODE OF CIVIL PROCEDURE (LAW 134/2010 PUBLISHED IN THE OFFICIAL JOURNAL OF ROMANIA, PART I, NO. 485 OF 15 JULY 2010)**

As the European Court of Human Rights emphasized, the most proper solution for problems regarding the excessive length of procedures is, as for many other fields, prevention<sup>16</sup>. From this perspective, CEPEJ adopted “the Compendium of best practices on time management of proceedings”, introducing the notion of “optimum and foreseeable time”. This time frame does not represent a term or maximum time limit, but an operational and interdepartmental instrument susceptible to settle a measurable «target» for the length of proceedings. Based on this concept, CEPEJ recommends the consolidation of five general guidelines for time management of legal proceedings: a) settlement of realist and measurable time frames; b) time frames application, c) data monitoring and broadcast, d) policies of procedures management and e) policies in the problem of «loading» the courts and judges with numerous cases. In the analysis of

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<sup>15</sup> In order to establish whether a certain right was compulsory, the European Court of Justice focused on the legal source regulating it. H. Becker *et alii*, *Human Rights Law*, General Editors B. Moriarty, E. Massa, Law Society of Ireland, Oxford University Press, 2010, p. 195.

<sup>16</sup> *Scordino c. Italia*, Decision of 29 March 2006, ECHR.

recommended measures examples of “best practice” from the Member States of the European Council are offered<sup>17</sup>.

As general evaluation, the recommendations of Council of Europe are useful from the perspective of presenting the general background of a policy regarding justice administration and the provision of punctual examples with reference to possible causes and solutions of proceedings delay. However, as CEPEJ says, there is no miraculous formula or an universal solution for justice administration, each state being obligated to adapt its public policies in relation to its factual situation, but with taking into account the general principles and “best practices” examples<sup>18</sup>. So, like the public agenda of the previous years, the European Commission of Justice Efficiency assumed in its Activity Program a series of general responsibilities for 2011, namely objectives and tasks related to the good administration of justice in the member states of the European Council Organisation. As objectives specific to the improvement of judicial systems belonging to member states by means of subsequent measures and recommendation, the following can be mentioned: measurement of parties’ perception upon the judicial system of their state (in order to settle the citizens’ degree of satisfaction with regard to the qualitative provision of public justice state service); settlement of certain evaluation instruments of courts’ efficient territorial organisation within judicial systems of member states; settlement of promotion measures for the conclusions of judicial experts’ activity; promotion assurance of justice instruments specific to the Commission<sup>19</sup>.

Art. 6, paragraph (1) of the 2nd Chapter, settling the Fundamental Principles of civil trial, of the New Code of Civil Procedure<sup>20</sup> provides the right to a fair trial, within an

<sup>17</sup> CEPEJ(2006)13, pp. 1-5 et sequens. See *The management of judicial time*, by Dr. Pim Albers, Special advisor of the CEPEJ (Commission européenne pour l'efficacité de la justice/ the European Commission for the Efficiency of Justice) Council of Europe, p 5. See also I. Gâlea, R. Gâlea, *Remedies regarding the length of procedures in the civil process from Romania*, in the *Transylvanian Review of Administrative Sciences*, no. 1 (25)/2010, pp. 30-51. It is worth mentioning the project shaped in 2007, namely the *Centre for Judicial Time Management. Study and Analysis of judicial Time Use Research Network, SATURN*. The Centre’s main objective is the collection of information necessary to shape a set of rules for efficient and reasonable judicial time frames, in the member states of the European Council in such a consolidated theoretical and practical way that it should determine the states adopting policies proper to prevent the violation of fair trial right within a reasonable time, protected by art. 6 of the European Convention of Human Rights. Also, the Centre is designed to become in time, an authentic European Observatory of judicial times, by means of the analysis of proceedings length specific to Member States (proceedings depending on the special types of litigations, waiting times within the procedures), and by providing the States new rules and instruments of analysis for the judicial times of proceedings. It is also responsible for the promotion and evaluation of the Guidelines of Judicial Time Management.

