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Nicolae VOICULESCU[*]
Maria-Beatrice BERNA[**]

ABSTRACT

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) constitutes the foundational legal instrument upon which the first international normative framework specifically dedicated to the protection of women's rights was constructed. Yet, the exhaustive scope of this regulatory architecture has not, mutatis mutandis, yielded an equally exhaustive guarantee of protection. Although the principles of equality and non-discrimination lie at the heart of the Convention's normative design and operate as transversal mechanisms for securing the rights conferred upon women, the phenomenon of gender-based violence appears to occupy a marginal position within this framework. In this paper, we aim to examine the modus operandi through which a universal guarantee of protection against all forms of violence perpetrated against women may be inferred from the substantive provisions of CEDAW, alongside the quasi-judicial functions exercised by the Committee established under CEDAW (the Committee) in accordance with the Optional Protocol – which establishes the mechanism for the consideration of individual communications – constitute the dual dimensions of the CEDAW's normative architecture.

KEYWORDS: *regulatory model; substantive provisions; procedural enshrinement through the mechanism of individual communications; indirect interpretation of gender based violence; CEDAW;*

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Reconciling the Formalism and Substance of international regulations: Conceptualizing Violence Against Women as an Implicit Normative Objective of the CEDAW

The CEDAW's emphasis on developing an advanced regulatory framework for ensuring the protection of women against discrimination derives intrinsically from both its title and Article 1[1], provisions that articulate the overarching purpose and objective of the instrument. A restrictive interpretation of Article 1 might suggest that discrimination against women can be assessed solely in relation to the rights and freedoms to which women are entitled as rights holders, discrimination being that factor which compromises or nullifies the recognition, enjoyment, and exercise of women's human rights across all spheres of activity, without distinction.

However, a closer examination of Article 1, reveals that discrimination possesses a **cross-cutting** character, insofar as it permeates and affects the full range of women's human rights, while simultaneously exhibiting a **dynamic, circumstantial, and intersectional** nature. Its dynamic dimension stems from the fact that the ways in which discriminatory practices impact women's human rights are observable only in the context of their actual exercise, thus revealing evolving patterns of harm and inequality. The circumstantial character of discrimination is directly shaped by the specific domain – social, civil, political, economic, public, or private – in which women find themselves when exercising their rights. These contextual variations underscore the multifaceted ways in which discriminatory structures manifest and reinforce gender-based inequalities.

The intersectional nature of discrimination pertains to the complexity of women's identities and operates in conjunction with its circumstantial dimension. When women are situated in diverse social contexts, they embody different social statuses, each of which renders them susceptible to experiencing the effects of discrimination in distinct and context-specific manners.

[1] For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The conceptual complexity and expansive reach of the notion of discrimination against women provide the analytical foundations for recognizing the full spectrum of juridical forms through which discrimination may materialize and, by extension, for subsuming gender-based violence within the definitional contours of this concept. Such an understanding is corroborated by a systematic and teleological interpretation of the provisions contained in Part I of the CEDAW Convention (Articles 1-6).

The rationale for adopting an extensive interpretative framework – one that attributes to the concept of discrimination the entirety of the regulatory content embedded in the introductory section of CEDAW – has been consistently affirmed in the authoritative interpretative instruments issued in relation to the Convention. Programmatic guidance further confirms that CEDAW is to be read in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which mandates that treaty interpretation must take into account not only the text itself but also its contextual environment and the subsequent practice generated through its implementation[2].

This interpretative orientation underscores the **inherently flexible, dynamic, and evolutionary character of the Convention's substantive obligations**. It also reinforces the premise that, in securing comprehensive protection for women against all forms of violence, the entire continuum of discriminatory manifestations – whether already established or emergent – must be contemplated. In this sense, CEDAW reveals a normative architecture capable of accommodating evolving forms of gender-based harm, thereby ensuring the enduring relevance and adaptability of its protective function.

This overarching premise is further fortified by the Committee's authoritative interpretative practice concerning Article 2 of the CEDAW, a provision that constitutes the normative cornerstone of state obligations to adopt all appropriate legislative, administrative, judicial, and other measures aimed at the eradication of discrimination against women. The ambit of Article 2 is markedly comprehensive, as it encompasses not only the creation of legal and institutional frameworks but also the development of jurisdictional and jurisprudential mechanisms necessary for the effective

[2] For further details, please see: *Background Paper of the UN CEDAW Committee, CEDAW Convention and the practice of the CEDAW Committee as the basis of the international legal framework on Gender-Based violence against Women and Girls*, paragraph 2, page 1.

prevention and suppression of violence against women. Additionally, the Committee explicitly acknowledges the evolutionary nature of CEDAW and emphasizes that the general purpose of the regulatory architecture articulated in Article 2 must be construed in systematic correlation with Articles 1, 3, 4 and 24. Its interpretation is to be informed by the entire corpus of programmatic and interpretative instruments – General Recommendations, concluding observations, and views on individual communications – emanating from the Committee's ongoing practice.[3]

This interpretative openness, which governs both the meaning and application of Article 2 and, correspondingly, the substantive reach of the provisions contained in Part I of the Convention, manifests in several significant ways. First, the regulatory focus is not restricted to discrimination grounded solely in biological sex; rather, it extends to encompass discrimination based on gender. In doing so, it addresses not only differential treatment deriving from biological distinctions between men and women, but also the broader constellation of inequalities embedded in socially constructed norms, cultural stereotypes, and hierarchical structures characteristic of patriarchal systems of power.

Secondly, among the interpretative dimensions emphasized by the Committee, particular prominence is accorded to the principle that the prevention and elimination of discrimination constitute obligations borne jointly by the state and private actors. These obligations persist with equal force during peacetime and in situations of armed conflict, thereby underscoring the Convention's broad conception of responsibility for safeguarding women's rights across all spheres of social, political, and institutional life. Thirdly, equally significant is the Committee's affirmation of intersectionality as a foundational criterion guiding the application of non-discrimination guarantees. In this sense, sex and gender as prohibited grounds of discrimination cannot be understood in isolation, but must be analyzed in conjunction with other identity markers – such as race, ethnicity, religion, or socioeconomic condition – which, when intersecting, generate qualitatively distinct and often exacerbated forms of disadvantage. Intersectionality thus provides the analytical framework necessary for

[3] Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, paragraph 5 and following.

capturing the layered and multifaceted manifestations of discrimination experienced by diverse groups of women.[4]

Lastly, the architecture of state obligations in the field of non-discrimination may be delineated along three complementary axes. First, the obligation to **respect** requires states to abstain from adopting laws, policies, or governmental priorities that produce discriminatory effects, whether directly or indirectly. Second, the obligation to **protect** demands affirmative action by state authorities to prevent, deter, and remedy discriminatory conduct perpetrated by private individuals or entities. Third, the obligation to **fulfil** imposes upon states the duty to adopt comprehensive measures – legislative, administrative, budgetary, and programmatic – aimed at ensuring the full and effective realization of women's rights, including, where appropriate, the implementation of temporary special measures designed to expedite the attainment of substantive equality.[5]

Articles 4 and 5 of the CEDAW Convention further refine and consolidate the thesis of an expansive and teleological interpretation of discrimination against women, articulating a direct and necessary link between the ideological and structural dimensions of discriminatory phenomena and the adoption of special measures designed to secure the effective integration of women into all domains of social, political, and economic life. This interpretative trajectory is anchored in the explicit recognition of the historical subordination to which women have been subjected – a subordination perpetuated through deeply embedded patriarchal norms, cultural constructs, and behavioural patterns that, over time, have shaped and sedimented collective modes of thought.

Under the heading of *temporary special measures*, Article 4 delineates the normative instruments required to attain substantive equality of outcomes between women and men. Its provisions underscore the socio-legal reality that biological differences and culturally mediated distinctions between the sexes may necessitate the adoption of targeted and temporary

[4] Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, paragraphs 11, 13, 18 and following.

[5] Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, paragraph 9 and following.

interventions in favour of women, precisely because they constitute a historically disadvantaged and structurally marginalized social group. Such measures do not undermine the principle of equality; rather, they constitute a juridical mechanism indispensable to its full realization, by correcting entrenched patterns of inequality that cannot be remedied through formal equality alone. Historically constructed cultural and social contexts have shaped the lived experiences of women and men in asymmetrical and often hierarchical ways, cultivating relations of power and domination that have systematically relegated women to subordinate roles within both public and private spheres. The normative logic of Article 4 is thus justified by the need to recognize, interrogate, and redress the differentiated existential paradigms that have marked the lives of women and men. It further affirms the legitimacy of providing enhanced support to women as a social category whose entitlement to such support has, for prolonged periods, been acknowledged only marginally and insufficiently within legal and institutional frameworks.[6]

The underlying rationale that permeates the interpretation of Article 4 may be distilled into the principle that measures adopted to support women as a historically oppressed social group – whether in the form of quotas or forms of leave grounded in biological or physiological particularities – cannot, in themselves, be regarded as discriminatory. Rather, such measures constitute legitimate and necessary instruments for advancing social equity, insofar as they seek to redress structural inequalities and to facilitate the full and effective integration of women as holders of human rights. The legitimacy of such measures derives precisely from their temporary character, which confines their operation to obtaining substantial equality between men and women.

Reaffirming the ideological and structural roots of discrimination against women, Article 5 of the CEDAW approaches the issue along two complementary dimensions: (1) the elimination of stereotyped patterns of thought and conduct grounded in custom, tradition, or cultural practice; and (2) the promotion of education within the family as a means of equalizing gender roles, including with respect to family responsibilities and the upbringing of children. Education is thus conceptualized as a transformative instrument

[6] For further details, please see, Committee on the Elimination of Discrimination against Women, *General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures),* Thirtieth session (2004), pages 1-5.

capable of reshaping human personality and social consciousness. Its deployment is envisaged as essential to dismantling the historically entrenched and ideologically perpetuated barriers that impede the attainment of gender equality.[7]

The interconnected analysis of the provisions constituting the introductory section of CEDAW underscores the intrinsic legitimacy of addressing gender-based violence as an essential component of the Convention's implementation. Discrimination against women, whether justified by cultural arguments or historically entrenched traditions, frequently manifests in the form of gender-based violence. This reality underscores the imperative for a coherent and coordinated response from state institutions, which may necessitate the adoption of temporary special measures as part of a comprehensive strategy to address violence as a structural and ideologically rooted form of discrimination.

Refining interpretative frameworks and explicitly affirming gender-based violence within the sphere of discrimination

The preceding section of this paper demonstrates that the normative gaps concerning the protection of women against violence, as revealed by CEDAW, operate along two principal axes: (1) the absence of a clear interpretative standard explicitly affirming that gender-based violence constitutes a form of discrimination necessitating comprehensive and coherent regulatory response, grounded in the Convention as a whole; and (2) the Committee's interpretative practice regarding the foundational articles of CEDAW, which addresses violence in a fragmented and diffuse manner, rather than as a unified phenomenon.

In light of these considerations, the present section examines the interpretative standards established by the Committee, which unequivocally recognize gender-based violence as encompassed within the scope of discrimination. Notably, early efforts to compensate for the absence of an *expressis verbis* reference to gender-based violence in the Convention's text were articulated through the measures set forth in General Recommendation No. 12.

[7] For further reference, Committee on the Elimination of Discrimination against Women, *General recommendation No. 36 (2017) on the right of girls and women to education*, 27 November 2027, paragraphs 24 and 25.

This Recommendation underscores the Committee's position that Articles 2 and 5 of CEDAW must be construed as obligating States Parties to ensure protection of women from all forms of violence, whether occurring within the family, the workplace, or any other domain of social life. From a procedural standpoint, Recommendation No. 12 further advises that States Parties incorporate into their periodic reports to the Committee detailed information concerning: protection of women against incidents of daily violence; adoption of measures to eradicate violence; comprehensive support services for women victims of violence; the collection and reporting of statistical data on violent incidents of any nature affecting women.[8]

General Recommendation No. 19 constitutes a seminal instrument in explicitly articulating the equivalence between violence against women and discrimination. The Committee emphasizes that the elimination of discrimination against women is inextricably linked to the prevention and eradication of gender-based violence, underscoring the inseparability of these obligations. The Recommendation further affirms that, for the purposes of CEDAW, the conceptualization of discrimination necessarily encompasses acts of gender-based violence. In parallel with other forms of discrimination, gender-based violence produces profound and multifaceted infringements upon women's human rights, affecting inter alia the right to life, freedom from torture, access to equal humanitarian protection, liberty and personal security, equality before the law, equality within the family, the right to health, and the right to work. The Recommendation also broadens the ambit of state responsibility, establishing that state actors are accountable not only for their own conduct but also for acts of violence perpetrated by private individuals when such acts fall within their effective control or oversight. Moreover, the Committee identifies gender stereotypes as a primary structural determinant of violence against women, insofar as they serve to objectify women and entrench male domination. Within this framework, General Recommendation No. 19 underscores that, in relation to Article 6 of CEDAW, practices such as trafficking and prostitution are exacerbated by structural conditions including poverty, unemployment, and armed conflict. Gender-based violence transmitted through harmful cultural practices further undermines the right to health and disproportionately impacts rural women, thereby perpetuating systemic inequality and

[8] Committee on the Elimination of Discrimination against Women, *General recommendation No. 12: Violence against women*, Eighth session (1989).

reinforcing entrenched patterns of social subordination. Furthermore, practices such as coerced abortions and forced sterilizations constitute profound infringements upon women's sexual and reproductive rights and are to be unequivocally classified as forms of gender-based violence. Within the familial domain, women are subjected to a spectrum of interrelated and mutually reinforcing forms of violence – physical, psychological, sexual, and economic – that operate both insidiously and cumulatively, thereby perpetuating structural subordination. [9]

General Recommendation No. 35 of the Committee[10] builds upon the conceptual foundations established in Recommendation No. 19, further elaborating them to the extent of recognizing the prohibition of gender-based violence against women as a principle of customary international law. The principal implication of this legal classification is that, at the international level, the elimination of gender-based violence against women is construed as a shared objective and obligation of States. This recognition engenders coordinated action by state actors to prevent and eradicate acts of violence, grounded in the firm conviction that the protection of women's rights against violence constitutes a collective human commitment, equivalent in normative weight to the protection of fundamental human rights more broadly.

Accordingly, the codification of the fight against gender-based violence as an international customary norm emerges from the interplay of two complementary dimensions: the **operative dimension**, encompassing the concrete initiatives and measures undertaken by states, and the **psychological dimension**, which validates and consolidates these initiatives by fostering a shared conviction within the international community regarding the legitimacy, necessity, and normative correctness of such actions.[11]

General Recommendation No. 35 further consolidates the comprehensive normative framework for the protection of women against gender-based violence by: (1) mandating that all forms of violence be addressed,

[9] Committee on the Elimination of Discrimination against Women, *General recommendation No. 19: Violence against women*, Eleventh session (1992)**.

[10] Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 26 July 2017.

[11] Michael Wood, Omri Sender, *Customary International Law,* article available at: *https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393.*

including those perpetrated or facilitated by other states, intergovernmental organizations, armed groups, or private corporations; (2) highlighting the diminution of women's protection when reservations are made to the provisions of CEDAW, with particular emphasis on Articles 2 and 16, whose reservation is deemed incompatible with the object and purpose of the Convention; and (3) advancing preventive and remedial measures grounded in a victim-centered approach, which prioritizes the effective participation and agency of women survivors in the design and implementation of protective mechanisms.[12]

Operationalizing the Nexus Between Discrimination and Gender-Based Violence in the Committee's Quasi-Jurisdictional Practice

The clarifications advanced by the Committee regarding the interpretative relationship between the elimination of all forms of discrimination against women and gender-based violence are likewise reflected in concrete, practice-oriented terms. The provisions of the Optional Protocol[13] to the Convention on the Elimination of All Forms of Discrimination against Women establish a procedural framework that enables a pragmatic examination of the nexus between discrimination and violence, viewed through the lens of the Committee's quasi-judicial mandate to assess individual communications[14].

In *Sandra Luz Román Jaimes v. Mexico*[15], the Committee addressed a particularly intricate factual matrix in which gender-based violence materialized in multiple and intersecting forms. The alleged victim's mother contended that the acts of domestic violence and other forms of

[12] Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 26 July 2017.

[13] Adopted by the General Assembly of the United Nations on October 6, 1999. Romania ratified the Protocol by Law No. 283/2003, published in the Official Gazette of Romania, Part I, No. 477 of July 4, 2003.

[14] Articles 1-7 of the Optional Protocol.

[15] Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 153/2020, date of adoption of the decision 24 October 2022, C*ommunication submitted by*: Sandra Luz Román Jaimes (represented by counsel, Idheas, Litigio Estratégico en Derechos Humanos), *Alleged victim*: Ivette Melissa Flores Román.

ill-treatment[16] directed against her daughter had not been investigated with the requisite diligence, thereby perpetuating a climate of impunity favorable to the perpetrator. The cumulative factual elements demonstrating the absence of a gender-sensitive perspective in the investigative process include: (1) the prevalence of stereotypical assumptions that informed the authorities' decision to refrain from initiating an investigation; and (2) the belated and discriminatory nature of the investigative measures eventually undertaken, marked by the failure to consider the specific features that define and substantiate acts of domestic violence; (3) the circumstance that the perpetrator's father was himself a member of the police force and had been under investigation for unlawful deprivation of liberty, bodily harm, torture, and rape, a factor that further amplified the structural asymmetries of power and the institutional vulnerabilities surrounding the case; (4) the enforced disappearance of the victim, which occurred against the backdrop of repeated acts of violence perpetrated by the family of her former partner following her decision to leave the abusive relationship, thereby underscoring the continuum of gender-based violence and the heightened risks faced by women attempting to exit situations of coercion and control.[17]

With regard to the merits of the case, the Committee reaffirmed the State's positive obligation to initiate criminal proceedings in situations of gender-based violence that threaten the victim's life, physical integrity, and health. The justification for such an extensive degree of state involvement in addressing discriminatory practices stems from the need to recalibrate the power dynamics between the victim and the aggressor. By assigning heightened responsibility to state authorities, the prevailing conditions of oppression that enable violence against women are counteracted, and the perpetrator is duly held accountable for his conduct. In essence, the State's due diligence obligation becomes procedurally manifest through the implementation of an effective investigation grounded in the principles of gender responsiveness, promptness, and thoroughness. From a multi-disciplinary standpoint, these procedural requirements translate into the empowerment of the victim, the dismantling of her position of subordination

[16] During the abusive relationship, the victim was forbidden to leave the house, was forced to follow a certain dress code, was beaten, harassed, threatened, humiliated, separated from her family and friends, deprived of her freedom, etc.

[17] See, at large, paragraphs 2.1.-2.5. of Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 153/2020, *op.cit*.

vis-à-vis the aggressor, and the affirmation of her status as an autonomous bearer of human rights entitled to equal protection from public authorities.[18]

An innovative dimension articulated by the Committee in its assessment of the case is the explicit acknowledgment of a direct conceptual and causal link between gender-based violence against women and enforced disappearance. In developing its reasoning, the Committee expressly affirms that enforced disappearances of women occurring within the broader context of domestic violence fall squarely within the scope of discrimination as defined by Article 1 of CEDAW. The Committee further scrutinizes the relationship between the State's failure to exercise *due diligence* in investigating acts of violence and its responsibility toward women who become victims of enforced disappearance. It emphasizes that, although the authorities could not, *ab initio*, be held directly responsible for the victim's disappearance, their inadequate and ineffective engagement in investigating the prior incidents of violence contributed to an escalation that ultimately materialized in the form of enforced disappearance. Accordingly, the Committee concludes that the State has breached the provisions of CEDAW guaranteeing protection against discrimination (Articles 1, 2, 5, and 15), establishing a direct normative link between these obligations and the victim's disappearance, which emerged as a foreseeable consequence of the State's passivity in addressing earlier acts of violence. This interpretative perspective is further reflected in the Committee's recommendations, which predominantly focus on ensuring the accountability of state agents involved in the search for the victim and in preventing future violations of a similar nature by applying an intersectional and a victim centered approach.[19]

In assessing another individual communication[20], the Committee explored the manner in which the sexual slavery endured by women in the

[18] See, at large, paragraphs 7.2.-7.3. of Committee on the Elimination of Discrimination against Women*,* Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 153/2020, *op.cit*.

[19] For further details, please see: paragraphs 7.4.-7.8., 9. of Committee on the Elimination of Discrimination against Women*,* Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 153/2020, *op.cit*.

[20] Committee on the Elimination of Discrimination Against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 155/2020, date of adoption of views 17 February 2023, *Communication submitted by*: Natalia M. Alonzo, Perla B. Balingit, Virginia M. Bangit, Francia A. Buco, Dela Paz B. Culala, Belen A. Culala, Jovita A. David, Zenaida P. Dela Cruz, Fermina B. Dela Pena, Pilar Q. Galang, Januaria G. Garcia, Rufina C. Gulapa, Marta A. Gulapa, Crisenciana

Philippines throughout the period of colonial occupation by Imperial Japan shaped the contemporary understanding of the State's obligations to protect women from discrimination and gender-based violence.

In the individual communication submitted by a group of Filipino women, the principal allegation concerned the fact that, between 1932 and 1945, Filipino women were exploited as instruments of psychological support for Japanese soldiers – commonly referred to as *comfort women* – by being subjected to sexual slavery within the Japanese military facility known as the *Red House*. They were subsequently exposed to systematic rape, related forms of sexual violence, torture, and inhumane conditions of detention. Although neither the Tokyo Tribunal (International Military Tribunal for the Far East) nor the 1956 Peace Treaty between Japan and the Philippines explicitly addressed the institutionalized system of sexual slavery imposed upon comfort women, official acknowledgment of the sexual violence committed against them emerged with the establishment of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery. This development opened the path for a renewed international discourse on the right of women victims of wartime sexual violence to the restoration of their rights, in light of the historical discrimination, subordination, and structural injustices they had systematically endured.[21]

Upon examining the circumstances of the case, the Committee identifies a clear pattern of discriminatory treatment between Filipino women who were subjected to sexual slavery and male war veterans. The central argument evidencing this unjustified differential treatment – one lacking any objective or reasonable justification – lies in the fact that the primary national institution tasked with monitoring the implementation of international obligations concerning women's rights (the Philippine Commission on Women) failed to address the historical, institutionalized system of sexual slavery to which these women had been subjected. By contrast, Filipino male war veterans have long benefited from the social entitlements attached

C. Gulapa, Rufina P. Mallari, Erlinda Manalastas, Emilia C. Mangilit, Lourdes M. Navarro, Esther M. Palacio, Teofila R. Punzalan, Maria L. Quilantang, Candelaria L. Soliman, Seferina S. Turla and Isabelita C. Vinuya (represented by counsel, European Center for Constitutional and Human Rights and Center for International Law Manila); *Alleged victims*: The authors.