<sup>18</sup> CEPEJ(2004)19REV2, paragr. 33, [www.coe.int.org](http://www.coe.int.org), [www.coe.int/cepej/](http://www.coe.int/cepej/)

<sup>19</sup> “From this perspective, to have a set of proper knowledge about the judicial time system - capable to ensure an optimum and foreseeable length of time process - also represents the responsibility of the European Commission for Justice Efficiency. A specific objective related to this responsibility is the commitment of CEPEJ in developing instruments for courts’ support in achieving reasonable timeframes, and the concrete task settled to fulfil this issue is represented by the foundation of a Judicial Time Monitoring Unit (Observatory) – designed to collect and process qualitative and quantitative information about the legal time system and courts’ management regarding the load cases”. The latter goal shall be fulfilled by means of policies created by the *Centre for Judicial Time Management (founded in 2007). Study and Analysis of Judicial Time Use Research Network (SATURN)*. For developments, see the Activity Program, for 2011, of the specialized Commission, of the Council of Europe, for Justice Efficiency, [www.coe.int/cepej/](http://www.coe.int/cepej/).

<sup>20</sup> In the presentation of reasons within the project of the New Code of Civil Procedure, from 2007, and within the previous Theses of the project from 2009, the following statement was analysed: “The current procedural

optimum and foreseeable time, with the following content: "Every person is entitled to enjoy a fair and public hearing, in an optimum and foreseeable time, by an independent and impartial tribunal established by law. In this purpose, the court has the obligation to use all legally approved measures and to assure the trial's celerity development. The second paragraph highlighting the fact the dispositions within the previous paragraph are applying even in the procedural phase of "

Article 6 of the new Code of Civil Procedure must be corroborated with art. 233 of the same Code, which, sets forth the fact that "during the first term of hearing when the parties are summoned, the judge, after the parties' hearing shall estimate the length necessary to the trial's inquiry, taking into consideration the circumstances of the case, in order to the trial to be resolved within a reasonable time, the estimated length being thus registered at the end and impossible to be re-evaluated only due to thorough reasons and with the parties' hearing". In the light of these regulations, it can be therefore stated that the judge's responsibility regarding the settlement of the hearing's length of the inquiry – stage when all proceedings necessary for the preparation of trial's settlement on merits are fulfilled – is marked out particularly to ensure the rigorism of the "fair trial within an optimum and foreseeable time", in the respective *pendinte* case. Further, the assurance of one of the fair trial's first rank components, namely celerity, is mentioned as a guideline, by art. 6 of the new Code, in the second thesis of the 1st paragraph, like this: "the judge is bound to ensure the immediate resolution of any trial – for a duly recognition and establishment of legal rights and interest submitted for trial – and not to permit any attempt of the parties to disturb the judgement. With this purpose in view, the judge shall take all necessary legally provided measures, without breaching the right of defence or other trial rights of parties (*lato sensu*) and, of course, without affecting the legal thorough resolution of the trial"<sup>21</sup>. In order to ensure the celerity specific to the trial's inquiry, the judge is entitled to take measures pursuant to art. 236 of the new Code of Civil Procedure called „Insurance of Celerity". According to this article, "with reference to the trial inquiry, the judge settles short terms, from one day to another, while the dispositions of art. 224 are applicable in a proper way (first paragraph). If there are thorough reasons, longer terms can be also provided than those mentioned in the first paragraph, as it is clearly pointed out in the second paragraph. At the same time, the judge is entitled to assign responsibilities for the parties and other trial participants, being related to documentary evidence, documents, the written response to the interrogatory provided

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system regulated by the Code of Civil Procedure, subject to frequent legislative interventions on different institutions, led to a non-coherent and non-unitary application and interpretation of the civil procedure law, with repercussions on length, efficiency and purpose of justice process. Over time, between major dysfunctions of the Romanian justice, the most harshly criticised was the lack of celerity in causes' solution, with all its effects. Because proceedings often proved difficult, formal, expensive and long-term, it was raised the awareness that the efficiency of justice process administration mostly represents and in the celerity the rights and obligations sanctioned though decrees entering the civil circuit, ensuring the stability of legal rapports on trial. So, the non-compliance with requirements to a fair trial under the aspect of procedure's length, or deriving from the decrees' non-observance, represented the object of various causes at the European Court of Human Rights (E.C.H.R.) where Romania is included. Taking into account the case book of Romania at E.C.H.R., although it can be said that proceedings timeframe does not severely exceed the European average, the trials' settlement within a reasonable time has represented and it still does a real problem and a reason for preoccupation for authorities".

<sup>21</sup> M. Tăbăreă, *Principiul dreptului la un proces echitabil, în termen optim și previzibil, în lumina noului Cod de procedură civilă*, Dreptul nr. 12/2010, p. 47.

pursuant to art. 349, assistance and performance in time of reports, and other actions necessary to resolve the case (third paragraph). And, when it is necessary for the fulfilment of obligations mentioned in the third paragraph, the parties, experts, translators, interpreters, witnesses, and other trial participants can be announced by telephone, telegraph, fax, electronic mail, or any other means of communication allowing the transmission of that document. With regard to telephone announcement, the court clerk shall draw a report with the description of the announcement (fourth paragraph)". Also, article 618 of the new Code of Civil Procedure, applicable to forced execution, refers to the fact that "during the forced execution, the judicial officer is bound to have an active role, attempting, with all legal means, to completely fulfill with celerity the obligation provided in the enforceable title, in compliance with legal dispositions, parties' and other interested persons rights". The phrase of «*reasonable time*» used in the New Code is, in my opinion, welcomed, and the argument to back up my statement is the following: it represents an explanation of the term of appropriate trial length, namely *the «reasonable time» stands for*, according to European Convention on Human Rights requirements (and to interpretations of the European Court of Human Rights), «*the minimum limit*»<sup>22</sup> of procedures' length which must be observed during the civil trial, and the expression

<sup>22</sup> V. M. Ciobanu, *Debate on the Project of the New Code of Civil Procedure*, 2008: „The project of the new Code of Civil Procedure is structured in 7 books. The preliminary title where the fundamental principles are settled is for the first time introduced, while most of these principles were practically applied even before, based on doctrine and jurisprudence. Among the novelties of these principles, it can be distinguished the resolution of civil trial within an optimum and reasonable time. In the European Convention of Human Rights, in art. 6, the focus lies on "the reasonable time", re-emphasized in the Constitution in art. 21, but the European Council issued a Recommendation adding "the optimum and foreseeable time", the reasonable time being the minimum limit. As a rule, the civil trial shall include two steps: inquiry and debate. The inquiry develops in the presence of the judge and parties who meet and settle the difficulties that trial raises. Depending on the case's complexity, the judge and parties settle this optimum term, for a proper predictability of the proceedings length". Actually, on the 11<sup>th</sup> of June 2004, the European Commission for Justice Efficiency presented at Strasbourg the framework programme where "the necessity of introducing a new objective in public policies relating to legal systems of member states, namely the judgment of each case within an optimum and foreseeable time, is argued in points 3, 4 and 5". In point 4 of this authentic «statement note» it is mentioned the aspect according to which "although the notion of reasonable time enshrined in art. 6 of the European Convention of Human Rights has currently obtained a value of reference point essential to this issue, this norm provided by the previously mentioned regional international instrument (with universal title), represents a minimum limit (dissociating observance by non-observance of the European Convention), which cannot be considered as a sufficient result, if this is achieved". Point 5 of this framework program describes accurate the most difficult situation at the level of the European Court concerning the protection of human rights and freedoms: "the European Court of Human Rights is currently overwhelmed by petitions related to the reasonable time and it dedicates a good deal of time to do justice with relation to resolutions within certain courts of member states, criticizing them for non-complying with the reasonable time specific to proceedings. Excessive timeframes represent a major problem for most of the member states. Here and there research demonstrates the fact that justice's inertia is the main problem, being perceived as such not only by the general public opinion, but by those who were in direct contact with courts, as well. This situation is disturbing for all parties, regardless of their position within the legal system: parties in litigation, victims, witnesses, juries, etc. – with the exception of those interested to make procedures last. Given that the private sector and other public services included for in the past years the notion of time in the relation with their clients, the justice seems to have remained behind this tendency, at least according to the image given to the public. The states affected to the greatest extent by this problem are the member states of the European Council even from its foundation. However, they were not the only states having to suffer because of this endemic damage affecting the European legal systems. In most of the states which adhered in the past years to the European Council, the problem of excessive length of legal procedures, became, also, a major bet of internal policy (...)", [www.coe.int/cepej/](http://www.coe.int/cepej/).