[21] Committee on the Elimination of Discrimination Against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 155/2020, date of adoption of views 17 February 2023, *op.cit*., paragraphs 2.1-2.11.

to their recognized status. The sexual violence inflicted upon Filipino women during the war reflects a set of extreme acts that gravely compromised their physical and psychological integrity, as well as their inherent human dignity – acts that amount to torture within the meaning of international human rights law. In this regard, the enduring consequences of such torture have been perpetuated through a broader pattern of systemic discrimination, reinforced by the State's persistent failure to acknowledge the gravity of the human rights violations these women suffered. This failure of acknowledgment was further compounded, at the procedural level, by the State's omission to provide the essential mechanisms of redress, compensation, and rehabilitation – measures indispensable for the effective legal recognition of the women's status as victims.[22]

The Committee's recommendations address the discrimination manifested through the sexual violence to which the victims were subjected across several dimensions: (1) **institutional** – by proposing concrete measures aimed at eliminating the structural disparities between survivors of sexual slavery (*comfort women*) and male war veterans; (2) e**conomic** – through the establishment of a State-funded reparations and compensation mechanism; (3) **symbolic** – by preserving the *Red House* site or, alternatively, by designating an equivalent memorial space to honor the women who endured sexual slavery. The latter is further strengthened by the Committee's call for the inclusion of information regarding the human rights violations suffered by Filipino women in academic materials, thereby ensuring public awareness and historical accountability.[23]

The individual communication *Tahereh Mohammdi Bandboni et al. v. Switzerland*[24] illuminates the nexus between harmful cultural practices and gender-based violence transmitted across generations. The author of the communication sought protection for herself and her family – her husband

[22] Committee on the Elimination of Discrimination Against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 155/2020, date of adoption of views 17 February 2023, *op.cit*., paragraphs 9.2.-9.5.

[23] Committee on the Elimination of Discrimination Against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 155/2020, date of adoption of views 17 February 2023, *op.cit*., paragraph 11.

[24] Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *Communication submitted by*: Tahereh Mohammdi Bandboni et al (represented by counsel, Florian Wick), Date of adoption of views, 15 May 2023.

and their two minor children – arguing that, if returned to the Islamic Republic of Iran, she would face gender-based persecution against which national authorities would be unable to provide effective protection. The author explained that her family – specifically her father and brother – opposed her intimate relationship with A.T., a young man of Kurdish ethnicity and Sunni religious affiliation. Upon merely contemplating this relationship, she was subjected to gender-based violence, including threats, harassment, and physical abuse, all occurring within a deeply patriarchal familial environment characterized by systemic discrimination and oppression of women. As her relationship with A.T. deepened and resulted in the birth of a child, the newly formed family was forced into hiding due to the escalating pressure and violence perpetrated by the author's father and brother. These circumstances compelled the author and her family to flee to Switzerland, where they applied for asylum on the grounds of a well-founded fear that, if returned to Iran, she would again be exposed to gender-based persecution. Their asylum application was ultimately rejected by the national authorities.[25]

Following a thorough examination of the circumstances, the Committee observes that the principal justification advanced by the national authorities for rejecting the author's asylum claim was the alleged impossibility of recognizing a well-founded fear of gender-based persecution when relying solely on the general human rights situation in the country of origin. The Committee underscores that the assessment of such a fear requires a contextualized, individualized inquiry capable of determining, in concrete terms, whether national authorities in the country of origin can effectively address the specific vulnerabilities identified by the victim. Although the respondent State itself acknowledged that gender equality and the protection of women from so-called "honor killings" are not consistently ensured in Iran through formal mechanisms, it nevertheless concluded that a finding of well-founded gender-based persecution could not rest upon an abstract notion of discrimination presumed to exist in the Islamic Republic of Iran. While the Committee concurs with the respondent State that an individualized assessment is indispensable, it diverges from the State's reasoning by emphasizing that such an assessment must fully incorporate

[25] See, in detail, Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *op.cit.,* 15 May 2023, paragraphs 2.1.-2.7.

the author's personal circumstances and particular vulnerabilities, rather than relying on generalizations about the national context.[26]

On the basis of this reasoning, the Committee identifies a clear correspondence between the author's personal characteristics – her Persian ethnicity, Shiite Muslim background, defiance of familial prohibitions, conception of a child outside marriage, exposure to physical and psychological violence during pregnancy justified in the name of "honor," and subsequent marriage to a man deemed undesirable by her family on account of his Kurdish ethnicity and Sunni faith – and the broader conduct of the Iranian authorities in cases of gender-based violence. In the Committee's assessment, a patriarchal, discriminatory, and structurally oppressive environment persists in the Islamic Republic of Iran, in which women are relegated to traditional and subordinate social roles, to the detriment of their rights to education, employment, health, and equality within family relations. These gendered stereotypes permeate both civil and criminal legislation and are reflected in institutional practices, rendering state authorities predisposed to fostering a climate of impunity for perpetrators, legitimizing domestic violence through references to cultural norms, and exhibiting systemic indolence toward cases of gender-based violence.[27]

In advancing its analysis, the Committee took into account the concept of *foreseeable risk*, namely the capacity to reliably assess the likelihood that the author would be subjected to gender-based persecution within the broader context of Iran's insidious and deficient human rights enforcement system. Moreover, when evaluating the conduct of the Swiss authorities in relation to the author's asylum application, the Committee articulated a line of reasoning that directly challenges the logic employed by the national authorities. Specifically, the Committee argues that, in adjudicating asylum claims, national authorities should refrain from relying on the standard of mere probability that an applicant will be subjected to gender-based persecution. Instead, they should apply the more protective standard of

[26] See, in detail, Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *op.cit.,* 15 May 2023, paragraph 7.4.

[27] See, in detail, Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *op.cit.,* 15 May 2023, paragraph 7.6.

reasonable possibility that the applicant may face discriminatory treatment upon return to her country of origin.[28]

This interpretative approach stands in contrast to the position of the respondent State, which had contended that the author's failure to report the violence to the Iranian authorities rendered her fears speculative and insufficiently substantiated. The Committee decisively rejects this argument, holding that the refusal to grant asylum solely on the grounds that the author did not seek protection from national authorities in Iran is untenable, particularly in light of the systemic gender-based violence and institutionalized discrimination characterizing the country's legal and social structures.[29]

According to the Committee, the respondent State arrived at a contradictory conclusion: although it acknowledged the author's heightened vulnerability, it nonetheless maintained that the Iranian authorities would be capable of protecting her upon return, although there exist sufficient grounds to cast serious doubt upon this line of reasoning. Consequently, the Committee finds that the Convention has been violated as a result of the respondent State's deficient assessment of both the objective circumstances and the subjective elements underpinning the author's fear of returning to her country of nationality. It therefore recommends the reopening of the asylum procedure and, pending its completion, the author's non-return to the Islamic Republic of Iran in light of the real and substantiated risk of gender-based violence. With respect to its general recommendations, the Committee underscores the need to recalibrate the legal grounds for asylum claims under domestic legislation so as to expressly include sex and gender. Such an approach would enhance the flexibility and responsiveness of national protection frameworks in addressing forms of violence against women that derive from monolithic and static interpretations of cultural norms.[30]

In another case[31], the Committee found that gender-based violence had occurred in the context of detention conditions that failed to incorporate a

[28] See, in detail, Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *op.cit.,* 15 May 2023, paragraph 7.7.

[29] *Ibidem*.

[30] For further details, see Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 173/2021, *op.cit.,* 15 May 2023, paragraphs 8 and 9.

[31] Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication

gender-sensitive perspective, thereby placing female detainees in a situation of heightened vulnerability. The factual circumstances of the case indicate that the authors of the individual communication, E.D. and M.D., were detained for non-compliance with regulations governing participation in public demonstrations. The conditions of their detention did not take into account the specific needs arising from the physiological and biological characteristics of women deprived of their liberty and resulted in violations of their dignity, insofar as these conditions were enforced under the supervision of male guards. In particular, the authors were compelled to dress, undress, and shower within their cells without the level of privacy required for such inherently intimate acts; they were not provided with hygiene products appropriate to menstruation and were required to request such items from male personnel; moreover, upon admission to the detention facility, E.D. was subjected to degrading treatment by male guards, having been forced to undress and perform physical exercises while naked.[32]

In light of these circumstances, the Committee reaffirmed the standards enshrined in the Mandela Rules concerning the requirement to ensure the presence of female staff in women's detention facilities, while also observing the lack of conformity of domestic legislation and practice with the Bangkok Rules. Taken together, these deficiencies supported the conclusion that guarantees of gender equality had been breached in the present case. The tolerance or facilitation of conduct by male guards that is incompatible with human dignity in their interactions with female detainees constitutes a distinct form of gender-based violence, with the potential to give rise to further violations of women's rights, particularly those relating to health and personal safety. Among its general recommendations, the Committee explicitly characterized sexual harassment in places of detention as a manifestation of gender-based violence and, implicitly, as a form of discrimination. It further underscored the necessity of preventing and addressing conduct that undermines the dignity of women deprived of their liberty

No. 157/2020, *Communication submitted by*: E.D. and M.D. (represented by counsel, Tatsiana Lishankova), *Alleged victims*: The authors,*Date of adoption of views*: 12 February 2024.

[32] Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 157/2020, *op.cit.*, paragraphs 2.1.-2.6.

through the adoption and implementation of gender-sensitive policies and protocols within detention settings.[33]

Conclusive findings

By reference to the interpretative guidance issued under CEDAW and the Committee's well-established quasi-jurisprudential practice, the protection of women against gender-based violence may be regarded as inherent in, and unequivocally embedded within, the normative substance of the Convention itself. Notwithstanding the Convention's dual approach to gender-based violence – encompassing both substantive and procedural dimensions – such violence continues to persist as a pervasive form of discrimination against women. This persistence is largely attributable to deeply entrenched discriminatory attitudes and behavioural patterns manifested by individuals, public authorities, and society at large. Owing to its multifaceted and systemic character, gender-based violence arguably constitutes one of the most complex forms of discrimination, possessing both lethal potential and the capacity to seriously and persistently undermine the effective protection of human rights. One of the central avenues of action in combating such violence, as reflected in the Committee's recommendations in its views on individual communications, lies in enhancing awareness of its multidimensional nature and in promoting integrated, victim-centred responses. At the same time, it is essential to acknowledge, at the international level, that victims of gender-based violence are entitled to specific forms of protection and corresponding rights, derived from the physiological and biological characteristics that are exposed and exploited within relationships marked by domination and control intrinsically linked to violence. Finally, transposing gender optics into the community as a guiding matrix for public action can be the focal point of sustained efforts to prevent and combat gender based violence.

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[33] Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 157/2020, *op.cit.*, paragraphs 7.7. and following.

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BILATERAL PROMISE OF SALE-PURCHASE. LIMITATION OF THE RIGHT TO REQUEST THE ISSUANCE OF A JUDGMENT THAT TAKES THE PLACE OF AN AUTHENTIC DEED. THE MOMENT FROM WHICH THE LIMITATION PERIOD BEGINS TO RUN

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ABSTRACT

The solution of the Brașov court commented in these pages deviates from the letter of the law, but it achieves a fair adaptation of the limitation regime to the particularities of the execution of contractual obligations. The interpretation given by the court violates the scope of application of art. 1669 paragraph (2) of the Civil Code and is therefore questionable in terms of formal legality, but, in light of the general principles of fairness and good faith, such a solution deserves to be supported, as it avoids sanctioning the creditor for the debtor's culpable inaction.

KEYWORDS: *promise to sell; real estate; land register; court decision that takes the place of a contract; limitation;*

By the lawsuit (...), the plaintiff (...) requested the court to force [the defendant] to conclude a sale-purchase contract in authentic form, suitable for registration in the land register, through which ownership over the real estate subject of the bilateral sale-purchase promise authenticated under no. 361/05.04.2021, concluded at the notarial office (...), real estate represented by a residential house, will be transferred to him (...), otherwise the decision that will be pronounced to take the place of an authentic sale-purchase contract, suitable for registration in the land register; the registration in the land register of his ownership over the real estate identified above, as well as to force the defendant to pay late payment penalties in the amount of

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0.01% of the real estate price, for each day of delay starting with 01.06.2022 and until the date of conclusion of the sale contract in authentic form, with the obligation of the defendant to pay court costs.

In the justification of the application, he indicated that, as a promissory buyer, he concluded with the defendant, as a promissory seller, a bilateral promise of sale-purchase, under which the defendant undertook to transfer the ownership over the previously described real estate. According to art. IV of the preliminary contract, the transfer of ownership was to be carried out by signing the authentic deed no later than 01.06.2022, the defendant assuming the obligation to prior register in the land register the real estate, an obligation that was only carried out on 26.01.2023. (...) After the registration of the real estate, the plaintiff notified the defendant in order to sign the authentic contract, by notification no. 1/30.05.2024, requesting him to appear before the public notary on 10.06.2024. The defendant did not appear, citing the unavailability of its representative, but did not indicate an alternative date. The plaintiff sent a new notification on 11.06.2024, by registered letter, scheduling the meeting for 26.06.2024, but the defendant did not appear at the notary on this date either. Subsequently, by notification no. 1065/11.06.2024 (...), the defendant informed the plaintiff that he no longer wished to conclude the sale contract at the price stipulated in the promise, requesting its renegotiation. The plaintiff claimed that this request is extra-contractual, unjustified, lacking legal and contractual basis, since the sale price had already been established and paid in full by him on the date of conclusion of the preliminary contract, namely the amount of 86,000 euros, the equivalent in lei of the amount of 422,784.60 lei, paid by payment order from the daughter's account, as shown in the attached documents.

In support of his claims, the plaintiff invoked the provisions of Article III of the preliminary contract, which establishes the fixed and intangible nature of the price, as well as Article IX of the same act, according to which any modification of the promise can only be made by an additional act signed by both parties. The plaintiff indicated that no such additional act was concluded. The plaintiff further indicated that the defendant unreasonably delayed his contractual obligations, including the tabulation (...), although the deadline for concluding the contract was 01.06.2022. This delay is attributable exclusively to the defendant.

Moreover, in an attempt to force the plaintiff to accept a higher price, the defendant resorted to abusive measures, consisting in the cessation of the supply of utilities in the building occupied by the plaintiff and his family,

namely electricity and water. The plaintiff invoked the provisions of art. 1166, 1170, 1266, 1270, 1279, 1530, 1531, 1536 and 1669 of the Civil Code, showing that the promissory buyer has fully fulfilled his obligations, while the defendant unjustifiably refuses to complete the sale. He emphasized that the preliminary contract is a bilateral legal act, generating mutual obligations, and, in the event of an unjustified refusal, the party that has fulfilled its obligations has the right to request the court to issue a decision that will take the place of an authentic contract, under the conditions of art. 1669 para. (1) Civil Code.

(...)

On 09.12.2024, the defendant filed a response to the summons and a counterclaim by which he invoked the exception of the limitation of the substantive right to action, and through the counterclaim he requested the rejection of the summons as unfounded, requesting the termination of the bilateral promise of sale-purchase (...), as a result of fulfilling the conditions provided for in art. 1271 para. (2) letter b) of the Civil Code, and in the alternative, obliging the plaintiff to pay the amount of 8310 lei, according to the invoice (...) issued on 11.04.2022.

Analyzing the documents and works of the file, with respect to the provisions of art. 248 of the Civil Procedure Code, with priority regarding the exception of the limitation of the substantive right to action, invoked by the response, the court notes the following:

About the exception to the limitation of the substantive right to action regarding the petition having as its object the issuance of a decision that will take the place of an authentic act, the court notes that in Art. VII of the bilateral promise of sale-purchase (...) having as its object the residential house and the related land, the parties agreed to conclude the sale-purchase contract no later than 01.06.2022.

The court notes that, according to art. 1669 paragraph (2) of the Civil Code, the right to action is limited in 6 months from the date on which the contract should have been concluded, and, according to art. 2523 of the Civil Code, the limitation begins to run from the date when the holder of the right to action knew or, according to the circumstances, should have known of its birth.

Thus, the court notes that, from the terms used by the parties when drafting the contractual clauses, results that, by the date on which the defendant's obligation to transfer the ownership in authentic form had to be fulfilled, the other obligations imposed by the contract had to be fulfilled as

well, namely the registration of the property in the land register or the obligations imposed by law, namely the presentation of the tax attestation certificate and the energy performance certificate.

According to art. 1676 of the Civil Code, "in the matter of sale of real estate, the transfer of ownership from the seller to the buyer is subject to the provisions of the land register", and according to art. 1658 paragraph (1) of the Civil Code, "if the object of the sale is a future asset, the buyer acquires the ownership at the moment when the asset is realized. With regard to buildings, the corresponding provisions of the land register are applicable".

According to the provisions of art. 37 paragraph (1) of Law no. 7/1996, "the ownership over the buildings is registered in the land register based on an attestation certificate issued by the local authority that issued the building permit, which confirms that the construction of the building was carried out in accordance with the building permit and that there is a receipt report upon completion of the works, as well as the other legal provisions in the matter and a cadastral documentation", and the provisions of art. 159 paragraph (5) of Law no. 207/2015 on the Fiscal Procedure Code establish the obligation to present, in the event of the alienation of the ownership over buildings, the fiscal attestation certificate attesting the payment of all payment obligations due to the local budget of the administrative-territorial unit within whose radius the property is fiscally registered, the consequence of concluding the deed in violation of these provisions being provided for in art. 159 paragraph (6) of Law no. 207/2015 on the Fiscal Procedure Code, according to which "the acts by which buildings, land, or means of transport are alienated, in violation of the provisions of paragraph (5), are null and void".

As the lack of these documents prevents the conclusion of the sale-purchase deed in authentic form, failure to meet these requirements within the procedure provided for by art. 1669 paragraph (1) of the Civil Code can only lead to the rejection of the application, the aforementioned provisions requiring that all conditions of validity be met.

In the same sense are the provisions of art. 57 of Government Emergency Ordinance no. 80/2013, according to which "(1) In the case of applications requesting the issuance of a decision that takes the place of an authentic act of alienation of real estate, the court will request an extract from the land register for real estate that has an open land register or a certificate of encumbrances for real estate that does not have an open land register, a tax certificate issued by the specialized department of the local public

administration authority and proof of up-to-date debits of the contribution quotas to the expenses of the owners' association".

(...) the court notes that, according to art. I of the bilateral promise, the defendant obliged himself to register the building in the land register, in the name of the company. Thus, given that this obligation was a preliminary obligation to the conclusion of the sale deed, the court notes that there is a postponement of the beginning of the limitation period, within the meaning of art. 2523 Civil Code, the birth of the right being conditioned by other preliminary obligations, starting from the way in which the parties agreed by pre-contract, there being a close connection between the completion of the construction, the registration of the residential building and the delivery of a decision by which the defendant is obliged to conclude the sale-purchase contract.

As a result, given that the property was not registered in the land register, the court could not issue a decision that would take the place of a contract according to the procedure provided for in art. 1669 paragraph (1) of the Civil Code. Under these conditions, the limitation cannot be invoked against the creditor of the obligation to complete the sale-purchase contract in authentic form, because the previous operations, assumed by the defendant, are the completion of the building and its registration (...).

In this regard, the court will reject the exception of the limitation of the claim for the issuance of a decision that will take the place of an authentic deed, invoked by the defendant, as unfounded. (...)

(Brașov Tribunal, 1st civil section, sentence no. 283 of July 11th, 2025, available at www.rejust.ro, accessed on November 11th, 2025, ***with Note by M. Tăbăraș and A.-A. Moise****)*

NOTE

1. The factual situation

The decision reproduced in the excerpt raises several interesting legal issues, but for the present judicial practice note we are only interested in the issue of limitation.

In this case, the Brașov Tribunal was called upon to rule on the request made by the promisor-buyer, based on art. 1669 paragraph (1) of the Civil

Code[1], with the object of issuing a judgment to take place of a sale contract[2]. The defendant (the promisor-seller) invoked the exception of limitation, claiming that the 6-month period provided for in art. 1669 paragraph (2) of the Civil Code began to run on the date on which the parties agreed to complete the sale, and the action was filed late.

The court rejected the exception as unfounded, holding that the right to action did not arise on the date agreed for the conclusion of the contract, since the defendant had not fulfilled the prerequisites imposed by law and the promise, namely the registration of the property in the land register. Pursuant to art. 2523 Civil Code, it was considered that the limitation could not begin to run until the moment this formality was fulfilled.

2. The legal issue

Basically, the court's solution is generally aligned with the opinions in the specialized literature[3] and judicial practice[4], which hold that, in order to

[1] Law no. 287/2009 on the Civil Code was republished in the Official Gazette no. 505 of July 15th 2011 and entered into force on October 1st 2011, according to art. 220 para. (1) of Law no. 71/2011 for the implementation of Law no. 287/2009 (published in the Official Gazette no. 409 of June 10th 2011).

[2] According to the High Court of Cassation and Justice (H.C.C.J.), the panel competent to judge the recourse in the interest of law, dec. no. 8/2013, published in the Official Gazette no. 581 of September 12th 2013, "the action requesting the issuance of a court decision to take the place of an authentic deed of sale-purchase of real estate has the character of a personal real estate action. The territorial jurisdiction to resolve such an action, registered before February 15th 2013, is determined under the conditions of art. 5, 7 and, respectively, art. 10 point 1 of the Code of Civil Procedure in force on the date of registration of the application".

[3] See, e.g., R. Luchianov, *Conditions under which a decision can be issued that will take the place of a contract in the real estate field*, in Romanian Case Law Review no. 2/2022, available at www.sintact.ro, accessed on November 11th 2025: "The need to present an extract from the land register, the tax certificate or the proof of execution of the pre-emption procedure results from public order norms, so the active role of the court requires their request ex officio if the court does not find other reasons for rejecting or canceling the application that would contradict this need".

[4] H.C.C.J., 2nd civil section, decision no. 235 of February 4th 2021, available at www.scj.ro, accessed on November 11th 2025: "the undisputed factual situation regarding the non-registration of the property that was the subject of the parties' agreement was noted, it being known that, in the absence of the steps taken by the promisor seller to register the property in the land register and to obtain the land register extract and the tax attestation certificate, the plaintiff who brought the action cannot carry out these

issue a decision that takes place of a sale contract regarding real estate, the immovable property must be registered in the land register.

From the perspective of positive law, the decision is certainly surprising. Art. 1669 para. (2) Civil Code is particularly clear: "The right to action shall be limited in 6 months from the date on which the contract should have been concluded". Thus, the court chose to ignore the letter of the law. Art. 1669 para. (2) Civil Code was considered inapplicable, art. 2523 Civil Code („The limitation period shall begin to run from the date on which the holder of the right to action knew or, given the circumstances, should have known of its birth") being preferred.

However, art. 1669 paragraph (2) Civil Code is a special rule enacted in the matter of the sale contract. The command in art. 2523 Civil Code is of a general nature and, therefore, according to the rules of common law, should *not* apply in the conflict with a special rule. The court's reasoning suffers because it does not clearly explain in what way art. 2523 Civil Code removes from application art. 1669 paragraph (2) Civil Code.

3. In the absence of art. 1669 paragraph (2) of the Civil Code, would art. 2523 of the Civil Code still have been applicable in this case?

In our opinion, the answer is negative. Art. 2523 Civil Code indeed enshrines a general rule[5], but the delivery of a judgment that takes the place of a contract is a form of execution in kind of a to do obligation[6]. Therefore, in this matter, the rule of principle is *not* in art. 2523 Civil Code, but in art. 2524 paragraph (1) Civil Code: "Unless otherwise provided by law, in the case of to give or to do contractual obligations, the limitation period

operations himself, in order to prove the fulfillment of the requirements imposed by the courts. Thus, under these conditions, the mere conduct of the defendant would lead to the blocking of the action that seeks the execution of the obligations assumed by him through the previous agreement, recognized as valid by the court and intended to produce effects".

[5] Which was explained as follows: "the simple violation of the subjective right, although it implies the birth of the right to action, does not also trigger the beginning of the limitation period, if the holder of the right to action did not effectively know the acts or facts to which the law links the birth of the right to action and, given the circumstances, should not have known them" (M. Nicolae, *Civil law. The General Theory*, vol. II, *The Theory of subjective civil rights*, Solomon Publishing House, Bucharest, 2018, p. 837).

[6] R. Dincă, *Special civil contracts in the new Civil Code. Course notes*, Universul Juridic Publishing House, Bucharest, 2013, pp. 52-53.

begins to run from the date when the obligation becomes due and the debtor was thus required to perform it".

However, in the present case, the obligation was not pure and simple, but affected by a suspensive term (the term established by the parties for the conclusion of the sale contract based on the promise). Therefore, paragraph (2) of art. 2524 Civil Code ("If the right is affected by a suspensive term, the limitation period begins to run from the expiration of the term or, as the case may be, from the date of renunciation of the benefit of the term established exclusively in favor of the creditor") was incident.

It is therefore easy to see that art. 1669 paragraph (2) of the Civil Code is well correlated with art. 2524 paragraph (2) of the Civil Code[7], the first text being important not for establishing the moment from which the limitation period runs [in this point practically making double regulation with art. 2524 paragraph (2) of the Civil Code], but for establishing the limitation period itself as being 6 months in this matter.

4. Could it have been a suspension of the limitation period?

The fact that the court is trying to bypass the application of art. 1669 paragraph (2) of the Civil Code is understandable. One of the functions of the limitation is to sanction the inaction of the creditor who, although he would have the possibility, does not perform interruptive acts.

The difficulty is, therefore, to know whether, although the stipulated term for concluding the sale contract has expired, nevertheless, by the time the real estate was registered in the land register, the limitation period under art. 1669 paragraph (2) of the Civil Code has begun to run or not. The Brașov Tribunal considered in this regard: "given that this obligation was a preliminary obligation to the conclusion of the sale deed, the court notes that there is a postponement of the beginning of the limitation period".

It therefore means that it must be verified whether there could be a case of suspension of the limitation period.

Recently, in the specialized literature, the opposite opinion has been expressed. Thus, the following has been said: «The second observation

[7] In the sense that "[a]rt. 1669 para. (2) Civil Code is nothing more than an application in matters of promises of art. 2524 para. (1) Civil Code", see M. Vasile, *The deadlines regulated by the Civil Code in the matter of promises of sale*, in Romanian Review of Private Law no. 3/2024 (available at www.sintact.ro, accessed on November 12th 2025), note 94. In our opinion, para. (2) of art. 2524 C. civ. is relevant, and not para. (1).

concerns the situation in which the obstacle to the conclusion of the promised sale is a certain formality, necessary for its valid conclusion (*i.e.* obtaining the cadastral plan, drawing up the energy performance certificate). Given the requirement, provided for in art. 1669 paragraph (1) of the Civil Code, that "*all other conditions of validity*" be met for the pronouncement of the judgment that will take the place of the contract, it could be argued that the passivity of the promisor debtor, who did not complete these formalities, determines the postponement of the beginning of the limitation period. Since the failure to comply with this condition of validity would determine the rejection of the action, it can be argued that the obligation to conclude the promised contract is not enforceable. I do not think that such an interpretation can be accepted either. Indeed, there is binding jurisprudence at the level of the High Court of Cassation and Justice (on the matter of formalities for the sale of land located outside the built-up area), applied, with regard to any other formalities, by the other courts of law, from which it is categorically clear that the court entrusted with the action has the obligation to administer evidence (*i.e.* topographic expertise to delimit the property in the cadastral system) in order to verify the completion of all formalities for the valid conclusion of the sale. For this reason, the failure to complete the formalities by the promisor-seller does not represent an impediment for the beneficiary, respectively the promisor-buyer, to introduce and obtain admission of the action, so the beginning of the limitation period cannot be postponed»[8].

In support of the opinion, the author refers, first of all, to a decision of the supreme court[9], but considers that, based on this decision, "it categorically follows that the court entrusted with resolving the action has the *obligation* to administer evidence (...) in order to verify the completion of all formalities for the valid conclusion of the sale" (o.u. – M.T., A.A.M.).

In reality, in the considerations, the supreme court held that "the court *can* administer evidence that may constitute proof of the fulfillment of the special validity conditions provided for in art. 5 para. (1) of Law no. 17/2014, with subsequent amendments and supplements" (o.u. – M.T., A.A.M.). The difference in nuance is important.

[8] *Ibidem*.

[9] H.C.C.J., the panel for resolving certain legal issues, decision no. 24 of September 26th 2016, published in the Official Gazette no. 936 of November 22nd 2016.

The cited author then states that the aforementioned decision of the supreme court "is applied, with regard to any other formalities, by the other courts of law". But a single court decision[10] is invoked in support of the statement, a decision by which the Bucharest Court of Appeal ruled as follows: "the court has the duty to identify the real estate promised for alienation, since it represents the object of the obligation, and this identification is made by carrying out a topographical survey to delimit the property in the cadastral system, since only in this way can it be guaranteed that the court decision is suitable for registration in the land register (...) the constitutive effect of the court decision that replaces the seller's consent and takes the place of an authentic contract of sale requires that the determination of the property be made rigorously, through a topographical survey report, since, after its pronouncement and becoming final, this decision can no longer be modified, producing all the effects of authority that the law attributes to it, no matter how absurd they may be".

We do not deny that the court *can*, within the limits of a civil lawsuit, for the resolution of a dispute, obtain the necessary documents that form the basis of a decision that replaces the consent for the sale. However, we consider that the court, although it has this possibility, *should not have an obligation in this regard*, in the sense that: i) elements of the litigious situation may make it unnecessary to obtain such documents; ii) if the parties remain passive, the court, in principle, cannot itself obtain the necessary documents from the competent institutions or persons.

First of all, an approach that would promote a duty in this regard could affect the prestige of justice: a problem of executing contractual obligations would become entirely the judge's problem, who would thus have to directly ensure that formalities that the parties failed to or, even worse, did not want to fulfill are fulfilled. Then, we can also discuss how the court could actually obtain the necessary documents. In addition to requesting them from the parties and ordering an expert opinion, we doubt that the judge has other levers at his disposal[11]. Shall we understand that, in order to pronounce a

[10] Bucharest C. App., IVth civil section, decision no. 94 of February 8th 2021, available at www.rejust.ro, accessed on November 12th 2025.

[11] It is the kind of situation that justifies a point of view such as that of Prof. I.-F. Popa (expressed with regard to the situation of the judicial practice prior to the Civil Code in force): "The role of the judge in the judicial procedure of this forced execution of the preliminary contract could not be compared to that of the notary in terms of warning and counseling (...). The judge performed a simple enforcement office and was limited to

decision that will take the place of a sales contract, the judge will have to request by himself, directly, from the competent persons: the home insurance contract, the urban planning certificate, the certificate from the owners' association or, in a more extreme perspective, the authorization of the act of disposition by another court if the party is a vulnerable person[12]?

Secondly, the issue seems to us to be likely to complicate the position of the promisor-buyer in a situation such as that in the annotated case: although he is not guilty of anything, he would be forced to act within the (relatively short) term provided for by art. 1669 para. (2) Civil Code, with the result that the issue would be passed on to the judge. In reality, it is much more reasonable for a promisor-buyer to consider that he is not under time pressure as long as his co-contractor has not fulfilled his obligations.

For these reasons, we believe that it is much more elegant and useful to consider that, in the case under discussion, the limitation was suspended. Of course, if the promisor-buyer wished, then he could have, indeed, rapidly requested the issuance of a judgment that would take the place of a contract, and, in the civil proceedings, the judge could have requested the completion of the necessary formalities. But, if the promisor-buyer did not do this within the term stipulated in art. 1669 paragraph. (2) Civil Code and, simply, decided to wait for the performance of the obligations of the other party, it does not seem to us that his attitude should be sanctioned, being one that ultimately tends to resolve disputes in an amicable manner.

It is indeed perhaps more difficult to overcome an argument such as that of Mr. Vasile, quoted above, to the effect that "the failure to complete the formalities by the promisor-seller does not represent an impediment for the beneficiary, respectively the promisor-buyer, to introduce and obtain admission of the action, so the beginning of the limitation period cannot be postponed". However, we consider that the essential fact is that, *from the perspective of the promisor-buyer*, it is not certain that the action in court will be successful, either because the conditions of the sale would not be met (e.g., there are debts to the owners' association for which there is no takeover

verifying the fulfillment of the conditions for the admissibility of pronouncing this decision" (I.-F. Popa, *Unilateral and bilateral promises of contract. Unilateral and synallagmatic promises of real estate alienation*, in Romanian Review of Private Law no. 5/2013, available at www.sintact.ro, accessed on November 13th 2025).

[12] We are considering the hypothesis in which initially only the conclusion of the promise was authorized, not the sale contract expected to be concluded based on that promise.

agreement), or because there may be aspects that fall under the incidence of non-unitary judicial practice. In other words: the promisor-buyer is psychologically *prevented* from acting within the term of art. 1669 para. (2) Civil Code as long as he observes that the promisor-seller does not fulfill his obligations.

5. What case of suspension of limitation could be in question?

We will note, however, that, strictly related to the legal text, the situation in this case would not seem to fall within any of the cases of suspension of limitation established by art. 2532 Civil Code[13].

Point 9 of art. 2532 Civil Code however deserves a closer look. According to it, "The limitation does not begin to run, and, if it has started to run, it is suspended: (...) 9. in the event that the person against whom the limitation is running or would run is prevented by a case of force majeure from performing acts of interruption, as long as this obstruction has not ceased; force majeure, when temporary, does not constitute a cause for suspension of the limitation unless it occurs in the last 6 months before the expiration of the limitation period; (...)".

As far as we are concerned, in this case this ground could have been invoked in support of postponing the running of the limitation period. However, some arguments are required. Indeed, the text speaks of force majeure, and this is defined in art. 1351 paragraph (2) of the Civil Code: "Force majeure is any external, unpredictable, absolutely invincible and inevitable event". The fact that the promisor-seller does not register in the land register the construction that he promised to sell, represents, in our opinion, for the promisor-buyer, an external, absolutely invincible and inevitable event, but it is deeply debatable whether it is also an unpredictable one.

The establishment by the Civil Code of unpredictability as a characteristic of force majeure has already been criticized in the specialized literature[14], a definition that we consider relevant being that force majeure must be understood as any extraordinary and invincible, insurmountable cir-

[13] And, the causes for suspension of limitation are "*limitative*, that is, of strict interpretation and application, therefore not susceptible to application by analogy" (M. Nicolae, *op. cit.*, p. 862).

[14] M. Nicolae, *op. cit.*, p. 866, where it is added that neither inevitability is of the essence of force majeure either.

cumstance[15]. Therefore, in a hypothesis such as the one in this case, the act of the promisor-seller (his inaction) would fall within the limits of this definition[16] for the promisor-buyer. The aspect also concerns the coherence of the contractual execution. Obviously, in theory, any event (including the fact that an event will not take place) that is related to objective reality could be considered foreseeable. From a contractual perspective, however, it could be argued with great reason that the execution of an obligation expressly assumed by one of the parties falls within the realm of the *foreseeable*, and the non-execution falls within the realm of the unpredictable.

In any case, we consider that an authoritative doctrine according to which "the limitation assuming a fault, (...) [the party holding the right to action] will have to be considered in a case of force majeure and defended, by its effect, by the extinction of the right to action (...), if the circumstance that prevented it from bringing the action within the time limit provided by law is irremovable, even if foreseeable"[17] can still be successfully supported.

6. Conclusion

Although the solution of the Brașov court deviates from the letter of the law, it achieves a fair adaptation of the limitation regime to the particularities of the execution of contractual obligations. The interpretation given by the court violates the scope of application of art. 1669 paragraph (2) of the Civil Code and is therefore questionable in terms of formal legality, but, in light of the general principles of fairness and good faith, such a solution deserves to be supported, as it avoids sanctioning the creditor for the debtor's culpable inaction.

[15] *Idem*, *The limitation*, Rosetti Publishing House, Bucharest, 2004, pp. 532-533.

[16] Foreign law is also relevant. For example, art. 206 BGB states that "Limitation is suspended for as long as, within the last six months of the limitation period, the obligee is prevented by force majeure from pursuing their rights". In the commentary of this rule it was said that "[e]vents which make it impossible to pursue a claim even through the utmost diligence which could reasonably be expected count as such an obstacle due to force majeure" [D. Effer-Uhe, A. Mohnert, *Commentary on art. 206 BGB*, in G. Dannemann, R. Schulze (ed.), *German Civil Code. Article-by-Article Commentary*, vol. I, C. H. Beck Publishing House, Munich, 2020, p. 281].

[17] E. Roman, *Limitation*, in Tr. Ionașcu *et alii*, *Civil Law Treatise*, vol. I, *The General Part*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1967, p. 482.

De lege ferenda, the issue would deserve express regulation, either in the sense of clarifying how the failure of the promisor-seller to obtain *all* the documents necessary to conclude the sale contract has an impact on the court's possibility of directly obtaining itself these documents, or in the sense of clarifying the notion of force majeure and the relevance of the debtor's culpable inaction in suspending the course of limitation.

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ROMAN LAW: A MODEL OF A UNIVERSAL AND TIMELESS SHIELD AGAINST "FORMS WITHOUT SUBSTANCE" IN LAW

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ABSTRACT

Seeking the relevance of Roman law solely within the museum of legal history is a pursuit justifiable only for non-specialists. For centuries, the seasons of law have succeeded one another in cycles, yet something remains immutable. That "something" is Roman law. The reasons behind its immortality have been the subject of research for the great legal scholars of all eras. How did they create and perfect a legal system so stable that it could serve as the foundation for the two major contemporary legal families – as disparate as the Romano-Germanic (Civil Law) system and the Anglo-Saxon (Common Law) system? Could it be the traits and moral values of the Roman people, the collective consciousness, the balance between the concepts of legal creation, realization, and enforcement, the hierarchy of the sources of Roman law, or the harmony between the statics and dynamics of law? How did they manage to combine, in such a harmonious and balanced manner, sophisticated legal technique, systemic logic, and internal coherence with the dynamics of judicial practice? Through this article, we aim to analyze and address all these questions.

KEYWORDS: *Roman law; praetorian law; action in court (actio); praetorian reforms; reception of Roman law; legal formalism;*

1. Introduction

To seek the relevance of Roman law in the museum of legal history is justified only in the case of non-specialists. Certainly, Roman history has always aroused the curiosity of subsequent civilizations, fascinated by the power of this people and the vast culture inherited. Nevertheless, for genuine jurists, the Romans will remain those who built a timeless legal system that responds to the demands of practice even today.

Roman law is not merely an old law, but a model of legal thought, a conceptual architecture that resists the changes of time, exercising a profound and continuous influence on the formation of the great contem-

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porary legal systems. Thus, both the Romano-Germanic law and the Anglo-Saxon law, although belonging to distinct legal families and governed by different normative rationales, find their conceptual foundations, directly or mediated, in the Roman legal experience. This reality justifies the constant interest of doctrine in identifying the elements of continuity and adaptation through which Roman law was received, reinterpreted, and integrated into these two great legal families.

To think like a Roman jurist means to understand not only the letter of the law but also its spirit. The great Professor Emil Molcuț used to say that while Continentals adopted the **letter** of Roman law, the Anglo-Saxons adopted the very **spirit** of Roman law.

Indeed, in the case of the Romano-Germanic system, the influence of Roman law is structural and explicit, manifested through the adoption of institutions, concepts, and systematization techniques developed in classical and post-classical Roman law. Modern codifications, starting with those of the 19th century, leveraged Roman law as a source for the rationalization of legal norms, borrowing fundamental notions such as the classification of rights, the theory of obligations, the regime of property, or the general principles of legal liability. Thus, Roman law was not only a historical source but a true methodological model for the construction of Continental civil law.

The influence of Roman law on Anglo-Saxon law is manifested in a more subtle and indirect, but no less relevant, manner, because at the core of the expression of law lies precisely the idea of *equity* and *good faith* (*bona fides*). Indeed, such a recontextualization of the law's role in the functioning of society was encountered in antiquity in the configuration of Praetorian law.

We consider that the answers sought through this article reside precisely in understanding the relationship between Roman Civil Law (*ius civile*) and Praetorian Law (*ius honorarium*).

2. On the Alignment of Roman Law with the Concept of the New World. The Metamorphosis and Gradual Refinement of the Sources of Roman Law

Roman law could never be characterized as a law of over-legislation. Nevertheless, legal relations were not deprived of regulation, because the hierarchy of the sources of Roman law was always synchronized with the

requirements of society. This is precisely where the capacity of Roman jurists to adapt Roman law to the challenges of social evolution stands out. Although they certainly did not face contemporary virtual realities, the Romans were not strangers to the phenomenon of calibrating the legal system to a new world.

But did they fall into the trap of substanceless forms that any change in trend initially generates? No.

In what follows, we will argue how the rejection at the level of collective consciousness of substanceless forms and the respect for meaning and substance in the face of misleading forms characterized the Romans throughout their entire history.

The evolution of Roman law sources reflects how the specificity of each era left its mark on the normative system. Thus, from custom, to law, to the glorious era of judicial practice expressed through the reforms of the Praetors, to the brilliant classical jurisprudence, and finally, in the Imperial era, the Emperor's will taking the form of *senatus consulta* and imperial constitutions, to the systematization of all Roman law in the *Corpus Iuris Civilis* – the radiography of the legal system's continuous relation to social realities becomes complete.

The metamorphosis and gradual refinement of the sources of Roman law reflect a complex process of normative crystallization, in which customary traditions, legislative acts, and jurisprudential creations were intertwined into an increasingly sophisticated legal architecture.

The evolution of the sources of Roman law reflects the profound transformations of Roman society throughout the most important historical eras[1]. Initially, law was manifested predominantly in the form of ancestral customs (*mos maiorum*), unwritten, but enforced by the religious and social authority of the King and the college of priests. During the Republic (509-27 BC), the need for transparency and predictability of norms led to the drafting of the Law of the Twelve Tables, the first written codification, which consecrated the transition from custom to a positive law accessible to citizens.

Subsequently, the Edicts of the Praetors and the creations of the jurists (*jurisconsults*) became dynamic sources of normative adaptation, allowing the legal system to respond to economic and social developments. In the Principate period (27 BC-284 AD), legislative authority gradually con-

[1] Molcuț, E. (2011), *Drept privat roman*, Ed. Universul Juridic, Bucharest, p. 36.

centrated in the hands of the Emperor, through imperial constitutions (*Edicts, Rescripts, Mandates, and Decrees*), without completely eliminating the role of jurisprudence, however. In the Dominate period (284-565 AD), the centralization of power led to the monopolization of normative production by the sovereign, culminating in important codification works such as the *Codex Gregorianus*, *Codex Hermogenianus*, and *Codex Theodosianus*, which prepared the ground for the vast Justinian work – the *Corpus Iuris Civilis*[2].

The *Corpus Iuris Civilis* exerted a decisive influence on the formation and development of modern legal systems, constituting the main vector for transmitting Roman law to the medieval and modern eras. By uniting, systematizing, and officializing imperial constitutions, classical jurisprudence, and didactic expositions, the Justinian work transformed Roman law from a fragmented set of norms and opinions into a coherent body, suitable for being studied, interpreted, and applied[3]. Decisively influencing legal methodology, legislative technique, and the content of private law institutions in Romano-Germanic systems, its impact is manifested both at the level of substance (through concepts such as obligation, property, succession, or good faith) and at the formal level (through the abstract structure of norms and the preference for systematization and generalization)[4].

Even in Anglo-Saxon law, the *Corpus Iuris Civilis* contributed indirectly to the development of legal thought through its influence on Canon Law, academic doctrine, and concepts of equity, confirming its role as a common foundation of the European legal tradition and an essential benchmark for the construction of modern law[5].

3. Roman Law and the Overcoming of Legal Formalism

The extremely low tolerance of the Roman people for forms devoid of substance was not manifested only in the legal sphere, as it is well known that, as early as 509 BCE, Roman society rejected the very governance of the state on the grounds of incompatibility with Roman values. Specifically, the expulsion of King Lucius Tarquinius Superbus and the proclamation of

[2] Tomulescu, C.St. (1937) *Contribuțiuni la studiul dreptului roman*, Buzău, p. 51.
[3] Molcuț, E., *op.cit*., p. 51.
[4] Vasiliev, A.A., *Histoire de l Empire Byzantin*, Paris, I, 1932, p. 193.
[5] David, R., *Les grands systèmes de droit contemporains*, Paris, 1982, p. 55-59.

the Republic were an expression of the Roman rejection of a power reduced to form lacking legitimate substance[6].