«optimum and foreseeable timeframe» represents a «structure» attempting to highlight «the efficient time framework and the optimum and foreseeable timeframes» which should coordinate the development of a specific proceeding, within a trial (from the point of view of the length, the future case resolution - based on the analysis of already solved cases by competent courts from a lower level or an upper one in the judicial system which present similar typological particularities -, represents a criterion which may be taken into account when discussing the length of proceedings)<sup>23</sup>. Of course, other factors which can positively or negatively influence the proceedings' length shall be taken into consideration<sup>24</sup>. Also, the procedural guarantee of fair trial right, within an optimum and foreseeable time, shall be entitled to contribute to the purpose of the *Development of the Romanian Justice as Public Service*<sup>25</sup>, as well: "an efficient and active justice, capable of generating a true, transparent act of justice - developed within a reasonable time and at a cost available to the citizens and state", but only if it is provided in an effective and concretely way, under the judge-magistrate's direction, along with the active participation

<sup>23</sup> Increase the Efficiency of the System for the Professional Evaluation of Magistrates Transition Facility 2007 /19343.07.01, Twinning RO /2007-IB/JH – 25 TL, project financed by the European Union, CONCEPT PAPER for the evaluation of the judicial system in Romania. Procedures and methodology, [www.csm.ro](http://www.csm.ro).

<sup>24</sup> According to the European standards, the (statistical) evaluation system should be applied both on national level of legal system and the territorial one in order to settle the total timeframes within legal procedures based on a well-elaborate case book referring to special cases which represented the object of legal resolution. From the same perspective: each court should process information regarding the legal procedures timeframes developing in that court. Pending cases or those completely resolved within a certain period (for example a calendar year) should be monitored separately and the data collected relatively to their duration divided into groups depending on time resolution criterion, longer or shorter (for example cases unsolved yet or completely resolved in less than a month, 1-3 months, 4-6 months, 7-12 months, 1-2 years, 2-3 years, 3-5 years and more than 5 years). Along with this classification, the settlement of an average development length of legal activity within proceedings is necessary, with the featuring of a minimum and maximum proceeding time when it is advisable to the litigations to be resolved.

The length of proceedings to be considered includes the taking into account both the starting time of the case when the court is notified with a claim or more (*dies a quo*) and the final moment specific to the pronouncement of a *sententia* - decree of disinvestment (*dies ad quem*). If possible, the information regarding the legal timeframes necessary for a completely resolved litigations should, on their turn, be divided into categories depending on the criterion of resolution based on a substantive inquiry or as a consequence of admission of a proceeding exception (substantiative or procedural postponing the further research of the case), and as well as based on the time necessary for the complete execution of the pronounced decree. Also, the monitoring of justice timeframes must not be limited only to the collection of data regarding the total length of legal timeframes (specific to the same trial category) developed from the starting time until the final time of the proceeding, being indicated that the information regarding the intermediary proceeding stages to be collected and grouped, as well, in order to identify the specific elements which can damage to the proper development of proceedings within a trial<sup>25</sup>.

With all these guidelines, the decision of the Superior Council of Magistracy regarding the settlement of the optimum quantity of records at the level of a judge-magistrate did not have the expected practical results, due to the other administrative-functional causes at the level of our Romanian courts.