Although the monarchy formally continued to exist as a traditional institution, its exercise by Superbus emptied it of its essential function of moderate governance, based on respecting the *mos maiorum*, consulting the Senate, and protecting the community[7]. The violent usurpation of the throne, arbitrary governance, and the abuses of the royal family transformed the royal authority into a legal-political appearance, devoid of moral foundation and civic consensus. In this context, the Roman reaction did not target merely the person of the King, but the very perpetuation of an institutional form that, detached from the values that legitimized it, had become incompatible with the Roman political order, leading to its replacement with a Republican system capable of giving real substance to the exercise of power.

In the legal sphere, however, the relationship between the static and dynamic nature of Roman law is of particular interest, perfectly mirrored in the two seemingly contradictory maxims: *praetor ius facere non potest* (the Praetor cannot create law) and *nam et ipsum ius honorarium viva vox est iuris civilis* (Praetorian law is the living voice of the civil law)[8].

To understand their essence, it is necessary to review the evolution of Roman civil procedure. As mentioned, the Praetors' Edicts became dynamic sources of normative adaptation, but this elaboration of Roman law through procedural means is specific only to the classical era.

In the old era, private Roman lawsuits were conducted according to the rigorous requirements of the *legis actiones* procedure. The *legis actiones* procedure, characteristic of archaic Roman law, was based on the strict observance of solemn formulas and ritual gestures, the accuracy of which conditioned the very existence of the right to an action. Access to justice was exclusively reserved for Roman citizens, and any deviation, even minor, from the prescribed words or acts led to the loss of the lawsuit, regardless of the merits of the claim submitted to judgment.

According to the *legis actiones* procedure, for the assertion of claims through legal proceedings, parties exclusively and restrictively had five regulated processes from the Law of the Twelve Tables, namely the judgement *legis actiones* (*sacramentum*, *iudicis postulatio*, *condictio*) –

[6] Titus Livius, *Ab urbe condita*, I, 49-60.
[7] Dionysius of Halicarnassus, *Antiquitates Romanae*, IV, 64-85.
[8] *Dig*. 1.1.8.

which aimed at the recognition of a right – and the execution *legis actiones* (*manus iniectio* and *pignoris capio*) – which aimed either at enforcing a right or at executing a judgment of condemnation[9].

This system was not assimilated without reluctance by the Romans, as excessive formalism was not favored, and this is precisely what the *legis actiones* procedure was characterized by. The incorrect utterance of a single word in the solemn formulas specific to the *legis actiones* legally led to the loss of the lawsuit, without even reaching the judgment phase, where evidence was debated.

Certainly, those who challenge the brilliance of Roman law could argue that the very existence of a procedural system based on the pronouncement of oaths and solemn formulas denotes a predisposition towards formalism.

We wholly and entirely contradict such possible arguments from the outset. Indeed, in the old era, where all ancient peoples to some extent confused legal norms with religious norms, the Romans also attributed a divine origin to law. However, this refers to the old era, in which legal customs were kept secret by the pontiffs, and the realization of law was eminently mediated by representatives of the religious cult. Nevertheless, although examples of confusion between law, religion, and morality can be glimpsed in Roman texts (most often borrowed from the Greeks), this did not mean that a clear distinction between the different types of norms was not made in the collective consciousness. In this regard, we mention the different terminology used by the Romans; when referring to legal norms they used the word *ius*, and when referring to religious norms they used the word *fas*[10]. The terminology demonstrates they had a representation of the specificity of each category of norms.

Both the existence of theoretical confusion and its rapid overcoming in practice (and in law, as the *legis actiones* procedure was replaced in 149 BC by the formula procedure) find their justification in the traits of the Roman people. As the illustrious Professor Emil Molcuț points out, the Romans were a people profoundly conservative, pragmatic, and lacking theoretical concerns[11].

The conservatism of the Romans is reflected in the stoicism with which they did not abandon their values, despite the constant reconfiguration of the

[9] Gaius, *Inst.* 4.14.
[10] Ulpian, *Dig.* 1,1,1 pr.
[11] Molcuț, E., *op.cit.*, p. 5-6.

world. Their conservative nature should not be understood as them clinging to outdated norms, opposing the idea of the new. By no means. On the contrary, their flexibility and capacity to adapt to the requirements of new times were remarkable. However, novelty never nullified the substance of moral values. These were non-negotiable.

In the field of law, Roman conservatism was complemented by pragmatism. Being a people of practitioners by definition, not theorists (like the Greeks), the Romans created a procedural system that kept pace with social fluctuations. Specifically, their conservatism is manifested by the fact that they never formally repealed any law, nor did they abolish institutions, concepts, or principles; instead, they overcame them through judicial practice, leaving behind everything that was anachronistic and no longer corresponded to the demands of the new times.

The promoters of Roman pragmatism were the jurists (*jurisconsults*) and the judicial magistrates (the *Praetors*). Through their creative, thorough, and substantial activity, they guaranteed Roman law a millennial life that transcends the transience of formal tendencies.

3.1. The Role of Classical Jurisconsults in the Reception of Roman Law Across the Ages

Regarding the jurists (*jurisconsults*), their model of thought and the suppleness of their reasoning undeniably led to the reception of Roman law in the Middle Ages and in modernity. By defining terms by their essence, making fine conceptual distinctions, treating difficult cases through analogy, and harmonizing seemingly contradictory norms, they developed a technique of argumentation and interpretation that remains a timeless model.

Roman jurists were received, in the Middle Ages and in the modern era, not just as authors of specific legal solutions, but as veritable architects of European legal reasoning[12].

The rediscovery of the *Corpus Iuris Civilis* starting in the 11th century placed classical Roman jurisprudence at the center of the formation of medieval law schools, especially through the Glossators and Post-Glossators, who treated the opinions of Roman jurists as normative and methodological authority[13]. Ulpian, Paulus, Gaius, and Papinian were received not as mere

[12] Kaser, M., *Das römische Privatrech*, München, 1971, vol. I, p. 12-18.
[13] Stein, P., *Roman Law in European History*, Cambridge, 1999, p. 43-67.

historical figures, but as intellectual benchmarks capable of offering rational solutions to contemporary legal problems. This continuity was consolidated in the modern era, when the doctrine of natural law and the codification movement leveraged classical Roman jurisprudence as a model for abstraction, systematization, and conceptual coherence[14].

Thus, the Roman jurist became, across the centuries, the prototype of the scholarly jurist, and classical Roman jurisprudence functioned as an intellectual link between medieval legal traditions and the dogmatic constructions of modern continental law.

For example, the famous definition of law – *ius est ars boni et aequi* (law is the art of the good and the equitable) – was adopted in the Middle Ages by the School of Glossators as the foundation of the conception of law as a rational and moral order[15]. This idea is adopted by the natural law doctrine, where law is conceived as an expression of reason and *equity*, not as a simple authoritative command[16].

In the area of obligations, the classic definition attributed to Paul, which conceives the obligation as a *vinculum iuris* (a legal bond) between creditor and debtor, was transmitted almost unchanged into medieval doctrine and then into German Pandectism[17]. This conception is found, in the form of a general theory of obligations, and underlies the theory of obligations in the French Civil Code and subsequent continental codes, where the obligatory relationship is analyzed as an abstract legal structure, independent of its concrete source[18].

Furthermore, the tripartite structure proposed by Gaius (*personae – res – actiones*) was adopted in the Middle Ages as a didactic and methodological scheme for teaching law. This systematization directly influenced the drafting of Justinian's *Institutiones* and, subsequently, the structure of

[14] Zimmermann R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 1-10.

[15] Ulpian, Dig. 1,1,1 pr.

[16] In the conception of Hugo Grotius, equity represents the rational expression of natural justice, serving to correct and interpret the general legal norm in accordance with its purpose, without undermining the authority of positive law. It does not oppose law but grants it moral and rational coherence, constituting a fundamental principle of modern law, inspired by the Roman tradition, but adapted to a secular and systematic vision of the legal order. See Hugo Grotius, *De iure belli ac pacis* (On the Law of War and Peace), I, 1, §§ 10-12.

[17] Paulus, *Digesta*, 44,7,3 pr.

[18] Halpérin, J.-L., *Histoire du droit privé français depuis 1804*, Paris, 2012, p. 45-52.

modern civil codes[19]. The French Civil Code and the codes inspired by it reflect, even in an evolved form, this Gaiusian conceptual matrix.

Moreover, the distinction formulated by Ulpian between *ius publicum* and *ius privatum* was received as a fundamental principle for delimiting branches of law and allowed for the autonomous development of private law in the modern era. This conceptual separation underlies the construction of continental legal systems and explains the persistence of a distinct legal dogmatics for private law[20].

Last but not least, Papinian, considered by the medieval tradition as *princeps iurisconsultorum* (*foremost of the jurists*) and received in the Middle Ages as the supreme authority in matters of equity and legal interpretation, was frequently invoked by the Glossators and Post-Glossators for his equitable solutions, in which reason and just measure prevail over normative literalism[21].

In the Middle Ages, Papinian's opinions were used to temper the rigid application of Roman norms, and in the modern era, they influenced the development of the principle of good faith and teleological interpretation in continental civil law.

Overall, the reception of classical Roman jurists went beyond mere historical preservation of texts, transforming into a process of intellectual continuity through which Roman concepts and methods shaped the structure and reasoning of medieval and modern European law.

3.2. Praetorian Law – The Antidote Against Formalism in Law

As we mentioned, the Romans did not embrace the formal rigors of the *legis actiones* procedure precisely because they opposed the idea of excessive formalism. But it was not just the burden of formalism that led to the creation of the formula procedure; it was also the fact that the dynamic nature of legal relations had outgrown the scope of the *legis actiones*. The five *legis actiones* had proven sufficient to cover the range of possible disputes arising between legal subjects specific to a society composed primarily of shepherds and farmers. However, with the development of the

[19] Gaius, *Institutiones*, I, 8; Kaser, M*., op.cit*., München, 1971, vol. I, p. 19.

[20] Molcuț, E., *op.cit*., p. 8.

[21] Wieacker, F., *A History of Private Law in Europe*, Oxford University Press, 1995, p. 54-58.

exchange economy, the dynamics of legal relations suddenly acquired new dimensions. In this context, legitimate claims that could not be asserted through the *legis actiones* arose daily. For this very reason, between 149 and 126 BCE, the formula procedure was regulated by the *Lex Aebutia*[22].

Certainly, the legislator left litigants the option to litigate either according to the *legis actiones* procedure or through the formula procedure. Still, as formal rigidity, which was suited to a small, homogeneous society, became incompatible with the realities of an expanding Rome marked by the diversification of legal relations and the intensification of economic exchanges, the Romans progressively abandoned the *legis actiones*. The formula procedure mitigated excessive formalism, expanded access to justice, and provided a flexible framework in which substantive law could be genuinely asserted, reflecting Roman law's orientation towards substance and equity.

Through the creative activity of the Praetors, Roman law transitioned from formalism to a clear tendency to subordinate form to legal purpose, replacing ritualistic rigors with criteria such as the will of the parties, good faith, and equity.

This is precisely why Praetorian law is said to be the living voice of Roman civil law. While Roman civil law, expressed through statute (*lex*), represents the static part of the law, Praetorian law serves as the expression of legal dynamism, offering aid, supplementation, and correction of the law in accordance with the public good[23].

The scope of the Praetors' procedural reforms is so extensive that a systematic exposition across several areas is required.

Firstly, by introducing the formula as a legal instrument for asserting claims through legal proceedings, the Praetors overcame the restrictive and rigid *legis actiones*, giving rise to new types of lawsuits, called honorary actions (*actiones honorariae*). In contrast to the *ius civile*, characterized by formalism and restricted applicability, the *ius honorarium* introduced corrective mechanisms inspired by *aequitas* (equity)[24]. The Praetor granted legal protection to situations that, although they did not respect traditional civil forms, reflected a legal reality worthy of protection. Thus, Roman law explicitly admitted the idea that form cannot absolutely prevail over substantive justice.

[22] Molcuț, E., *op.cit*., p. 70.
[23] *Dig*. 1.1.7.1.
[24] Watson, A., *The Spirit of Roman Law*, Athens-London, 1995, p. 89-94.

The same orientation is found in the establishment of actions of good faith (*actiones bonae fidei*), within which the judge enjoyed a wide margin of appreciation. Unlike actions of strict law (*actiones stricti iuris*), these allowed for the evaluation of the parties' conduct based on the requirements of good faith (*bona fides*) and the true will of the parties at the moment the obligation arose, even beyond the literal content of the agreement[25]. Through this mechanism, Roman law relativized formalism and introduced subjective and moral criteria into the analysis of the legal relationship.

Moreover, through the *actiones bonae fidei*, consent was transformed into a central element of the obligation, anticipating the modern conception that the agreement of wills constitutes the foundation of the contract, and contributed decisively to the configuration of a general theory of contracts, which would later be adopted by medieval law and modern civil codifications. By granting legal protection to agreements founded exclusively on the consent of the parties, the Praetors established consensual contracts such as *emptio venditio* (sale), *locatio conductio* (lease/hire), *societas* (partnership), and *mandatum* (mandate)[26].

Another example of the revolutionary nature of the Praetor's Edict is the introduction of useful actions and fictitious actions (*actiones utiles* and *actiones ficticiae*), through which legal protection was extended to situations not provided for by strict civil law[27]. Through legal fictions inserted into the procedural formula, the Praetor allowed, for instance, the application of civil law to foreigners (*peregrini*) or the protection of bona fide possessors, contributing to the universalization and flexibility of Roman law.

The protection of possession through Praetorian interdicts represented a huge step in the reform of Roman law through Praetorian means. The Praetors' Edicts introduced possessory interdicts (*uti possidetis*, *utrubi*, *unde vi*), which protected possession as a *matter of fact*, independent of the legal title. This conceptual separation between possession and ownership represented a decisive step in the evolution of property law and provided

[25] Stoicescu, C. 2009. (reprint 1931), *Curs elementar de drept roman*, Ed. Universul Juridic, p. 474.

[26] Tomulescu, C.St. (1973), *Drept privat roman*, Tipografia Universității din București, p. 283.

[27] Gaius, *Institutiones*, IV, 30-34; Schulz, F., *Classical Roman Law*, Oxford, 1951, p. 68-72., Pringsheim, F., *The Legal Policy and Reforms of Hadrian*, Oxford, 1934, p. 54-60.

social and legal stability, anticipating modern conceptions regarding the protection of factual situations[28].

In the domain of property, Praetorian Edicts allowed the overcoming of the rigidity of the concept of *dominium ex iure Quiritium*. By granting protection to the bona fide possessor and by consecrating factual situations capable of leading to usucapion (acquisitive prescription), the Praetor facilitated the circulation of goods and the security of patrimonial relations[29]. Thus, through the Publician Action (*actio Publiciana*)[30], the Praetors created Praetorian ownership (*bonitary ownership*), and then through a special *actio in rem* they established provincial ownership and peregrine ownership[31], so that finally, in post-classical law, a single form of ownership, called *dominium*/*proprietas*, arose from the unification of Quiritary ownership with Praetorian ownership[32].

Property law was thus gradually detached from excessive formal requirements and oriented towards its economic and social function.

Through the formula with transposition (*formula cum transposition* – also a Praetorian action), the possibility of imperfect representation in contractual matters was created, which had enormous implications in the field of civil liability[33]. Specifically, by enabling the plaintiff to sue the father, through an accessory action, to recover damages caused by his son, the exchange economy could flourish, because from that moment on, the Romans were no longer afraid to contract through a representative, having the guarantee of recovering the loss.

Another Praetorian innovation was the introduction of procedural exceptions (*exceptiones*). The Praetor allowed the defendant to invoke, within the framework of the formula, exceptions that could paralyze the plaintiff's claim, even if it was civilly founded[34]. The exception of fraud (*exceptio doli*) is a classic example, through which the abusive exercise of a

[28] Justinian, *Inst.*, 4.15.2-4.; Levy, E., *West Roman Vulgar Law*, Philadelphia, 1951, p. 102-107.
[29] Birks, P., *Introduction to the Law of Restitution*, Oxford, 1989, p. 21-24.
[30] Stoicescu, C., *op.cit*., p. 191.
[31] Gaius, *Inst.*, 2.7.
[32] Dig., 8.1.1.
[33] Justinian, *Inst.*, 4.6.10.
[34] Molcuț, E., *op.cit*., p. 73.

right was sanctioned, establishing the principle that a right cannot be used contrary to good faith[35].

Finally, in the matter of successions, Praetorian intervention had a profound impact, correcting the rigidity of archaic civil rules. An eloquent example is the institution of *bonorum possessio*, through which the Praetor granted hereditary vocation to persons excluded by the *ius civile*, such as blood relatives (*cognates*) or the wife married *sine manus*[36].

Through the procedural means at their disposal, the Praetors did not fictitiously intervene on the types of kinship, but they established good faith possession as the basis for the hereditary vocation, susceptible to being claimed through legal means. Thus, categories of cognates such as emancipated sons and children resulting from marriages *sine manus* were no longer excluded from inheritance[37].

Moreover, through the Praetorian reforms in succession matters, the reciprocal hereditary vocation of spouses married *sine manus*, who, in the eyes of the law, were considered strangers up to that point, was also recognized[38].

Through this, succession was progressively oriented towards criteria of natural connection and equity, to the detriment of agnatic exclusivity.

4. Conclusions

The timelessness of Roman law in the legal architecture of the contemporary world cannot be explained by the authority of tradition or by the mere force of historical precedent. What allowed this system to cross epochs, civilizations, and radical institutional reorganizations is its profoundly structural character: Roman law is not a corpus of old norms, but a particular way of constructing legal reasoning. Roman jurists understood law as a form of knowledge that must be simultaneously exact and adaptable, articulate and permeable, definitive and yet capable of incorporating the nuances of reality. This double orientation – towards conceptual rigor and functional flexibility – explains why Roman institutions became the matrix for many modern legal traditions.

[35] Ulpian, *Dig*. 44,4,2 pr.; Gaius, *Inst*. 4. 118.

[36] Gaius, *Inst.*, 3.17-27.

[37] Axente, A.M., *Curs de drept privat roman* (Course of Roman Private Law), 2nd edition, Ed. Hamangiu, Bucharest, 2024, p. 278.

[38] Gaius, *Inst.* 3.33., Dig., 38.8.1.3.

Conceptual rigor is found in the Roman legal technique for creating law, adopted in the continental legal system, while functional flexibility transcended temporal limits due to the efforts of the Praetors to give meaning to the application of law.

Regarding the refined Roman legal technique, it should be noted that Roman jurisconsults did not limit themselves to inventorying legal situations; instead, they produced a mode of argumentation based on fine distinctions, controlled analogies, and correlations between seemingly divergent principles. From this technique was born what we now call "systemic legal thought." It does not offer ready-made solutions, but provides criteria by which solutions can be evaluated: internal coherence, proportionality, equity, and the avoidance of formalism devoid of content.

This is why Roman law functions as a critical instrument, capable of exposing the incongruities or exaggerations of certain modern legislative tendencies.

The Praetors' Edicts and the formula procedure represented a veritable legal revolution, transforming Roman law from a rigid, formalistic, and exclusive system into a flexible, inclusive law oriented towards the just resolution of disputes. Through these mechanisms, Roman law acquired the capacity to evolve continuously, maintaining its conceptual coherence while adapting to the social and economic demands of a changing world.

Overall, these evolutions demonstrate that Roman law, especially in its classical period, cannot be reduced to a rigid formalistic system, but is characterized by a constant concern for balancing form with substance and for achieving equity. This anti-formalist dimension largely explains the profound influence exerted by Roman law on modern legal systems, including those which, like the common law, traditionally value flexibility and pragmatism.

The European reception in the Middle Ages (in medieval universities – the school of Glossators and Post-Glossators) and modernity (in modern codifications – the French Civil Code, German BGB) merely amplified this function as a "common language" of law. Reinterpreted, digested, and reconfigured through the filter of the Glossators, modern codifications, and contemporary doctrine, Roman law became the conceptual infrastructure upon which diverse legal identities were built.

This reception was not a simple archaeological recovery, but an intellectual reactivation, which explains why Roman law continues to be useful, not just venerable.

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CHRONICLE OF A COURT HEARING: THE HEARING MINUTES – THE FAITHFUL WITNESS OF CIVIL PROCEEDINGS

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ABSTRACT

The hearing minutes constitute essential procedural acts in civil proceedings, as they record, step by step and hearing by hearing, the activity carried out before the court. They accurately reflect the course of the civil trial, the parties' positions, the evidence administered, and the measures ordered by the judge, thus serving as the official instrument certifying the legality of the procedure. Through their function, the minutes ensure transparency in the administration of justice and enable the subsequent review of how the proceedings unfolded, including through legal remedies. They therefore have a dual nature: they are both acts recording procedural operations and acts through which the court may rule on motions or objections raised during the trial. Their role in the architecture of civil proceedings is indispensable, as they guarantee the continuity and legality of adjudication, from the first hearing until the issuance of the judgment. In judicial practice, the hearing minutes represent a key document for the verification of procedural legality, as they precisely certify the order and conditions in which procedural acts were performed. Their proper drafting ensures transparency in civil proceedings and provides appellate courts with a genuine basis for assessing possible nullities, other procedural irregularities, or violations of the parties' procedural rights. For this reason, the content of the minutes must be complete, clear, and faithful to what has actually occurred, without personal interpretations or omissions by the court clerk or the judge.

KEYWORDS: *hearing minutes; court clerk; hearing; judgment; preliminary minutes;*

1. General Considerations on Judicial Minutes

The hearing minutes, also referred to as *preliminary minutes*, represent the procedural act through which the conduct of each hearing is recorded, faithfully serving as the "mirror of the court session[1]." They accurately

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[1] V.M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, vol. II, Ed. Național, 1997, p. 112.

reflect the course and dynamics of the proceedings, being the official document that certifies what occurred before the court. Unlike a judgment[2] or a decision[3], which settles the dispute and divests the court of the case, the preliminary minutes are issued after each hearing and have an incidental character, being prior to adjudication on the merits.

It is useful to emphasize that the hearing minutes, when having a preliminary nature, must not be confused with the *minutes as a procedural act through which the court divests itself from adjudicating the case*, in which case the notion of minutes is equivalent to a judicial ruling on the merits of the claim brought before the court. In other words, such minutes do not have a preliminary character but constitute the final act of adjudication of a claim or procedural incident[4]. Thus, in expressly regulated situations, the court may divest itself by means of minutes rather than by judgment or decision[5]. Likewise, the law explicitly provides cases where the court's divestiture does not occur through minutes, judgment, or decision, but through a *ruling*. For example, in the case of conflicts of jurisdiction, the court resolves the matter by means of a ruling[6].

Furthermore, hearing minutes must not be confused with the minutes issued by the bailiff in enforcement proceedings. The bailiff also issues minutes; however, these are specific to enforcement and do not constitute judicial acts (as hearing minutes do), but procedural acts inherent to the enforcement stage, which is the second phase of civil proceedings and

[2] A judgment is the procedural act of divestiture through which the court rules at first instance or within an action for annulment or revision when these extraordinary remedies are lodged against a judgment.

[3] A decision is the judicial ruling delivered by the court on appeal, on appeal in cassation, or within an action for annulment or revision when these extraordinary remedies are lodged against a decision.

[4] M. Tăbârcă, *Drept procesual civil, vol. II – Procedura contencioasă în fața primei instanțe. Procedura necontencioasă judiciară. Proceduri speciale*, Ed. Universul Juridic, 2013, p. 232.

[5] In this regard, we refer to Article 144 paragraph (2) of the Code of Civil Procedure, under which the ruling on the motion for transfer of jurisdiction (is issued without a statement of reasons and is final; therefore, the court seised with the motion will rule by minute rather than by judgment (which is specific to adjudication at first instance).

[6] According to Article 135 paragraph (4) of the Code of Civil Procedure, the court competent to resolve the jurisdictional conflict shall rule in chambers, without summoning the parties, by means of a final ruling.

applies only when the debtor fails to voluntarily comply with the obligation established through the enforceable title.

The hearing minutes are drafted by the court clerk within three days[7] from the court session, based on the clerk's handwritten notes and, where applicable, on the audio recordings made by the court. Their content must accurately reproduce the measures ordered, the statements and conclusions of the parties, and the procedural acts performed. When a discrepancy arises between what actually occurred in the hearing and what is recorded in the minutes, the minutes may be corrected, either ex officio or at the request of the parties, through the procedure for correcting material errors regulated by Article 442 of the Code of Civil Procedure. According to Article 231 of the Code of Civil Procedure, the court clerk attending the hearing is required to take notes on the conduct of the proceedings, and the parties have the right to request the reading of those notes and, where necessary, to request corrections. After the hearing has concluded, the participants in the trial may obtain, upon request, a copy of the clerk's notes, which may be challenged no later than at the next hearing. Likewise, Article 231 paragraph (4) of the Code of Civil Procedure establishes that the court must record the hearings and, upon request, provide an electronic copy of the recording to the parties.

Moreover, under Article 125, first sentence, of the Internal Rules of the Judicial System (22 December 2022)[8], "*the hearing minutes and the minutes postponing the issuance of the judgment shall be drafted by the court clerk within the time limit provided by law, while summonses for the next hearing, official notices and other tasks ordered by the court shall be drawn up by the clerk within four working days."* This time limit may be shortened when shorter deadlines are provided by law or when the judge orders a shorter deadline in view of the specific circumstances of the case[9].

As to its internal structure, the hearing minutes follow the model of a judicial decision, as they consist of: the introductory section, which contains the composition of the bench, the names of the parties, their presence or absence, their procedural positions, the submissions made by the parties and by the public prosecutor (where applicable), as well as the evidence admi-

[7] The three-day time limit is a recommendation; exceeding it has no impact on the validity of the procedural act. See also H. Țiț, *Drept procesual civil. Partea generală. Judecata în primă instanță,* Ed. Hamangiu, București, 2024, p. 478.

[8] *https://legislatie.just.ro/public/detaliidocument/263130*

[9] G. Neacșu*, Redactarea încheierilor de ședință în procesul civil. Aspecte particulare pentru grefierii debutanți*, în Scripta Manent nr. 9/2024, p. 20.

nistered; the reasoning section, in which the court explains the measures ordered or the solutions given to procedural incidents or objections; and the operative part, which contains the concrete measure ordered by the court (for example: the adjournment of the case and granting of a new hearing date, the admission of a means of evidence, the rejection of a procedural objection, etc.).

According to Article 233 paragraph (1) of the Code of Civil Procedure, the minutes must include mandatory information such as: the court, the case number, the date of the hearing, the composition of the bench, the name of the clerk, the parties and their representatives, the participation of the public prosecutor, verification of proper service of the summons, the subject-matter of the case, the evidence administered, the motions and submissions, the solutions and reasons in fact and in law, the legal remedy and the time limit for exercising it, the mention regarding whether the hearing took place in public or in camera, and the signatures of the bench and the clerk.

A separate set of minutes is drawn up for each hearing, except where at the same hearing in which the oral debates take place the court also delivers its judgment on the merits. In such a situation, the introductory part of the judgment shall include the elements corresponding to that hearing, and a separate set of minutes is no longer required (Article 233 paragraph (3) of the Code of Civil Procedure). If the pronouncement of the judgment is postponed, the introductory section of the judgment will include only the strictly necessary elements (the court, the bench, the file number, the hearing date and, where applicable, the participation of the public prosecutor), while all other information is contained in the minutes postponing the pronouncement, which forms an integral part of the judgment. If the court postpones the pronouncement several times (since the law does not limit the number of postponements), a separate minute must be issued for each postponement of the pronouncement, under the sanction of nullity of the judgment[10].

Regardless of their content, hearing minutes play a fundamental role within the architecture of civil proceedings, as they constitute the main instrument for verifying the legality of hearings and of the procedural steps

[10] In this respect, judicial practice has held that the absence of the minute (in which the debates must be recorded) renders the judgment null, since appellate review becomes impossible; the appellate court cannot verify the circumstances relating to how the debates took place (Court of Appeal Iași, Civil Decision no. 1141/1999, in Jurisprudența pe anul 1999, p. 224, in V.M. Ciobanu, M. Nicolae (coord.), *Noul Cod de procedură civilă comentat și adnotat*, vol. I, Ed. Universul Juridic, 2016, p. 805).

performed. They may provide grounds for legal remedies, may prove procedural irregularities, and may confirm the reality of procedural acts performed before the court. Their legal nature is therefore mixed: they are acts of recording procedural facts, but also acts of disposition, insofar as the court settles incidental motions, procedural objections, or adopts measures regarding the conduct of the trial.

2. Classification of Hearing Minutes

Depending on the measures ordered within their content, hearing minutes are classified as follows[11]:

Preparatory minutes, through which the court adopts certain measures intended to investigate and resolve the case, preparing the issuance of the judgment, without however anticipating the solution. These minutes have the following characteristics: on the one hand, through the measures ordered, the court does not resolve aspects or circumstances related to the merits of the case; on the other hand, the court is not bound by such measures and may reconsider them if required for the proper administration of justice.

Preparatory minutes include: the minute through which the court assesses the usefulness of a means of evidence[12]; the minute ordering the transfer of the case file to another court[13]; the minute through which the court orders the merger of cases; the minute in which the court estimates the duration of the proceedings[14], etc.

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[11] M. Dinu, *Drept procesual civil. Principiile procesului civil. Acțiunea civilă. Participanții la procesul civil. Competența instanțelor judecătorești. Actele de procedură și termenele procedurale. Judecata în primă instanță*, Ed. Hamangiu, București, 2020, p. 282.

[12] One must not confuse the minute by which the court rules on the usefulness of a means of evidence (a preparatory measure, allowing the court to reconsider it after adversarial debate) with the minute ruling on the admissibility of evidence (an interlocutory measure – e.g., whether witness testimony, interrogation, or a certain document is legally admissible).

[13] The court may reconsider the measure of joining cases, as provided by Article 139 paragraph (5) of the Code of Civil Procedure, under which conned cases may be disjoined at any stage of the proceedings, if only one of them is ready for adjudication.

[14] According to Article 238 paragraphs (1)-(2) of the Code of Civil Procedure, at the first hearing where the parties are legally summoned before the first-instance court, the judge, after hearing the parties, shall estimate the duration necessary for the investigation of the case, taking into account its circumstances, so that the case may be resolved within an optimal and foreseeable time frame. The duration thus estimated shall be recorded in

Interlocutory minutes are those through which, without deciding the case in its entirety, the court resolves procedural objections, procedural incidents, or other contested issues. The specific characteristic of these minutes is that they bind the court, which cannot revert to the measure previously ordered by such a minute, as it resolves matters linked to the merits of the case. In other words, these minutes may be set aside only through judicial review by the hierarchically superior court. The phrase "the court cannot revert" must be understood as including even the situation in which, for well-grounded reasons, the panel that issued a certain measure through an interlocutory minute is replaced during the course of the proceedings. Therefore, even if the judges are different, as long as they represent the same court, they cannot revert to an interlocutory minute, even if the new judges disagree with the solution issued by one of the judges who has been replaced[15].

Consequently, an interlocutory minute has two defining features: on the one hand, it prejudges the merits of the case; on the other hand, it binds the court, which can no longer revert to the measure previously adopted. According to relevant scholarly opinion[16], the expression "*prejudging the merits"* does not mean that the judges have already formed a final opinion on the outcome of the dispute. Rather, it signifies that one may foresee, hypothetically, based on the measures ordered by the court, the possible result of the trial at a certain stage. This is possible because interlocutory minutes resolve specific factual or legal issues upon which the parties have previously debated in an adversarial manner. Therefore, through the solution provided, an aspect of the dispute is settled.

Interlocutory minutes include: the minute admitting a motion to intervene in principle[17]; the minute admitting a claim in partition proceedings in

the minute. For well-grounded reasons, after hearing the parties, the judge may reconsider the initially estimated duration.

[15] Gh.-L. Zidaru, P. Pop, *Drept procesual civil*, *Procedura în fața instanței și în căile de atac,* Ed. Solomon, București, 2020, p. 75.

[16] G. Boroi, M. Stancu, *Drept procesual civil*, ed. a 6-a revizuită și adăugită, vol. I, Ed. Hamangiu, 2023, p. 612.

[17] In the matter of motions for intervention, the court rules on their admissibility through an interlocutory minute, regardless of the form of intervention (principal or accessory voluntary intervention, or compulsory intervention through impleader, guarantee, or designation of the holder of the right), except when the third party is introduced *ex officio.*

principle; the minute through which the court rules on a procedural objection by rejecting it; the minute through which the court verifies its general, subject-matter, or territorial jurisdiction pursuant to Article 131 of the Code of Civil Procedure, etc.

Regarding the minute through which the court, at the first hearing where the parties are legally summoned before the court of first instance, verifies its general, subject-matter, and territorial jurisdiction under Article 131 of the Code of Civil Procedure, such minute is interlocutory in nature. This means that the court cannot reconsider it. However, the objection of lack of general jurisdiction may be raised by the court ex officio or by the parties at any stage of the proceedings pursuant to Article 130 paragraph (1) of the Code of Civil Procedure, whereas the objection regarding lack of subject-matter or public-order territorial jurisdiction must be raised either by the parties or by the judge at the first hearing where the parties are legally summoned and able to state their submissions, in accordance with paragraph (2) of the same Article. Based on the legal provisions referred to above, the following question arises: Can the objection of lack of subject-matter or public-order territorial jurisdiction, as well as lack of general jurisdiction, still be raised and upheld if the court has already verified its jurisdiction at the first hearing before the court of first instance? In our opinion, the answer is affirmative. The verification of jurisdiction under Article 131 of the Code of Civil Procedure does not overlap with the act of raising the objection of lack of jurisdiction, except in cases where, at the time when the court puts the issue of jurisdiction up for discussion, the interested party or the court itself raises the objection of lack of public-order jurisdiction. In such a case, if the objection is found well-founded, the court, after allowing adversarial debate in compliance with the principle of contradiction and the right to defense, must uphold the objection, with the effect of declining jurisdiction in favor of the court deemed competent (in cases of lack of subject-matter or exclusive territorial jurisdiction), or of dismissing the claim as inadmissible (when jurisdiction belongs to a non-judicial body or to courts outside the Romanian judicial system).

However, another scenario may arise: at the first hearing where the parties are legally summoned, only the claimant appears and the defendant is absent. The court, pursuant to Article 131, raises ex officio the issue of jurisdiction, declares itself competent, and subsequently, during the same hearing, the defendant appears (having failed to respond to the initial roll call for various reasons) and raises an objection of lack of subject-matter

jurisdiction. In such circumstances, given that the court has already declared itself competent, may it still put the objection of lack of jurisdiction up for debate at the defendant's request? We consider the answer to be affirmative. In this situation, the court will rule based on the objection of lack of jurisdiction raised, and not as a result of the operation of Article 131 of the Code of Civil Procedure. If the defendant's arguments convince the court that the objection raised is well-founded, the court must uphold it, with the consequence of declining jurisdiction in favor of the court deemed competent. In such circumstances, the court does not, in practice, "reconsider" the minute by which it previously verified and declared its jurisdiction. Instead, it divests itself as a consequence of upholding a jurisdictional objection raised in due time by the party. To hold otherwise would imply that the verification of jurisdiction, which the court is obliged to perform under Article 131 of the Code of Civil Procedure, eliminates the possibility of raising a jurisdictional objection. This conclusion would be contrary to the rule whereby lack of general jurisdiction may be raised at any stage of the proceedings.

Although the legislator classifies judicial minutes into interlocutory and preparatory minutes, we consider that mixed minutes may also exist, namely, minutes that contain measures that bind the court, alongside measures the court may reconsider during the course of the proceedings. A relevant example is the minute issued at the first hearing where the parties are legally summoned before the court of first instance and are able to make submissions. Through such a minute, the court verifies its subject-matter, territorial, and general jurisdiction (a binding measure) and estimates the duration of the proceedings (a measure the court may reconsider; therefore, in this respect, the minute is preparatory). Nevertheless, the court issues a single minute, meaning that the measures contained therein simultaneously bear interlocutory and preparatory legal effects.

3. Remedies Against Preliminary Minutes

As a general rule, preliminary minutes cannot be challenged separately, but only together with the judgment on the merits. By way of exception, there are minutes that may be challenged independently, such as: the minute by which the court orders the suspension of the proceedings or rejects a request for resumption of the trial (Article 414 of the Code of Civil Procedure – these minutes may be challenged through an appeal in cassation

throughout the duration of the suspension, except for the minute issued by the High Court of Cassation and Justice, which is final); the minute rejecting a request for interim relief, which may be challenged separately only by appeal [Article 361 paragraph (2) of the Code of Civil Procedure], etc. Pursuant to Article 234 paragraph (2) of the Code of Civil Procedure, when minutes issued by the court during the proceedings are subject to appeal or, as the case may be, to appeal in cassation independently from the judgment on the merits, the file must be forwarded to the superior court in a certified copy, attested by the registry of the court that issued the challenged minute.

There are also minutes that cannot be challenged through any remedy, such as the minute admitting or rejecting the judge's declaration of abstention; the minute admitting a motion for recusal; the minute by which the court admits the suspension of proceedings in a case in which a motion for transfer of jurisdiction has been filed, until the latter is resolved.

Furthermore, some minutes are final (thus not subject to appeal or to appeal in cassation, although, if the legal requirements are met, they may be challenged through extraordinary remedies such as annulment or revision). An example in this regard is the minute by which the court resolves a motion for transfer of jurisdiction, pursuant to Article 144 paragraph (2) of the Code of Civil Procedure.

Conclusions

The hearing minutes prove to be an indispensable procedural instrument, without which the legality and transparency of civil proceedings could not be guaranteed. Through their declaratory and evidentiary function, as well as their role as preparatory acts to the judgment on the merits, minutes ensure logical and juridical continuity in the conduct of the trial. They constitute the official record of how the court has conducted the proceedings, of the evidence administered, and of the procedural positions of the parties, which is why accuracy in drafting is not a mere formal requirement but a genuine condition for ensuring procedural legality.

Although considered an "intermediate" act, hearing minutes may have decisive effects on the civil case, since incidental motions or procedural objections that directly impact the course or even the outcome of the proceedings may be resolved through them. Their importance is reinforced by the possibility of invoking errors, omissions, or inconsistencies through

the procedure for correcting material errors, emphasizing that the minute must accurately reflect the reality of the judicial debates.

Moreover, their evidentiary function extends beyond the trial stage, as minutes may serve as grounds for legal remedies or as a basis for disciplinary or professional liability of participants in the proceedings, in cases of procedural irregularities. The minute is therefore not merely an administrative formality, but a procedural act with tangible legal and evidentiary value.

In conclusion, the role of hearing minutes in the architecture of civil proceedings is one of stability, transparency, and a guarantee of the right to a fair trial. This significance requires professionalism, precision, and responsibility on the part of those who draft and sign them, as any irregularity may distort the content of the act of justice and undermine the credibility of judicial proceedings. Thus, by their nature and functions, hearing minutes remain a fundamental pillar of judicial practice and a true "legal memory" of the civil trial.

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LEGAL INFORMATION NETWORKS AND ARTIFICIAL INTELLIGENCE (THE DIGITAL DIVIDE: A GENERATIONAL PARADOX)

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ABSTRACT

This article examines the relationship between information networks and artificial intelligence (AI) in the legal field, emphasizing its impact on legal education and practice. It analyzes how generative AI is transforming legal education by promoting a more analytical and critical approach, and how it can optimize professional practice through predictive and automated tools. Additionally, it discusses challenges in Latin America, such as the digital divide and resistance to change, proposing strategies to integrate AI into legal training. The text concludes that adopting these technologies is essential to ensure more accessible, efficient justice, and a coherent relationship that serves to unite university professors and legislators, who are mostly digital migrants today, with the recipients and beneficiaries of their activities, who are digital natives.

KEYWORDS: *information networks; artificial intelligence; practice and teaching of law;*

I. Information Networks as an Engine of Progress

Yuval Harari defines information networks as "interconnected structures that allow the flow and processing of data between different nodes or points in a society." [1] The philosopher argues that human history can be understood as the evolution of these information networks, from primitive webs of tribal gossip to the current use of the internet and generative Artificial Intelligence (AI hereinafter).

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[1] Harari Yuval Noah, *Nexus: Una breve historia de las redes de la información desde la Edad de Piedra hasta la IA*, Editorial Debate, 2014.

The constant innovation in Information and Communication Technologies (ICT hereinafter), the massive use of social networks, e-commerce, and telematics activities, in both personal environments and public and private spheres, begin to underscore the leading role of human beings in a new digital era. It must be considered that the information society is not only based on the use of the internet but encompasses a set of social, economic, and cultural interrelationships in which ICTs, through a great diversity of devices, tools, and infrastructures, enable the production, dissemination, and processing of information.

In its beginnings, primitive networks were limited to oral transmission and had a simple, local reach, as was the case in villages or tribes. Cultural exchange and communicational synergy proved to be factors that contributed to evolution and advancement toward global interconnectivity. However, these information networks changed with technological progress. In a second stage, the invention of writing created the first enduring and transmissible information network. Subsequently, the printing press revolutionized the speed and scale of information transmission. Then, the digital revolution brought about a qualitative leap: the information shared is now instantaneous, global, and can be processed. Nowadays, AI and generative AI technology represent the last stage in the evolution of information networks.

The AI network does not merely transmit but processes and generates information, eventually with complete independence from any human intervention. This special characteristic of AI networks is unique. It has never before occurred in human history. For the first time, an information network can exist and evolve without the intervention of human beings, who had always been present, either directly or indirectly, in the historical types of networks throughout development. Global interconnection allows the emergence of collective intelligences that can be qualified as "non-human." Based on this fact, Harari argues that power today resides in the control of these new informational networks: "The power of information networks lies in their capacity to shape reality through the narratives they transmit." [2]

[2] Harari Yuval Noah, *"Homo deus. Una breve historia del mañana",* Editorial Debate, 2015.

II. Information Networks and the Law

Just as Harari defines information networks as an engine of progress, we can characterize the Law as a subsystem within them. In this way, we arrive at the concept of legal information networks, which, in each national jurisdiction, frame genuine interconnected legal structures that allow the flow and processing of data between different legal subjects in a given society. In turn, those domestic legal networks are part of a larger network, constituted by International Law, which links different legal systems based on common, universal values. In this sense, the efforts of the international community to achieve a consensus on principles and binding norms for States on the governance of AI are noteworthy. For example, the United Nations' High-level Panel on Digital Cooperation was established in July 2018 and presented its final report in 2019, titled "The Age of Digital Interdependence."[3]

At this point, we wonder about the impact that generative AI will have on legal networks and whether there is a possibility that it could develop without the intervention of the human person. From Roman times to the present, the human being has consistently been the central agent in the creation and consolidation of legal systems: "*Hominum causa omne ius constitutum est*". The advent of generative AI introduces the unprecedented possibility of a legal system operating autonomously. This prospect raises a fundamental question: what would its underlying values be? Two areas that will undoubtedly be affected are the teaching and the practice of Law. From both perspectives, we will review certain innovations that are already happening, with the intention of predicting (although algorithms would do it best) certain changes in both professional fields.

The traditional structure of legal education has been in place for centuries and remains largely unchanged. It is based on the memorization of norms and doctrine, with special emphasis on the knowledge of the hierarchical authority of traditional legal sources. Recent research indicates that the effective integration of AI requires a fundamental reconfiguration of the pedagogical model, moving from approaches centred on the memorization of norms towards others that prioritize analytical, critical, and ethical

[3] Comisión Interamericana de Derechos Humanos, Relatoría Especial para la libertad de expresión, *"Inclusión digital y gobernanza de contenidos en internet"*, OEA. V.II. CIDH. Informe. 28/24, 2024.

competencies to complement the capabilities of automated systems, establishing a balance between technological innovation and the preservation of fundamental legal values. [4] This classical approach to teaching Law is based on the triangle formed by codified legislation, jurisprudence (mostly from the highest domestic courts and published in print), and, in turn, academic doctrine (also domestic). This classical triangle is safeguarded in physical libraries. As can be noted, these three factors limit knowledge and its dissemination. In this scheme, knowledge of regional and international sources is also minimal, which undermines any perspective of legal globalization.

A first step out of this confinement was the legal digital evolution that began at the end of the 20th century. In this first stage, the digitization of codes and jurisprudence onto CD-ROMs and local databases was undertaken. A notable example of this work in Argentina is the *Sistema Argentino de Informática Jurídica* (SAIJ). The second step in the erosion of classical practice and education was the transition to online platforms. This is evidenced by the emergence of web-based legal databases (such as ElDial or LexisNexis in Argentina), which contribute to the democratization of the right of access to information. Another example in Argentina is the *Plan Estratégico de Gobierno Electrónico* (Strategic Electronic Government Plan), initiated by Decree 378/2005, called *Plan Nacional de Gobierno Electrónico y Planes Sectoriales de Gobierno Electrónico* (National Electronic Government Plan and Sectorial Electronic Government Plans). [5] The policy aims at open management of complex scenarios where citizens express interests, and specific social and cultural problems that require differentiated treatments, and where active policies are an essential part. This is a more integrated and egalitarian conception of open government, which attempts to achieve higher levels of social inclusion within a framework of expanding rights and the future strengthening of social integration. A third step in deepening this transition integrated certain digital judicial management systems that are currently transforming professional practice, such as the digital case file (*expediente digital*) or electronic notifications.