<sup>24</sup> Dr. Pim Albers, Special advisor of the CEPEJ, *op. cit.*, pp. 2-17. "In 2003 one of the two working groups within CEPEJ invited two experts in order to conduct a study about the factors determining the reasonable time of a procedure and also of those factors generating the proceedings delay. Information of Langbroek and Fabry study represented the basis for the development of CEPEJ programme concerning the matrices of optimum and foreseeable judicial time (CEPEJ(2004)19REV2E). The latter document renewed in its preamble the fact that a new challenge «suffocates» the European courts, namely the one with regard to the processing and resolution of all cases within optimum and foreseeable timeframes<sup>25</sup>."

<sup>25</sup> The Strategy of Romanian Ministry of Justice regarding: *The Development of the Romanian Justice as Public Service* 2010-2014, [www.just.ro](http://www.just.ro), p. 12.

and *bona fide* of the parties and other trial participants. Otherwise, this right and the other components of the "fair trial" shall be without substance, enjoying only a theoretical and apparent establishment, incompatible with the principle of supremacy of law.

#### **4. PROVISIONS OF THE NEW CODE OF CIVIL PROCEDURE DESIGNED TO ASSURE THE FAIR TRIAL (BOTH AS AN ORGANISATIONAL AND JUSTICE FUNCTIONING PRINCIPLE AND AS A SPECIFIC RIGHT-GUARANTEE), WITHIN OPTIMUM AND FORESEEABLE TIME**

In order to a fair trial to enjoy effectiveness and efficiency in its fulfillment it is necessary to assure and observe one of its top requirements, namely celerity. The latter must be assured within different legal systems (of member states of Council of Europe) by means of certain provisions designed to transpose, in various situations, the principle of fair trial within optimum and foreseeable time.

In this view, the legislator of the new Code of Civil Procedure has set up, by means of some provisions of the new Code, a series of mechanisms designed to avoid the delay of judgement and, as a consequence, to assure its optimum length. Hence: a) during the contentious procedure, in the preliminary stage of trial initiation, when the sue petition is not performed in compliance with the conditions mentioned in art. 189-192, the petitioner is notified in writing with reference to his or her shortcomings and, pursuant to the way he or she observe or not the obligations concerning the request's filling out or modification, either the first hearing is settled, with the summoning of all parties, or the petition is annulled by the court resolution provided in the advising chamber and submitted to re-evaluation only. In this way it is avoided the defendant's notification as an incomplete request and, possibly, the grant of terms for remedial; b) the first hearing is settled after the defendant has lodged a motion, being notified to the plaintiff and the latter responded to the motion or, if the defendant does not lodge a motion or the plaintiff does not respond to the motion, according to the expiration of terms provided in art. 196. In this way, the timeframes granted for the presented proceedings are abolished; c) the communication procedure of procedural documents was changed so that, along with the classic notification means through court agent or any other court employee or by post, at the party's demand and on his or her expense, pursuant to conditions of art. 149, fifth and sixth paragraphs, the notification of proceedings shall be made directly through judicial officers or express delivery service. Also, the notification of citations and other procedural documents can be made by the court clerk and by facsimile, electronic mail or any other means ensuring the transmission of the document's text and the confirmation of its delivery, all this if the party has granted the court the proper data; d) a wider meaning was given to the notion of "informed timeframe" as representing any hypothesis according to which it can be presumed that the party has received the citation and knows the term (art. 224 of the new Code of Civil Procedure); e) it was introduced the appeal regarding the «slowness» of the trial, based on which the party considering that the cause is slowed down shall be entitled to take legal measures in order to resolve the situation (cases mentioned in points 1-4, second paragraph of article 515 of the new Code of Civil Procedure). The proceeding of this legal institution shall have an incidental character, developing before the court invested with the cause resolution, court which will pronounce a judgment; a remedy at law can be introduced against the court judgment to

the superior court. For its resolution, the superior court shall not be entitled to provide solutions in fact or in law problems that are meant to anticipate the way of the final resolution of the trial or to be detrimental to the judge's freedom to decide upon the cause submitted for trial. In order not to exist the risk that such a proceeding to become itself a way, a method, a purpose of slowing down the trial, the abuse in applying this proceeding shall be sanctioned<sup>26</sup>.