[4] Ruiz Muñoz, Paz Zamora, Morales Loor y Narváez Vega, *"El impacto de la inteligencia artificial en la enseñanza del derecho"*, Multidisciplinary Latin American Journal, ISSN: 2960-8414, Vol. 3, Núm. 1, 2025.

[5] Ministerio de Justicia de la Nación Argentina, *Plan Nacional de Gobierno Electrónico y planes sectores de gobierno electrónico, Decreto 378/2005,* Infoleg Información Legislativa, Buenos Aires, 27.04.2005.

As mentioned, the Law, as a normative system, is in itself an information network. AI in Law represents the fusion of human and artificial networks for normative processing. A paramount challenge is to integrate these networks while ensuring the human remains the ultimate decision-maker.

The rise of AI introduces a collaborative paradigm in legal practice, augmenting traditional operators with predictive tools and automated assistants. This shift is mirrored in legal education, where the instructor's role transforms from a mere disseminator of knowledge to a facilitator of digital literacy and critical thinking. In 2022, researchers such as Martínez Béjar and Miró Llinares documented initial experiences of incorporating AI tools in legal education, highlighting how these technologies are redefining fundamental pedagogical activities such as case analysis, the elaboration of arguments, and legal research. These transformations are not merely instrumental; they affect core aspects of legal training, from the definition of learning objectives to the evaluation of professional competencies.[6]

III. Latin American Panorama

In the region, virtually every diagnosis must account for the existence of a structural digital divide.[7] Eighty-five percent (85%) of Latin American law schools maintain a traditional, memorization-based model; only fifteen percent (15%) of institutions have incorporated advanced technologies into their curricula. Brazil and Colombia lead the way in legal educational innovation, followed by Chile and Argentina. In this context, sixty-two percent (62%) of public law schools lack adequate technological infrastructure. Limitations related to connectivity are also significant. Forty-five percent (45%) of students residing in non-metropolitan areas suffer from these problems, and only thirty percent (30%) of educators report having advanced digital skills.[8]

Educators are a relevant part of this change. However, as digital migrants, they must invest significant time and financial resources to adapt to the new scenario. Resistance to digital change is strongly expressed in the statistics.

[6] *Idem.* Nota 5.

[7] Cepal, *"Brecha digital podría ampliarse en América Latina",* Comunicado de prensa, Naciones Unidas, 2002.

[8] Lustosa Rosario, A.C., Yaacov, B.B., Franco Segura, C., Arias Ortiz, E., Heredero, E., Botero, J., Brothers, P., Payva, T., & Spies, M., *Higher Education Digital Transformation in Latin America and the Caribbean*, BID, 2021.

Seventy percent (70%) of university professors prefer to continue using traditional methods;[9] fifty-five percent (55%) of bar associations express concern about the "robotization" of the profession, as they fear it may reduce job opportunities for their members.[10] Only twenty-five percent (25%) of law schools include mandatory courses on legal technology.

If we consider law students, more than sixty-five percent (65%) are digital natives and logically demand technological updates both in pedagogy and content. On this point, it is necessary to emphasize that the Latin American legal tech market is growing 30% annually, but only eight percent (8%) of graduates have training in legal tech.

The need for a conceptual integration of generative AI into teaching practices, which goes beyond its use as an isolated tool, emerges as a call to action to rethink pedagogical strategies in the digital age. Furthermore, the importance of developing teacher training proposals that address the specific needs for digital competencies, institutional support, and ethical reflections is underscored, ensuring they adapt to the dynamic changes imposed by technology in the educational environment.[11]

IV. Current Initiatives and AI Pilot Projects in Argentine Law Schools

What follows is a detailed account of some of the principal educational and pedagogical initiatives in Argentina aimed at strengthening the integration of artificial intelligence (AI) in university-level legal sciences education. These initiatives respond to the growing need to adapt curricula to the demands of the labour market and the digital transformation of traditional disciplines, particularly in the field of law and social sciences.

a. The *Laboratorio de Innovación e Inteligencia Artificial* (Innovation and Artificial Intelligence Laboratory) of the Faculty of Law at the University of Buenos Aires (UBA-IALAB) is a pioneer in the integration of

[9] Asociación Latinoamericana de Facultades de Derecho, *"Actitudes Docentes frente a la Transformación Digital"*, 2023.

[10] Federación Interamericana de Abogados, *"Perspectivas sobre Automatización Legal*", 2024.

[11] S. Andreoli, E. Aubert, M.C. Cherbavaz, L.Perillo, *"Entre humanos y algoritmos: percepciones docentes sobre la exploración con IAG en la Enseñanza del Nivel Superior",* Revista Iberoamericana de Tecnología en Educación y Educación en Tecnología, no. 37, 2024.

advanced technologies in the legal sphere in Ibero-America. Furthermore, UBA offers a postgraduate course in *Especialización en Derecho Informático* (Specialization in Computer Law).

b. The University of San Andrés has integrated the "Legal Tech & Innovation" program into the mandatory curriculum of its Law degree.

c. The Universidad Austral has established the *Centro de Estudios de Tecnología y Derecho* (Center for Technology and Law Studies), dedicated to developing AI prototypes for contract analysis. It also offers a *Diplomatura en LegalTech Avanzado* (Diploma in Advanced LegalTech).

The integration of AI in the legal domain has also fostered the development of innovative projects that seek to optimize and transform the administration of justice. Among these, initiatives such as Prometea and the virtual assistants developed by the IALAB at the University of Buenos Aires (UBA) stand out.

The first, named Prometea, was developed to serve the *Ministerio Público Fiscal* of the Autonomous City of Buenos Aires. This predictive AI system streamlines judicial processes, especially in repetitive cases. This software can predict the outcome of a judicial case in less than 20 seconds, achieving a 96% accuracy rate. Over a 45-day period, it produced 1,000 legal opinions in cases related to housing rights, demonstrating its efficacy in optimizing the justice system.[12]

The IALAB – UBA intelligent assistant, for its part, is designed to answer legal queries. Together, these systems guide users via voice or conversational interfaces, enhancing the reliability of outcomes and minimizing human error.[13]

V. Adaptive Learning Systems as a Mechanism for Democratizing Access to Justice

Every innovation generates opportunities. Among those emerging from the advent of AI in legal networks, we find the democratization of the right of access to justice, as a basic principle of the rule of Law. In this regard, AI can reduce the cost of basic legal services by 60%, benefiting vulnerable

[12] Prometea: el primer sistema de inteligencia artificial predictivo de la justicia se presenta en el "Mundial de Inteligencia Artificial", Abogados.com.ar, mayo 2019. Disponible en*: https://abogados.com.ar/prometea-el-primer-sistema-de-inteligencia-artificial-predictivo-de-la-justicia-se-presenta-en-el-mundial-de-inteligencia-artificial/*

[13] Asistencia inteligente, IALAB Agents. Disponible en*: https://ialab.com.ar/*

populations in Latin America. It is therefore fundamental to understand the ways in which certain basic principles of the rule of law are being fundamentally redefined in the new digital context. It is no longer sufficient for the legal system to be economically accessible; it must also be cognitively transparent, with procedures and timelines that are readily comprehensible. Furthermore, it must be efficient in practice and must institutionalize fairness, ensuring that the quality of justice one receives is not a function of their digital competencies or financial means.[14]

Secondly, generative AI enables a paradigm shift towards personalized education. Adaptive learning systems exist that can cater to different learning styles and paces, significantly increasing knowledge retention among students.

Thirdly, we highlight the potential for greater efficiency in judicial procedures. The automation of repetitive processes frees up resources for complex cases, reducing resolution times by half. However, greater efficiency must not compromise the quality and individualized attention that each case requires.[15]

Fourthly, the domain of legal research may be profoundly augmented. Generative AI can instantaneously analyze and synthesize jurisprudence from across the continent, facilitating deep comparative analysis of Latin American legal systems. This allows scholars to move beyond isolated national studies to identify transnational trends, trace the migration of legal doctrines, and conduct macro-level studies on the harmonization or fragmentation of law in our region, thereby forging a more integrated Latin American jurisprudential understanding.

Fifthly, the internationalization of legal academia is being increased by AI. The technology's ability to provide accurate, context-aware legal translation in real-time facilitates unprecedented collaboration. Researchers from the region can now effortlessly co-author papers, participate in comparative projects, and integrate global perspectives into their work, effectively collaborating with any scholar in other different cultures, fostering a truly integrated global dialogue on legal problems.

[14] Gamito Marta, *Desigualdad algorítmica: gobernanza, representación y derechos en la IA*, Revista CIDOB d'Afers Internacionals n.º 138, ISSN:1133-6595, 2024.

[15] *Idem*, 12.

Finally, the legal labour market has significant room for development, with the emergence of new professional roles such as legal engineers and privacy officers.

VI. Challenges

The integration of AI into legal education in Latin America also faces several challenges, as supported by data and recent studies.

The first, which we have repeated throughout the article, relates to the digital divide. The disparity in access to and use of information and communication technologies is an old and persistent problem in the region. One study highlights that the digital divide must be addressed from a multi causal perspective, considering factors such as access to devices, digital skills, and the effective use of technology. The University of Buenos Aires in Argentina has implemented policies to guarantee pedagogical continuity and reduce digital gaps among its educational community.[16] A study by ECLAC (CEPAL) has revealed that 45% of Latin American students lack adequate access to the internet, while 60% of public law schools do not have the necessary technological infrastructure.[17]

A second factor to consider is institutional resistance. The adoption of technologies in the educational and legal spheres faces resistance due to structural factors. This creates a challenge regarding the design and implementation of institutional policies that, in the short and medium term, can reduce digital divides and ensure adequate teacher training.

Ethical challenges are equally relevant. In the educational sphere, these technologies, with their capacity to automate content generation and emulate human creations, constitute a disruptive scenario that prompts profound reflection on the transformations in the design of teaching proposals and learning dynamics. Simultaneously, they pose new challenges related to academic integrity, dealing with issues such as the authorship of scientific production, plagiarism, creativity, and knowledge construction processes in universities.[18]

[16] Nosiglia M. Catalina, Andreoli Silvia, *Brecha digital: articulaciones institucionales, estrategias de formación inmersivas y contextos de innovación*, Documentos de Trabajo Fundación Carolina, nº 64. 2022.

[17] CEPAL,"*Panorama de la Brecha Digital en la Educación Superior Latinoamericana"*, 2024.

[18] *Idem*, footnote 9.

Fourthly, there are risks associated with the handling of sensitive data, both personal and judicial. There is also the peril of algorithmic bias, by which AI systems perpetuate and even amplify existing societal prejudices, and possibly undermining the fundamental principle of equality before the law. These risks collectively highlight the urgent need for specific ethical frameworks to govern the development and deployment of AI. At present, Argentina does not have any regulation on the use of AI.[19]

Fifthly, implementation costs are certainly challenging. According to reliable estimates, the initial implementation in university teaching requires an average investment of USD 50,000 per faculty, with annual maintenance costing around 20% of the initial capital.[20] Latin America generally has lower rates of digital technology adoption than similar OECD countries. Given that, the price of technology in the region is among the highest in the world. Therefore, institutions have been reluctant to require or incorporate digital delivery in teaching and learning.[21]

Sixthly, we have teacher training. The effective integration of AI into legal education is not limited to the adoption of new technological tools but demands a profound transformation of the pedagogical model. As mentioned, this change must shift from a traditional approach focused on the memorization of norms to one that values and promotes the development of analytical, critical, and ethical competencies that are complementary to (and not in competition with) the capabilities of AI systems. This reconfiguration process implies not only an update of curricular content but also a transformation in teaching practices and training, learning spaces, and assessment methods, adapting them to a context where technology enhances certain cognitive skills and, in turn, requires the refinement of others.

Lastly, we highlight the need for regulation and sustainability of AI environments. The presence of clear regulatory frameworks linked to the use of advanced technologies in the educational field, particularly in Law, is currently starting. This fact can lead to limitations in the development of

[19] See Farinella, Favio (2024). *Regulación de la Inteligencia Artificial en Argentina. Sistema Argentino de Información Jurídica.* Ministerio de Justicia. Available at *https://www.saij.gob.ar/DACF240120* (October 2025).

[20] Unesco-Iesalc. "*Informe de Infraestructura Digital en Facultades de Derecho",* 2023.

[21] Lustosa Rosario, A.C., Yaacov, B.B., Franco Segura, C., Arias Ortiz, E., Heredero, E., Botero, J., Brothers, P., Payva, T., & Spies, M., *Higher Education Digital Transformation in Latin America and the Caribbean*, BID, 2021.

innovative initiatives and/or the evolution of academic models that meet current global standards and needs. The integration of AI into university pedagogical and evaluative processes requires not only a legal framework to regulate its use, but as we stated before, ethical norms that guarantee the protection of personal data, equity in access to technology, and the elimination of algorithmic biases.

VII. Prospects and Conclusions

Among the emerging trends, we can mention immersive classrooms, a strategy that involves the possibility of conducting legal simulations using virtual reality with AI for professional practice. Similarly, there are so-called legal co-pilots, genuine personalized AI assistants used to support the individual learning process. Continuous assessment in teaching can be carried out through certain AI systems that measure, in real time, students' comprehension and application of legal concepts. Finally, it is logical to expect adaptive curricula, meaning that law school programs evolve automatically according to legislative and technological changes. To this end, technological developments useful for the effective realization of the mentioned trends are already underway. For example, AI models specialized in Latin American law, which are trained on regional jurisprudence. Likewise, international legal collaboration platforms powered by multilingual AI, as well as block chain certification systems used to validate digital legal competencies.

The legal profession will witness significant changes. It is estimated that 40% of routine legal tasks will be automated in the medium term. New legal roles will also emerge, such as the Legal Data Scientist, the Ethics AI Officer, or the Smart Contract Designer. The hybridization of skills will be another major change: nearly 70% of lawyers will need to possess advanced technological skills to practice their profession effectively. As we can see, the democratization of legal services will continue to advance through AI interfaces accessible to anyone whose rights have been violated.

Now, moving to conclusions, weighing urgencies and conveniences, we consider that the integration of AI into legal education processes is not an option, but an urgent necessity. Latin America and Brazil have the opportunity to reduce the enormous gaps in access to justice through the implementation of ICTs and AI. In this sense, the future of legal practice will be hybrid, combining the indispensable traditional legal expertise of the

litigating lawyer with the adoption of technological competencies. These competencies do not only imply knowing how to use applications mechanically, but also understanding in depth the result that each of them can contribute to the practice of the profession.

Beyond what is urgent, it is advisable to initiate teacher training for all digital migrants towards legal technologies. Every semester of delay hinders the transmission of knowledge and widens the digital divide. Therefore, it is pertinent and strategic to establish alliances with technological actors and other faculties to reduce costs and maximize results. Furthermore, within the university educational community, the creation of legal innovation committees with the participation of students and professors is extremely necessary. This will imply an intergenerational convergence that will collaborate in reducing the digital divide.

We arrive, then, at the paradox of migrants teaching natives how to survive. Those who legislate, apply, interpret, and teach the law are mostly, by a simple matter of age, digital migrants. At the same time, those who begin their law studies and who will practice in the world of legal AI are digital natives, born in this 21st century. Each year adds new generations of digital natives. It is easy to understand that the audience expects to see a different performance from us, the actors.

Perhaps the true innovation in law does not lie in replacing legal judgment with machines and applications, but in enhancing human capabilities with technology, to guarantee a justice system that is more accessible, efficient, and equitable for all, and basically, for the most vulnerable groups of society.

A balance between technological innovation and traditional legal principles is fundamental to ensuring that the digital integration of the Law preserves its essential foundations. The incorporation of AI and other technologies into the legal sphere must be carried out in a way that respects the fundamental pillars of the legal system, such as due process, equity, justice, and legal certainty. While the automation of tasks and the use of predictive analytics tools can increase efficiency and accessibility, it is crucial that these innovations do not displace human decision-making in areas where judgment, interpretation, and legal sensitivity are essential.

As in Roman times, and as always: *Hominum causa omne ius constitutum est* (All law is established for the sake of human persons).

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THE FRAGILE BALANCE BETWEEN CELERITY AND THE GUARANTEE OF PROCEDURAL RIGHTS IN MODERN CIVIL JUSTICE

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ABSTRACT

The article explores the complex dynamics between the requirement of celerity in civil justice and the fundamental need to protect the procedural guarantees of litigants. Amid pressure to ensure a quick and efficient trial, the Romanian judicial system faces significant challenges. The analysis focuses on the recent evolution of civil procedural legislation, its fundamental principles and the impact of the conflict between efficiency and safeguards. The article argues that while mechanisms to speed up the process are essential, they must not undermine the right to a fair trial, an adequate defence and access to justice. A case study on the evidentiary regime illustrates the tensions and possible solutions in this delicate balance.

KEYWORDS: *civil procedural law; celerity; procedural guarantees; access to justice; fundamental principles;*

Introduction

In our modern society, where speed and efficiency are central values, the judiciary faces increasing pressure to respond promptly to demands for justice. Civil procedural law, as an instrument for the application of substantive law, plays a crucial role in ensuring a fair trial, while guaranteeing that the settlement of disputes is carried out within a reasonable time, according to Article 6 of the European Convention on Human Rights (hereinafter "ECHR"). This double requirement – on the one hand, celerity, and on the other hand, the guarantee of procedural rights – represents the central axis of the legislative reforms of the last decades, including in Romania, with the adoption of the New Code of Civil Procedure in 2010 (hereinafter "NCPC").

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The thesis of this article is that the balance between these two requirements is not a static one, but a dynamic and often tense process, which requires constant calibration on the part of the legislator and legal practitioners. Any excessive inclination towards celerity, to the detriment of guarantees, risks affecting the quality of the judicial act, just as an over-regulation of guarantees can lead to unjustified procrastination. The paper aims is to analyse this balance, identify the main challenges and assess the current legislative mechanisms, with emphasis on an analysis of the regime of evidence, to illustrate the complexity of the topic.

1. Foundations of civil procedural law

Civil procedural law constitutes the normative architecture through which the rights and obligations enshrined in substantive civil law are transposed into legal reality, through procedural instruments. This is not an autonomous goal, but a set of legal mechanisms indispensable for the effective realisation of substantial rights. In the absence of procedure, substantive law would remain a mere statement of principle, lacking practical efficiency.

In the Romanian legal system, the New Code of Civil Procedure (NCPC, Law no. 134/2010, republished) enshrines a corpus of fundamental principles aimed at guaranteeing a fair, transparent and predictable process, at the same time constituting the guarantee of a modern and efficient judiciary. These principles not only have theoretical value, but also exert a direct normative force on the way the civil process is conducted.

1.1. Availability principle

According to art. 9 para. (1) NCPC, *„the civil process can be started at the request of the interested party"*. Thus, the initiative to initiate the procedure belongs exclusively to the holder of the subjective right, who decides whether, when and within what limits he will request the jurisdictional protection of the state. Also, by virtue of the principle of availability, the parties can waive the judgment, conclude transactions or modify the object or cause of the action, within the limits imposed by public order and

good morals. This principle reflects the idea of the autonomy of procedural will recognised by the doctrine as the foundation of civil litigation[1]

1.2. Principle of adversativity

Contradictory, expressly provided by art. 14 of the NCPC, ensures the possibility for each party to state its position, support its arguments and combat adverse claims and evidence. It constitutes the procedural expression of the right to defence, enshrined in art. 24 of the Romanian Constitution and art. 6 of the European Convention on Human Rights (ECHR). Failure to respect adversativity amounts to a serious violation of the principle of equality of arms, potentially leading to the nullity of the judgment or the recognition of a violation of the right to a fair trial[2].

1.3. The right to a fair trial, within an optimal and predictable time frame

Another cardinal principle, provided by art. 6 para. (1) The NCPC enshrines the right of every person to obtain the resolution of his case *„fairly, within the optimum and foreseeable time-limit, by an independent, impartial court established by law"*. This provision transposes into domestic law the European standard of „to the reasonable term, provided by art. 6 §1 ECHR.

The European Court of Human Rights has consistently reiterated that the excessive length of a procedure can constitute a denial of the right to a fair trial, since „a delayed justice amounts to a denied justice" (*case Frydlender c. France*, Judgment of 27 June 2000)[3].

[1] Boroi, G., Stancu, M. *Civil procedural law, Vol. 1. General part. Trial before the first instance court. 6th edition, revised and added.* Hamangiu Publishing House, Bucharest, 2023.

[2] Les, I., *Treaty on civil procedural law*, Ed. The Legal Universe, 2014. A see also the ECHR Judgment in the case *Kress c. France*, 2001.

[3] ECHR, *Frydlender c. France*, Grand Chamber, 27 June 2000; *Vernillo c. France*, 20 February 1991.

1.4. The relationship between substantive law and procedure

Civil procedural law does not have an independent existence, but justifies its finality by reference to substantive law. The procedure constitutes „the vehicle" whereby the rules of substantive law are implemented and turned into legal reality. That is why the efficiency of the justice system depends on the harmonisation between the two dimensions: if substantive law establishes „what" is due, procedural law determines „how" the recognition of that right is obtained.

An inefficient or excessively formalistic procedure can transform substantive rights into mere abstractions, emptying them of content. Consequently, the legislator must ensure a procedural framework that guarantees the effective and rapid exercise of civil rights, in a climate of equity and transparency.

These cardinal principles represent not only the theoretical foundation of civil procedural law, but also the pillars on which the entire architecture of the judicial act is built. They configure a space procedural in which the essential dynamic between celerity and procedural guarantees takes place, a balance that constitutes one of the most delicate challenges of modern justice.

2. Celerity versus guaranteeing procedural rights

2.1. Structural tension between efficiency and equity

In the contemporary civil process architecture, the notion of celerity – understood as the court's obligation to resolve the case within an optimal and predictable time frame – has turned into a judicial policy imperative. However, this requirement, of European origin, carries a constant risk: that formal speed becomes a real threat to the fundamental guarantees of the litigant.