Complementary to the above mentioned provisions, pursuant to art. 218, first paragraph of the new Code of Civil Procedure, "the absence of the legally summoned party cannot prevent the cause resolution, if law does not say otherwise". In the same purpose, in art. 225, first paragraph of the new Code of Civil Procedure it is mentioned that "upon the request of that party, the term which it has been taken note of, pursuant to art. 224, or for which the summons were sent, can be changed only due to thorough reasons and with the summon of the parties. Their summon is made on short-term, in the advising chamber, and the resolution of changing the hearing represents the court's competence". In the second paragraph of the same article it is mentioned that "in case that the court cannot develop its trial activity, at the term settled, because of objective reasons, the term shall be changed, without the parties' summoning, and due to this fact they shall be summoned for the new settled term".

It must be said that the judgment, through dispositions of general nature, regarding the effective character of the right to appeal to justice/to a court (a component) and the right to a fair trial (as a complete guarantee), within an optimum and foreseeable time, does not represent the competence of the Romanian courts, because only the European Court of Human Rights has this opportunity, for each case. The circumstance that by means of remedies at law it is invoked the breach of the provisions enshrined in articles 5 and 6 of the New Code of Civil Procedure does not mean that the Romanian courts generally can settle, if national legislation assures or not an effective right to appeal to justice, or the right to a fair trial, within an optimum and foreseeable time, because articles 5 and 6 contain fundamental principles, and the Romanian courts check only the degree of observance/violation of specific texts which represent the application of those fundamental principles<sup>27</sup>.

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<sup>26</sup> The fourth title of the new Code of Civil Procedure, art. 515-519. Also, nowadays, a special emphasis is put on the stringent problem of the dispersed, non-unitary practice within our country in order to resolve it, given the fact that the feeling of distrust in the Romanian legal system is due to this aspect, as well. The new Code of Civil Procedure (and the «small justice reform», Law 202/2010 regarding certain measures designed for the acceleration of trials resolution, which attempts to adopt the structural changes promoted by the New Code - not yet into force - and paradoxically to promote solutions different from those already adopted by the New Code), provides in article 508 the obligation (as opposed to the old formulation enshrining the right of subjects with legal standing to notify the High Court) of notifying the supreme court with reference to the admission of "presence of a non-unitary jurisprudence", not only by the institution of attorney general and the board of administration of the Appeal Courts, but also by those at the level of the High Court of Justice and Cassation, and by the Ombudsman. The content of article 508 of the New Code of Civil Procedure is identical with that of art. 329 of the actual Code of Civil Procedure, as it has been amended and added through Law no. 202/2010. For an approach of this difficult issue for the Romanian legal system, see I. Leș, *Assurance of a Unitary Jurisprudence in the Perspective of Future Code of Civil Procedure*, in the Judicial Courier, no. 11/2008.

<sup>27</sup> M. Tăbărcă, *op. cit.*, pp. 55-56. Of course, in our country, a court that has the competence to pronounce through general principles on different rights and liberties enshrined in the Romanian Constitution is the Constitutional Court of Romania, a court which has a *sui generis* nature. Given the fact that art. 21 of our Constitution provides the Right to appeal to justice, and by the means of article 11 paragraph (2) and article 20 of the same

## 5. CURRENT QUALITATIVE AND QUANTITATIVE APPROACHES OF THE MANAGEMENT OF JUDICIAL TIME

Within the reunion which took place on the 19-20th of May 2011, in Strasbourg, the Coordination Group of SATURN (CEPEJ) decided to focus on qualitative and quantitative approaches of judicial timeframes at the level of the European courts. This Coordination group proposed professional training sessions of these courts, in order to implement in an effective way, CEPEJ instruments - for an improvement of the *management of judicial time*. Also, that group has closely analysed the specific information, from every judicial system, for a detailed knowledge of judicial timeframes depending on the type of the case submitted for trial before competent authorities.

## 6. FAIR TRIAL ASSURANCE AND THE STATE SUBJECT TO THE RULE OF LAW

A «fair trial» - as a fundamental human right and justice organizational and functioning principle - represents an essential structural element of the state subject to the rule of law, through the necessity of applying the principle of supremacy of law by authorities. In this view, the concept of state subject to the rule of law inevitably includes the analysis of the requirement of complying with fundamental rights and, implicitly, the fair character of proceedings<sup>28</sup>.

If the state represents that institution, based on a group of people residing in a certain region, capable to self-administer, in order to manage the legislative, executive and judiciary power, the state subject to the rule of law represents a legal and political concept defining a form of the democratic regime of government from the perspective of the existent relationships between the state and right, power and law, through the assurance of fundamental human rights and freedoms in the power exercise<sup>29</sup>. Three aspects are characteristic to the state subject to the rule of law: a) human rights enshrinement and assurance; b) strict subordination of state authorities to the national and international rules of law (with the condition of ratifying the treaties where they are included) and c) separation of powers under the conditions of an existence of a mutual control between them<sup>30</sup>.

Under these circumstances, the «fair trial» is presented as an essential condition for the existence of the state subject to the rule of law, because by means of assuring the fair development of a proceeding, certain premises are created for the exercise of human fundamental rights and freedoms.

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Constitution, the European Convention on Human Rights is part of the internal dimension of our legal system, it can be appreciated if the respective right has an effective character or not (author's note).

<sup>28</sup> For a general view of this issue, through the fair trial right approach from different means of presentation, namely human fundamental right, justice organisational and functioning principle, existence condition of the state subject to the rule of law, see the monography developed by M. Damaschin, *The Right to a Fair Trial in Criminal Issues*, Ed. Universul Juridic, Colectia Biblioteca de Drept Penal, Volume 4, Bucharest, 2009.

<sup>29</sup> I. Ceterchi, I. Craiovan, *Introduction to the General Theory of Law*, Ed. All, Bucarest, 1993, p. 152.

<sup>30</sup> G. Vrabie, *L'etat de droit, principe d'amenagement et de fonctionnement des autorités publiques de Roumanie, Etudes de droit constitutionnel*, European Institute, Iași, 2003, pp. 178-179, *apud*. M. Damaschin, *op. cit.*, p. 24.

## 7. CONCLUSIONS

The fair trial institution, although relatively recently introduced in the Romanian legal system, represents a legal institution of crucial significance. In this view, the right to a fair trial received constitutional enshrinement, in 2003, through the provisions of art. 21, third paragraph of the amended Constitution, according to which "The parties have the right to a fair trial and to cases' resolution within a reasonable time". However, since the moment of ratification of the European Convention on Human Rights in Romania, in 1994, its dispositions concerning the fair trial's exigencies could be invoked within the proceedings of our country, in the virtue of the assimilation effect with the norms of the internal right concerning the international documents ratified by the legislative power, enshrined in art. 11, second paragraph of the Constitution. Also, the analysis of the procedural guarantees mentioned in art. 6 of the European Convention of Human Rights proved that most of them could have been invoked, before 1994 (the year Romania ratified the European Convention on Human Rights) as internal procedural norms.

For the first time in the Romanian legislation, the new Code of Civil Procedure provides as a fundamental principle of the civil trial *the right to a fair trial, within an optimum and foreseeable time*, fact which is proposed to bring into first plan, to emphasize the continuous preoccupation for the assurance and observance of rights and interests of parties in a society thought to be the missionary and the applicator of general human rights and freedoms, along with the fair trial.

It only remains the aspect that, in the future, within the process of modifying the Constitution, the phrase of «optimum and foreseeable time» will also obtain constitutional legal value.

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