The famous maxim „justice delayed is justice denied" evokes the idea that the excessive duration of the trial constitutes an implicit denial of the act of justice. But, symmetrically, an excessively rapid justice, obtained by sacrificing the right of defence, adversative or effective access to court, is

no longer a fair justice, but a procedural simplification emptied of its guarantor content[4].

In domestic law, art. 6 para. (1) The NCPC enshrines the obligation of the court to ensure the conduct of the process „with celerity". This norm reflects the harmonization of Romanian procedural law with the standards of the European Court of Human Rights, which, in its constant jurisprudence, established that the duration of a procedure must be assessed through the prism of four cumulative criteria: the complexity of the case, the behaviour of the parties, the behaviour of the judicial authorities and the importance of the dispute for the plaintiff[5].

Thus, although the Romanian legislator tried to achieve a balance between efficiency and guarantees, judicial practice proves that tensions persist. In numerous cases, the pressure on the courts to resolve disputes quickly has led to excessive restriction of the evidentiary possibilities of the parties or to the pronouncement of succinctly reasoned decisions, with the risk of affecting the right to an effective defence.

2.2. Legislative mechanisms to speed up the procedure

In order to respond to the growing requirement of efficiency, the legislator introduced into the Romanian procedural architecture a series of instruments aimed at reducing the duration of processes, without affecting – in principle – the fundamental guarantees of the parties.

In accordance with art. 6 of the Code of Civil Procedure, the court has the express obligation to ensure the speedy conduct of the trial, ordering all the measures allowed by law to avoid procrastination. The introduction of the statute of limitations, as well as sanctioning the inactivity of the parties, aims to strengthen procedural discipline and prevent abuses of law.

At the same time, the Code establishes special procedures, such as the payment order, the small claim or the presidential order, aimed at quickly resolving cases that do not raise complex legal issues. These instruments, supplemented by the provisions of Emergency Ordinance no. 80/2013 on judicial stamp duties, reflect the trend of rationalisation of judicial resources.

[4] Ciobanu, VM., *Theoretical and practical civil procedure treaty*, vol. I, Ed. National, Bucharest, 1996.

[5] See ECHR, Cause *Kreuz c. Poland*, Judgment of 19 June 2001.

And last but not least, the modernisation of the judicial infrastructure, through the introduction of the electronic file, the digital signature and procedural communications by electronic means, represents a significant evolution. These measures facilitate the celerity of the procedure, reducing the time allocated to traditional communications and allowing an efficient management of the caseload.

2.3. The importance of guaranteeing procedural rights

Speeding up the civil process, although necessary, cannot become synonymous with diminishing the procedural guarantees of the parties. Efficiency must not be achieved at the expense of equity, but in complementarity with it.

The right to defence constitutes an essential component of due process. The defendant must have a reasonable period of time and adequate means to prepare his defence, formulate defences, propose evidence and request expertise. The imposition of excessively short deadlines, although justified by the desire for celerity, can seriously jeopardise the effectiveness of this right.

Effective access to the court must also remain unrestricted, even in the context of simplifying procedures. Regulating too restrictive procedural filters or excessive technical requirements (for example, in the electronic communication system) could create obstacles for litigants, especially vulnerable people[6].

Contradictory, equality of arms and the reasoning of the decision represent, in turn, essential guarantees that cannot be sacrificed in the name of speed. A trial conducted without the parties having the effective opportunity to combat the opponent's evidence or without a real reasoning of the decision would turn the act of justice into a simple formality devoid of legal legitimacy.

2.4. The practical and jurisprudential conflict

In judicial practice, the dilemma between celerity and the guarantee of rights is constantly manifested. The courts are called upon to avoid undue

[6] ECHR, Cause *Kreuz c. Poland*, since 19 June 2001.

procrastination but, at the same time, to prevent any precipitate settlement that might prejudice the parties.

The European Court of Human Rights has developed, in this sense, a constant jurisprudence, establishing the criteria according to which the reasonableness of the duration of a procedure is assessed: the complexity of the case, the behaviour of the parties, the behaviour of the judicial authorities and the importance of the dispute for the litigant[7].

Therefore, the challenge of modern justice is not only to resolve cases quickly, but to do so without diluting the content of fundamental guarantees. The true performance of a judicial system consists in achieving a dynamic balance between efficiency and equity – a fragile balance, but indispensable to the legitimacy of the act of justice.

3. Evidence regime in civil trial

The legal regime of evidence in civil procedural law constitutes a genuine laboratory of the balance between procedural efficiency and the protection of fundamental procedural rights. By its nature, the evidentiary activity is intended to establish the judicial truth, but also to guarantee the fairness of the process. It is precisely this double finality – of being simultaneously efficient and equitable – that transforms the administration of evidence into a space of confrontation between the principle of celerity and that of adversativity.

3.1. Celerity in the administration of evidence

The Romanian legislator, through the New Code of Civil Procedure (Law no. 134/2010, republished), sought the establishment of a procedural mechanism to prevent delays and ensure a reasonable duration of the process, in accordance with the requirements of art. 6 § 1 of the European Convention on Human Rights.

According to art. 254 para. (1) NCPC, the parties must propose all the evidence they understand to use, under penalty of forfeiture, together with the summons request, respectively, the response. This provision reflects the legislator's intention to give the civil process a firm and predictable pace. However, the doctrine noted that the excessively formalistic application of

[7] See ECHR, Case Frydlender c. France, 2000.

the penalty of forfeiture may undermine the parties' right of defence, particularly when the failure to put forward evidence is determined by objective reasons[8].

According to the legal provisions, the court has the prerogative to reject evidence that is manifestly unnecessary, inconclusive or contrary to the law. In the same sense, in special procedures – such as the payment order or the small claim – the judge is called upon to apply a simplified evidentiary regime in accordance with the summary nature of these proceedings.

This evidence filtering competence is intended to support the efficiency of the process, but it presupposes high professional rigour on the part of the magistrate. In the absence of a thorough justification, the refusal to administer evidence may lead to a violation of the right to a fair trial, as the European Court of Human Rights ruled in the case of *Dombo Beheer BV c. Netherlands* (1993)[9].

3.2. Guaranteeing the right to proof

The right to evidence is an essential component of the right to defence, enshrined both by the Romanian Constitution and art. 6 § 1 ECHR. This right is not absolute, but any limitation thereof must be proportionate, justified by a legitimate aim and not affect the substance of the right itself.

Any evidence obtained in violation of the law or the fundamental rights of the parties is void. Thus, it is necessary to exclude evidence obtained by illegal means, even if it would contribute to the faster resolution of the case. The jurisprudence of the European Court of Human Rights has consistently enshrined the idea that the legality of evidence is an integral part of the concept of due process.

Art. 14 para. (5) NCPC and art. 6 § 1 The ECHR enshrines the principle of adversity and equality of arms, according to which each party must have the real and effective opportunity to know and combat adverse evidence 8. Therefore, the balance between the parties on an evidentiary level is not only a technical requirement, but a substantive guarantee of the legitimacy of the court decision.

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[8] Boroi, G., Stancu, M. *Civil procedural law. Vol. 1. General part. Trial before the first instance court. 6th edition, revised and added.* Hamangiu Publishing House, Bucharest, 2023.

[9] See ECHR, Cause *Dombo Beheer BV c. Holland*, Judgment of 27 October 1993.

Technological progress has led to the emergence of a new type of evidence – digital – that includes e-mails, electronic conversations, audio-video recordings, computer files or evidence extracted from social networks. Although these means contribute to evidentiary efficiency, they raise serious issues of authenticity, integrity and confidentiality.

It is worth emphasising the need for a detailed regulation of digital evidence, in order to avoid the risk that celerity becomes a pretext for diminishing the legality control. The ECHR decision in the *Barbulescu case v. Romania* (Grand Chamber, 2017) provides a significant example of the limits of communication monitoring and the use of digital data as judicial evidence.

3.3. The structural tension between celerity and the right to proof

The evidentiary framework clearly reveals the structural tension between efficiency and procedural guarantees. On the one hand, statute of limitations and limitation of evidence are necessary tools to ensure speed; on the other hand, an inflexible application of these measures can substantially affect the right to defence.

In complex cases, involving technical expertise, a massive volume of documents or digital evidence, the pressure to respect procedural deadlines can lead to the exclusion of essential elements to find out the truth. At the same time, the lack of any procedural limits risks to generate excessive delays, contrary to the requirement of the reasonable term provided by art. 6 § 1 ECHR and art. 6 para. (1) NCPC.

Therefore, the judge is called to exercise an active and balanced role – as provided by art. 22 para. (2) NCPC -in order to find out the truth and the correct application of the law. It must combine the rigour of speed with the flexibility of equity, ensuring a proportionate interpretation between the public interest of judicial efficiency and the individual interest of the litigant to benefit from a full evidentiary investigation.

Conclusions

The balance between celerity and the guarantee of procedural rights in modern civil justice is a difficult but imperative objective. The analysis highlighted the fact that, in Romanian law, there is no lack of legislative will to increase the speed of case resolution – art. 6 NCPC being expressive in

this regard. But, such reforms must be managed with caution and finesse, in order not to erode the principle of the fairness of the process.

Thus, any excessive inclination towards celerity, without ensuring that the parties can effectively exercise their procedural rights, can affect the legitimacy of the judicial act. At the same time, an excessive proceduralization, with rigid deadlines, numerous formal acts, and without acceleration mechanisms, can generate delays that amount to a denial of the efficiency of justice.

The future of civil procedural law will be defined by the capacity of the justice system to integrate technology and procedural innovation, but without renouncing the fundamental values: equality, the right to defence, adversativity and the reasoning of decisions. Only in this way can it be ensured that "rapid justice" remains and "correct justice".

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THE "NORDIS" LAW – PROTECTION FOR BUYERS OR A VIOLATION OF FREEDOM OF CONTRACT?

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ABSTRACT

The year 2024 shook the Romanian real estate market when a well-known real estate developer was accused of fraud and real estate deception, causing considerable damage to a large number of creditors. In the same year, the real estate developer went into insolvency, with creditors registering their claims with the company's creditors' committee. The scandal surrounding this well-known real estate developer also stirred up the political class in Romania, which, in its legislative activity, decided to change the legislative framework by amending Law No. 10/1995 on quality in construction and Law No. 7/1996 on cadastre and real estate advertising. In this paper, we will analyse the proposed amendments to the two laws, with a close look at the provisions of the Romanian Civil Code, which establishes clear principles regarding the conclusion of contracts.

KEYWORDS: *Freedom to contract; consent of the parties; bilateral promise of sale and purchase; limitation of the parties' will; violation of the principles governing the conclusion of contracts;*

1. Introductory aspects

The Romanian real estate market was shaken in 2024 when a well-knownwell-known real estate developer was accused of fraud and real estate fraud, with both a criminal case and a civil case being filed against the company, which was declared insolvent by Decision 4602/2024 of the Bucharest Tribunal, 7th Civil Section[1] . Following an extensive media campaign that put extraordinary pressure on the political class in Romania, a draft law was initiated to amend and supplement Law No. 10/1995 on

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[1] For details, see: *https://portal.just.ro/3/SitePages/Dosar.aspx?id_dosar=30000 0001124029&id_inst=3.*

quality in construction and Law No. 7/1996 on cadastre and real estate advertising.

The explanatory memorandum underlying the legislative initiative[2] states that although the real estate market in Romania is constantly expanding, being one of the engines of economic growth, it also presents risks for buyers, especially for transactions involving properties under construction. It also states that current practices allow developers to request large advances when signing sales agreements, without adequate guarantees in the event of non-compliance with contractual obligations by the developer.

In our view, amending Law No. 10/1995 on construction quality is not appropriate, given that, on the one hand, the law that is intended to be amended represents the basis for construction quality, without this area of construction quality being able to impose certain limitations on the freedom to contract, which is what the Romanian Parliament is seeking to do in the form submitted for promulgation.

We believe that amending the law on construction quality but not amending the Civil Code will give rise to confusion in the application of legal provisions because, in our view, Law No. 10/1995 cannot be considered a special law in relation to the provisions of of the Civil Code to be applied with priority. Moreover, the scope of the law on construction quality itself must be taken into account, which, in Article 2(1), stipulates that "The provisions of this law apply to constructions and related installations, hereinafter referred to as constructions, in the stages of design, technical verification of projects, construction and acceptance of constructions, as well as in the stages of operation, technical expertise and interventions on existing constructions and their post-use, regardless of the form of ownership, destination, category and class of importance or source of financing, in order to protect human life, property, society and the environment". In this regard, we believe that the legislator, in its work, should have already identified, through its specialised committees, that the proposed regulation is far from the legal and social reality and will only give rise to numerous controversies in the application of its provisions.

[2] To view the legislative process of the draft legislation, see: *https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=22317.*

2. Legislative inconsistencies

Surprisingly and without substance, the legislative proposal in the form submitted for promulgation contains concepts that are not correlated with other laws in force at the time of adoption of the normative act.

For example, the draft law amending Article 22 of Law No. 10/1995 on quality in construction proposes that Article 22(1) should read as follows: "(1) Investors are natural or legal persons who finance and carry out investments or interventions in existing constructions within the meaning of the law, as well as those who develop real estate projects such as condominiums or individual dwellings for sale, hereinafter referred to as *developers*, and have the following main obligations regarding the quality of constructions", while Article 2(r) of Law No. 196/2018 on the establishment, organisation and functioning of owners' associations and the administration of condominiums provides that "*owner of the residential complex/developer of the residential complex* is the legal entity that carries out all real estate operations for the construction, completion and handover of dwellings to beneficiaries, as well as the coordination of the sources of financing necessary to carry out these operations". As can be seen from the wording of the two legal texts cited, the definitions chosen by the legislator are different and are, implicitly, unrelated.

The legislative proposal, in the form submitted for promulgation, establishes that Article 22(3) shall have the following content: "Promises of sale/promises of purchase/bilateral promises of sale-purchase agreements concerning individual units within the future condominium or future individual dwellings shall be concluded only in authentic form, after the building permit has been recorded in the land register and after obtaining in advance the land register extract for the future individual unit or, as the case may be, for the future individual dwelling."

To illustrate the negligent manner in which the legislative power understands to exercise its powers conferred by law, we reproduce below the provisions of Article 906 of the Civil Code, which regulates as follows: (1)The promise to conclude a contract concerning the right of ownership of the property or another right related to it may be noted in the land register if the promisor is registered in the land register as the holder of the right that is the subject of the promise, and the preliminary contract, under penalty of rejection of the request for registration, specifies the term within which the contract is to be concluded. The entry may be made at any time within the

period stipulated in the preliminary contract for its execution, but no later than 6 months after its expiry. In the context of the two normative acts, one in force and one proposed for promulgation, we cannot fail to notice a new inconsistency created by the legislator. We ask ourselves and request the competent authorities to consider how notaries public should act when authenticating promises to sell future property. Will they apply Law No. 10/1995 or will they be guided by the provisions of the Civil Code and Law No. 7/1996, given that these two laws govern the valid conclusion of legal acts and also the manner in which real estate advertising is carried out?

At the same time, it should be noted that, at this time, promises of sale do not have to be concluded in authentic form *ad validitatem.* This aspect results from the provisions of the Civil Code, which do not require a solemn form for the promise. It is true that discussions regarding the solemn form may be held when the court is seized of a request for a ruling to replace the deed of sale, in which case it has been deemed necessary to have a solemn form of the promise[3], an opinion that we do not share, given the following considerations: the promise of sale does not give rise to a real right for this contract to be a solemn one. Being a contract, the promise of sale must comply with the substantive requirements imposed by law, while in terms of form, the principle of consensualism applies, in the absence of a regulation stating otherwise. In support of our opinion, we also invoke Decision No. 23/2017[4] issued by the High Court of Cassation and Justice, which ruled that "in the interpretation and application of Art. 1279 para. (3) of the Civil Code and Art. 1669 para. (1) of the Civil Code, authentic form is not mandatory when concluding a promise to sell immovable property, with a view to issuing a decision that takes the place of an authentic document".

We would like to point out that, according to current regulations, regardless of whether or not promises of sale have been made on future goods, the provisions of Law No. 50/1991 on the authorisation of construction works[5] stipulate in Article 7(23)(3)that after the building permit has been communicated, but before the commencement of the works, the

[3] In this regard, see *https://www.juridice.ro/essentials/862/este-obligatorie-forma-autentica-la-incheierea-promisiunii-de-vanzare-cumparare-a-unui-bun-imobil-in-vedere a-pronuntarii-unei-hotarari-care-sa-tina-loc-de-act-autentic.*

[4] Published in the Official Gazette 365/17.05.2017.

[5] Republished in the Official Gazette of Romania no. 933/13.10.2004.

beneficiary is obliged, at its own expense, to note in the land register of the property, as well as in a widely circulated newspaper, the information provided for in paragraph (23^1) letters a) and b), and to place the investment identification panel in a visible place on the construction site. Therefore, once again, we consider that as long as the legislative framework currently requires the beneficiary to record the building permit in the land registry, we consider the proposed amendment to be inappropriate, completely ignoring the current legislative framework and without even including a provision in the proposed legislative text referring to the provisions of Law No. 50/1991.

In this legislative context, we consider it inappropriate to establish formal conditions for the conclusion of a promise of sale in a law that regulates quality in construction and that would be contradictory to the provisions of the Civil Code, which represents the essence of the regulation on the conclusion of contracts. As we have previously stated, in order for the legislative proposal to be effective, we believe that the legislator should conduct a comprehensive analysis of the existing legislative framework and that the proposed amendments should be consistent and not give rise to inequalities or a lack of predictability that could affect one of the engines of the national economy. In our view, the enacted legislative proposal will not achieve the purpose for which it was initiated and adopted, as it lacks predictability, is insufficiently clear and raises real problems of application.

Equally, having read the legislative proposal submitted for promulgation, we cannot ignore the fact that, in our view, the proposed content of Article 22(5) and (6) is equally very fragile from the point of view of the legislative acts currently in force. Thus, according to the provisions of the Civil Code, the parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and morality.

Thus, according to the provisions of the Civil Code, the parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and morality. The imposition of conditions regarding the agreement to reserve a future asset in the legislative proposal in a normative act regulating safety in construction is, at lea ly surprising, since this law cannot be considered a special law that derogates from the provisions of the Civil Code.

In the proposal to amend and supplement Law No. 10/1995, it is intended that Article 22(5) regulate that agreements on the reservation of the purchase of future goods may be concluded for a maximum period of 60 days, the amounts paid under these agreements may not exceed 5% of the sale price,

under penalty of absolute nullity of the reservation agreement. We have serious reservations regarding the cause of absolute nullity of the agreement for exceeding the amount paid under it because, first of all, the causes of absolute nullity are regulated to protect a public interest that we cannot identify in the regulated norm. In reality, we consider that the penalty of absolute nullity cannot be imposed for exceeding a ceiling by a law that cannot be considered a special law in relation to the Civil Code and, moreover, the penalty regulated must also take into account the penalty provided by law for a fictitious or derisory price, namely relative nullity[6] . Consequently, in our view, the penalty of absolute nullity is not supported by the protected interest, which is clearly a private interest that would justify, at most, the regulation of a cause of relative nullity[7] .

The violation of the legal distinction between the two forms of nullity exposes the new regulation to genuine criticism of the very possibility of enacting this form of law. Moreover, if the legislator was concerned with regulating a cause of absolute nullity in agreements that merely reserve a future asset, with regard to promises of sale, where percentage limits are set on the advance paid by the buyer, the legislator has not established a penalty that should apply in a situation where the agreement of the contracting parties would be expressed in terms of the payment of a larger sum of money, without complying with the limitations imposed by the law on construction quality, which is intended to be amended and supplemented.

The proposed legislative text does not meet the requirement of predictability and clarity of the legal norm, which leads us to believe that the proposed regulation violates one of the guiding principles applicable to the conclusion of contracts, namely freedom of contract. If the legislator wishes to regulate additional measures to protect prospective buyers of future goods, this can be done with caution and taking into account all the principles of the Civil Code which, by regulating private law relationships, gives effect to the equality of the parties before civil law. Another aspect that the legislator must consider is that, although the legislative proposal submitted for promulgation gives the impression that prospective buyers are

[6] According to Article 1665 of the Civil Code: (1) The sale is voidable when the price is set without the intention of being paid. (2) Also, unless otherwise provided by law, the sale is voidable when the price is so disproportionate to the value of the goods that it is obvious that the parties did not intend to consent to a sale.

[7] The Civil Code regulates the nullity of contracts and establishes the difference in legal treatment between absolute nullity and relative nullity in Articles 1247 and 1248.

vulnerable to prospective sellers of the same goods, the Civil Code regulates effective remedies that can be used by the contracting parties in the promise of sale, such as: termination, damages, moratorium interest, referral to the court with a request for a court decision to replace the deed of sale.

Equally, in our view, an isolated case, although it causes damage, cannot lead to a change in the legislative framework, especially in the form adopted by the legislator, without complying with the rules of legislative technique and in violation of the provisions of the Civil Code that regulate all the remedies necessary to ensure equal arms by which the parties are protected from the actions or inaction of the other contracting party.

Also with regard to the text proposed to be added, namely the obligation to open a separate bank account for the developer, dedicated to the construction of the project for which the advance payment was made, we consider that this proposal is unclear, is not predictable and may be misleading, while also failing to comply with the rules of legislative technique provided for in Law No. 24/2000[8], which must ensure the systematisation, unification and coordination of legislation, as well as the content of normative acts.

From our point of view, by initiating this legislative amendment, the legislator is merely upsetting the legal balance between developers and buyers, as the legislator only regulates the developer's conduct, without analysing the conduct that the buyer must have. In this regard, as long as the law limits the advances that can be paid by the buyer, the legislator should also consider the possibility of the buyer providing a guarantee to compensate for the small advance. The legislator's lack of concern in this regard is evident, as is the adoption of the law strictly on theoretical grounds, without considering the practical problems that may arise as a result of the adoption of a law such as the one under analysis.

Last but not least, we consider that it is also necessary to analyse the sanction that the legislator considers appropriate when the developer uses the money paid by the prospective buyers for purposes other than those for which the advance payment was made, namely a fine of 1% of the turnover recorded in the previous year. Without indicating a legal regime for this fine, starting from the penalty of nullity in the event of exceeding an advance payment made under a future property reservation agreement, the legislator

[8] Published in the Official Gazette of Romania No. 260/21.04.2010.

arrives at the penalty of a fine for using the money for projects other than the one for which the advance payment was made.

As can be seen, once again the legislator is enacting an inconsistent, unpredictable, ineffective legal norm that seems to have been inserted arbitrarily. Beyond the terminological inconsistency contained in the promulgated bill, which incorrectly uses the term "buyer" instead of "promising buyer," in our view, the law, as it was sent for promulgation, will not have the desired effect, being a very easy target for constitutional review.

From the above analysis, we consider that the systematisation and coordination of legislation is not respected, an aspect that should draw attention to the legitimacy of the proposed normative act. At the same time, it should be borne in mind that the legislative proposal must maintain the specific balance of private law legal relationships, so that in the next section of this paper we will attempt to make some concrete regulatory proposals.

Equally, reading the form sent for promulgation, it is easy to see that the legislator has not adopted transitional measures regarding the applicability of the law with these amendments. As substantial amendments have been inserted, we consider that a longer period would be required for the provisions of the law to enter into force, but after the law has been correlated as indicated above.

The draft law also envisages amending Law No. 7/1996 on the cadastre and real estate advertising by introducing a new concept, that of pre-apartmenting. With regard to the amendment of this law, the legal operation of pre-apartmenting will entail additional costs for buyers, which will be reflected in the final cost of the real estate purchased. In our view, these legal operations are unnecessary in the context of the developer's good faith. Generalising a unique situation and transposing it into a law without content will only complicate the procedures carried out in relation to future property. We must not neglect this, and the legislator must bear in mind that the civil legislation governing legal relations concerning future properties is mainly represented by the Civil Code, and the proposed legislative amendment does not take into account the of these provisions. The legal consequences are easy to anticipate, and we are unpleasantly surprised by the lack of consistency in the legislative process.

Point IV of the legislative proposal regulates measures of immediate application that will apply until the entry into force of the provisions of Article 26(9)-(11) of Law No. 7/1996, namely for a period of three months from publication in the Official Gazette of Romania. Although the text of

the law does not provide for it, we consider that these provisions of Article IV of the legislative proposal will apply only to legal situations that will arise after the entry into force of the law.

Although the text of the law does not provide for this, we consider that the provisions of Article IV of the legislative proposal will apply only to legal situations that arise after the entry into force of the normative act. It should be noted once again that the provisions of Article IV do not specify whether they amend or supplement an article of Law No. 7/1996, which, from the perspective of legislative technique, is unacceptable.

As a general conclusion, we consider that prior to promulgation, the President of Romania should have applied Article 77(2) of the Constitution and sent the request for re-examination of the law to Parliament or referred it to the Constitutional Court for a review of constitutionality prior to promulgation, by reference to the provisions of Article 146(a)(i) of the Constitution in conjunction with Articles 15-18 of Law No. 47/1992 on the organisation and functioning of the Constitutional Court[9] . Considering that the promulgation took place on 5 December 2025, without the president using these weapons to avoid the promulgation of an unpredictable law with serious problems of interpretation and application, it remains to be seen what consequences will ensue after these legislative changes come into force.

3. Potential solutions that could have been considered by the legislator

Taking into account the issues raised in this article, we believe that the proposed text of the law should have removed the outlined inequalities and restored the principle of equality of the parties before civil law, while not neglecting the provisions of the Civil Code, which represent the essence of the regulation of contractual relations.

Firstly, it should be ensured that the proposed text of the law does not contradict other regulations in force. We consider this to be one of the most important aspects listed above. The conclusion of a contract, being governed by the principle of freedom of contract, must provide for exceptions that are strictly interpreted and applied in the same place as the principle or in related civil legislation. As previously stated, Law No. 10/1995 regulates quality in

[9] Published in the Official Gazette of Romania No. 643/16.07.2004.

construction and does not govern rules applicable to the conclusion of contracts, even if they relate to new constructions.

Secondly, when the legislator limits the advance payment by prospective buyers, we believe that the legislator should also regulate measures to protect investors so that they have the opportunity to finance the projects developed. For example, state banks could take over this financing through dedicated lines guaranteed by the state. We consider this to be appropriate and in line with the spirit of the law, which aims to protect the interests of prospective buyers; at the same time, the legislator must also take into account the position of prospective sellers when advances are limited by the effect of the law. The above measure would be intended to ensure that this engine that supports the national economy continues to function.

Equally, we consider it appropriate that, in a situation where advances remain limited, the prospective buyer should submit a bank guarantee letter at the conclusion of the promise of sale to help the prospective buyer obtain financing, as proposed above.

At the same time, in our view, the penalties introduced by the legislative proposal should have been reviewed because, as we noted earlier, the penalty of absolute nullity of reservation agreements is not justified as long as the interest protected by the establishment of the cause of nullity is a particular, individual one. At the same time, with regard to the penalty of a fine based on turnover, this penalty should be developed, specifying the legal regime of the fine applied, whether the fine can be challenged, who can apply the penalty of the fine and other such details that would give the legal norm predictability.

With regard to the amendments to Law No. 7/1996, we believe that greater attention should be paid to the concept of pre-allocation and to the transitional provisions that must ensure the application of the legal provisions in accordance with the principle of non-retroactivity of civil law[10].

From our point of view and considering all the issues outlined above, we believe that the text of the law in its current form should not have been promulgated, as the president had the option of requesting a review of the law or requesting a constitutionality check prior to promulgation. The fact

[10] For a comprehensive discussion of the principle of non-retroactivity of civil law, see: *https://www.ccr.ro/wp-content/uploads/2021/01/puskas_ro.pdf* [The principle of non-retroactivity of civil law].

that the legislative process is treated in a superficial manner, lacking in substance, will have an impact on both developers and buyers, with direct consequences for the proper functioning of this branch of the economy.

4. Conclusions

The draft law analysed in this paper is far from being in a form that complies with the general principles governing the conclusion of contracts. In order to comply with the rules of legislative technique and to bring the new law into line with the provisions of the laws in force at the time of its promulgation, we believe that it would have been necessary for the President of Romania to adopt one of the options available to him under the law in order to achieve the coherent adoption of a normative act.

Being aware that legislative activity must be carried out in compliance with all legal provisions and in order to avoid giving rise to inequalities by generalising a single case to the entire sector carrying out such activities, we recommend that the legislator move away from the theory of ineffective protection and ensure effective protection for both parties to the specific civil legal relationship.

We are interested in following up on the issues analysed in this paper and will return to the analysis as soon as problems arise in practice related to the interpretation and application of the new legislative changes to be published in the Romanian official gazette.

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PARENTAGE IN A CROSS-BORDER CONTEXT. CHALLENGES OF ROMANIAN LAW AND THE PROPOSAL FOR A REGULATION ON THE EUROPEAN CERTIFICATE OF PARENTAGE

Ramona PREDESCU[*]

ABSTRACT

This article examines the issue of parentage in a cross-border context, considering the diversity of national regulations and the practical difficulties arising from the recognition of birth certificates issued in another member state of the European Union. Starting from the Proposal for a Regulation on parenthood and the creation of a European certificate of parenthood, the article highlights the potential of this instrument to ensure greater uniformity among member state practices in matters of parenthood, as well as to simplify domestic procedures for the transcription of birth certificates issued abroad or for the recognition of foreign judicial decisions. At the same time, these proposals for harmonization play an essential role in providing effective protection for children in cross-border situations and in safeguarding the principle of their best interests.

KEYWORDS: *parenthood, principle of the best interest of the child, European certificate of parenthood;*

Introductory aspects

Nowadays, the family can no longer be regarded as a static entity, but rather as a space of continuous interaction and transformation, in which the relationships among its members are shaped by contemporary social, cultural, and legal realities. Recent legal scholarship has emphasized that "the family is a dynamic entity, within which members are bound together by a legal or factual relationship, continuously shaping their relationships and constructing a shared existence".[1]

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[1] Lucia Irinescu*, Dreptul familiei*, Hamangiu Publishing House, Bucharest, 2024, p. 4.

Contemporary society is undergoing a period of profound transformation. Over recent decades, we have witnessed a paradigm shift in the ways in which people choose to live together and to form a family.

Traditional models of cohabitation now coexist with various forms of family life. These developments have been driven by changing social values, individual autonomy, and the freedom to choose the ways in which family relationships are established and developed. In this context, the family can no longer be analysed exclusively by reference to the traditional legal norms that once defined it, but must be understood as a living reality, constantly adapting to the dynamics of society.

It is undeniable that family relationships have been significantly reshaped by technological developments, increased mobility of people, globalization, and the freedom of movement. Members of the same family may choose to live in different cities or even in different countries, communicate and interact beyond geographical boundaries, and build emotional closeness at a distance. Under these circumstances, the family has evolved alongside the society that generated it, adapting to new realities without losing its fundamental role as a space in which solidarity predominates.

Against the background of increased mobility of persons, one of the defining characteristics of the European Union (EU) and of the freedom of movement[2], an increasing number of family situations involving a foreign element have emerged. Family relationships may fall under the scope of several legal systems of different states, while the birth of children, the establishment of parentage, or the exercise of parental rights and obligations may be subject to rules that vary from one state to another. In this cross-border context, difficulties may arise regarding the recognition in one state of a legal situation created in another state, whether it concerns the recognition of foreign judgments or the recognition of parentage recorded in a child's birth certificate. In such situations, the public policy of the state in which the effects of parentage are invoked may come into conflict with

[2] The free movement of persons within the European Union is already recognised at EU level through *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.*

the manner in which parentage was established in another state.[3] It is estimated that, at present, approximately 2 million children may face situations in which parentage established in one EU member state is not recognised for all purposes in another member state.

Among the institutions of family law, parentage occupies a central position, representing the legal bond between a child and his or her parents.[4] The establishment of parentage determines this legal relationship and produces direct effects on the child's legal identity, name, nationality, parental authority, as well as on patrimonial rights and obligations. From this perspective, the establishment of parentage is not merely a matter of domestic law, but a legal reality with cross-border implications in which the best interests of the child must prevail.

The absence of uniform mechanisms for the recognition of parentage at the level of the EU may lead to situations in which parentage legally established in one member state is not recognised, or is subject to additional conditions, in another member state, thereby directly affecting the best interests of the child. Frequently, families are compelled to resort to judicial proceedings to resolve disputes relating to the establishment of their children's parentage, proceedings which require time and entail costs for the families concerned. It is precisely these practical difficulties that have prompted, at European level, the need to adopt a legal instrument capable of ensuring the recognition of parentage established in one member state throughout the territory of the European Union.

[3] Lucia Irinescu, *Protecția modernă și implicațiile juridice: de la bioetică la biodrept*, in Transilvania, no. 11-12, 2024, p. 124.

[4] The legal notion of parenthood does not automatically reflect the biological reality between a child and his or her parents. *Lato sensu*, parenthood represents the legal bond existing between a person and his or her descendants, while *stricto sensu*, parenthood constitutes the relationship of descent of a person from his or her parents or the "direct and immediate" legal link between a child and his or her parents, irrespective of the biological fact of procreation and birth. Parenthood is also established between parents and a child conceived through medically assisted reproduction techniques (even in the absence of a biological link between the parents and the child), as well as because of adoption, between adoptive parents and the adopted child. In this sense, Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*, 7th ed., C.H. Beck Publishing House, Bucharest, 2021, p. 374.

Proposal for a Regulation on Parenthood and the Creation of a European Certificate of Parenthood[5]

1. Objectives and Rationale of the Proposal for a Regulation on Parenthood

At the level of the European Union, a clear trend towards the harmonisation of cross-border practices in matters of parenthood can be observed. In this context, on 7 December 2022, the European Commission adopted the Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (hereinafter: the Proposal for a Regulation on Parenthood). This initiative seeks to establish a uniform legal framework designed to facilitate the recognition of parenthood established in one member state throughout the territory of the European Union, without affecting the competence of the member states in the field of substantive family law.

According to the explanatory memorandum, one of the essential objectives of the Proposal for a Regulation is to strengthen the protection of fundamental rights and other rights of children in cross-border situations. It concerns the child's right to identity, the right to respect for private and family life, the right to non-discrimination, as well as patrimonial rights deriving from the establishment of parenthood, such as the right to maintenance or succession rights. In all these situations, the best interests of the child are enshrined as a paramount principle governing the interpretation and application of the rules in this field.[6]

Another important aspect highlighted in the Proposal for a Regulation concerns the need to ensure the recognition of a child's parenthood irrespective of the manner of conception or birth and regardless of the family structure to which the child belongs. In this respect, the Regulation aims to secure the recognition of the parenthood of children raised in single-parent families, in families composed of same-sex persons, as well as of children who are adopted or conceived through medically assisted repro-

[5] European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*, COM(2022) 695 final, Brussels, 7.12.2022.

[6] European Commission, *Proposal for a Regulation on Parenthood*, p. 1.

duction techniques. This approach ensures compliance with the principle of non-discrimination and guarantees that Member States afford equal rights to all children.[7]

At the same time, the European Commission has expressly underlined that the Proposal for a Regulation on Parenthood does not seek to harmonise substantive family law across the Member States and does not require them to amend their internal rules concerning the definition of the family, the establishment of parenthood, or the recognition of specific forms of cohabitation. The scope of the European intervention is limited to the creation of common rules on the cross-border recognition of parenthood, intended to ensure the protection of the child's legal status.[8]

The Commission's proposal also envisages the adoption of EU rules on international jurisdiction in matters of parenthood[9] and on the applicable law, in order to facilitate the recognition in one Member State of parenthood established in another Member State.

Furthermore, the Commission proposed the creation of a European Certificate of Parenthood, which children (or their legal representatives) may request and use in order to prove their parenthood in another Member State. The establishment of the European Certificate of Parenthood represents a central element of the Proposal for a Regulation. This instrument is designed to facilitate proof of parenthood in another member state and to reduce the administrative and procedural burden on families involved in cross-border situations.

2. Examination of the Proposal for a Regulation on Parenthood by the European Parliament. Current Stage and Form

The Proposal for a Regulation on parenthood and the creation of a European Certificate of Parenthood was preceded by an extensive process of analysis and consultation. In this regard, the legislative initiative was based on an impact assessment carried out at the request of the Directorate-

[7] *Ibidem,* p. 3.

[8] *Ibidem.*

[9] By designating the courts of the member states that are competent to adjudicate matters relating to parenthood, including the establishment of parenthood in cross-border situations.

General for Justice and Consumers (DG JUST)[10], aimed at identifying the legal and social implications generated by the lack of recognition of parenthood between EU member states.

In accordance with Article 81(3) of the Treaty on the Functioning of the European Union (TFEU)[11], measures relating to family law with cross-border implications are adopted under a special legislative procedure, whereby the European Parliament is consulted, while the final decision lies with the Council of the European Union, which acts unanimously. Within this procedural framework, the role of the European Parliament consists in delivering an opinion on the proposed regulation, reflecting concerns related to the protection of fundamental rights and the observance of the principles enshrined in EU law.

At the time of drafting this paper, the Proposal for a Regulation on parenthood has the status "tabled", as indicated on the European Parliament's Legislative Train page[12] meaning that the proposal has been adopted and transmitted by the European Commission to the European Parliament, which has begun its examination. In this context, following the examination of the proposal submitted by the European Commission, the European Parliament adopted its opinion on 14 December 2023 and proposed a series of amendments to the initial text of the Proposal for a Regulation on parenthood.[13] Through these amendments, the European

[10] DG JUST is an executive body within the European Commission, with responsibilities for the development and implementation of EU policies in various fields, such as justice, fundamental rights, and consumer protection.

[11] Article 81(1) The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. (3) Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

[12] For the evolution of the legislative procedure and the current stage of the Proposal for a Regulation on the recognition of parenthood between EU member states, see the European Parliament's Legislative Train page, which provides a concise overview of the project's legislative pathway, the relevant documents, and its procedural status. Available at: *https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-recognition-of-parenthood-between-member-states* (accessed 8 December 2025).

[13] European Parliament, Legislative resolution of 14 December 2023 on the proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a

Parliament primarily sought to strengthen the protection of the fundamental rights of children in cross-border situations, to clarify the scope of application of the Regulation, and to define the limits within which the European Certificate of Parenthood is to produce legal effects.

By means of Amendment No. 2 to recital (2) of the Proposal for a Regulation, the European Parliament emphasised that member states are obliged to act in the best interests of the child. At the same time, they are required to ensure the non-discrimination of children based on the family structure from which they originate or on the way they were conceived or born. Moreover, the European Parliament recalled that the case-law of the European Court of Human Rights has expressly stated that the best interests of the child reduce the margin of appreciation of the state's parties with regard to the recognition of the relationship between a child and a parent[14] This entails the legal identification of the persons responsible for the child's upbringing, for meeting his or her needs and ensuring his or her well-being, as well as the possibility for the child to live and develop in a stable environment.[15]

The European Parliament also drew attention to the fact that the refusal by a member state to recognise parenthood established in another member state particularly affects rainbow families (LGBTIQ+ families), as well as other types of families that do not correspond to the traditional nuclear family model. This is especially relevant in situations where there is no biological link between the parents and the child.[16]

Through Amendment No. 27, which modified Article 4 of the Proposal for a Regulation on parenthood, the European Parliament replaced the expression "parent-child" with "child-parent". Accordingly, parenthood is defined as the child-parent relationship established by law. This amendment was applied consistently throughout the entire document.

European Certificate of Parenthood [COM(2022)0695 – C9-0412/2022 – 2022/0402 (CNS)].

[14] In this respect, reference should be made to the judgment of the ECHR in *D.B. and Others v. Switzerland*, Applications nos. 58252/15 and 58817/15, 22 November 2022 (Third Section).

[15] ECHR, 10.4.2019 (GC), Advisory opinion requested by the French Court of Cassation.

[16] European Parliament, Legislative Resolution, recital (11a) introduced into the Proposal for a Regulation on parenthood by Amendment No. 6.

By proposing these amendments, the European Parliament also sought to reaffirm that the Proposal for a Regulation does not affect the competence of the Member States in the field of substantive family law and cannot be interpreted as imposing changes to national legislation concerning the definition of the family or the acceptance of certain practices. In this respect, the Parliament's opinion reflects a balanced approach, focused on protecting the best interests of the child and ensuring the continuity of the child's legal status, without undermining the diversity of national legal systems.

In its current form, the Proposal for a Regulation is structured into nine chapters.

Chapter I sets out the object and scope of the Regulation and contains several essential definitions, including that of parenthood, as mentioned above.[17]

Chapter II regulates the courts having jurisdiction to hear cases concerning the establishment of parenthood in cross-border situations and provides for alternative jurisdictional criteria to ensure children's access to a court located in their proximity.[18]

Chapter III establishes the law applicable to the determination of parenthood in cross-border situations.[19]

Chapter IV addresses issues relating to the recognition of judicial decisions and authentic instruments concerning parenthood.[20]

Chapter V deals with authentic instruments that do not produce binding legal effects.[21]

Chapter VI [22] regulates matters relating to the European Certificate of Parenthood, an instrument designed to facilitate the recognition of parenthood established in one Member State in other EU Member States in a cross-border context. The Certificate is issued for use in another member state and produces legal effects directly, without being subject to any additional formalities. The Proposal for a Regulation provides that the use of the European Certificate of Parenthood is optional and that its absence does not affect parenthood established in each state. Essentially, the

[17] European Commission, *Proposal for a Regulation on Parenthood*, art. 1-5.
[18] *Ibidem,* art. 6-15.
[19] *Ibidem,* art. 16-23.
[20] *Ibidem,* art. 24-43.
[21] *Ibidem,* art. 44-45.
[22] *Ibidem,* art. 46-57.

Certificate constitutes a supplementary instrument issued at the request of the child or of the child's legal representative by a competent authority in matters of parenthood of the member state in which parenthood was established. Unlike birth certificates issued by each State in accordance with national rules, the European Certificate of Parenthood is issued according to the same procedure across the member states and consists of a uniform standard form with the same content and effects throughout the Union. The Certificate constitutes a valid title for the registration of parenthood in the relevant register of a member state.

Chapter VII regulates matters relating to digital communication and administrative cooperation between the member states.[23]

Chapter VIII provides for the possibility for the Commission to adopt delegated acts.[24]

Chapter IX contains the general and final provisions.[25]

Although the Proposal for a Regulation on parenthood and the creation of a European Certificate of Parenthood is not, at the time of drafting this paper, in force, the European legal framework envisaged by it could significantly influence the way children's parenthood is established in cross-border situations. In this context, it is necessary to analyse the rules applicable under Romanian law in this field, to highlight the current practical difficulties that could be addressed through the adoption of such an instrument at EU level.

Parenthood under Romanian Law

In Romanian family law, parenthood represents one of the fundamental institutions, having the role of establishing the legal relationships between a child and his or her parents. The rules governing parenthood are regulated in Chapter II of Title III of Book II of the Civil Code, as follows: Section 1 – Establishment of parenthood, Articles 408-440 of the Civil Code; Section 2 – Medically assisted human reproduction with a third-party donor, Articles 441-447 of the Civil Code; and Section 3 – The legal status of the child, Articles 448-450 of the Civil Code.

[23] *Ibidem,* art. 58-62.
[24] *Ibidem,* art. 63-64.
[25] *Ibidem,* art. 65-72.

Article 408 of the Civil Code sets out the general legal framework regarding the methods of establishing parenthood. Accordingly, parenthood may be established in relation to the mother (maternity) and in relation to the father (paternity).

Article 408(1) of the Civil Code enshrines the way maternity is established. Thus, maternity results from the material fact of the child's birth by a woman. This rule applies both in the case of parenthood within marriage and parenthood outside marriage.[26]

In order to determine maternity, proof must be provided of the following elements: the fact of the child's birth and the identity of the child claiming maternity with the child who was born, in other words, proof that the child in question, and not another, was born to the respective woman.[27] The fact of birth is established by the birth record drawn up in the civil status register, as well as by the birth certificate issued on the basis of that record, in accordance with Article 409(1) of the Civil Code concerning proof of parenthood. However, maternity may also be established by the recognition of the mother[28] or by a court decision, in certain cases expressly provided by law. More precisely, where proof of parenthood cannot be made by means of the birth certificate, or where the accuracy of the information contained in the birth certificate is contested, maternity shall be established by a judicial decision.[29]

Regarding paternity, Article 408(2) and (3) of the Civil Code provide that the establishment of parenthood in relation to the father differs depending on whether the parenthood is within marriage or outside marriage. In the case of parenthood within marriage, paternity is established by the effect of the presumption of paternity[30], there being an indivisibility between maternity and paternity, in the sense that once maternity is established,

[26] According to Article 2 of the European Convention on the Legal Status of Children Born out of Wedlock, concluded in Strasbourg on 15 October 1975, to which Romania acceded by Law No. 101/1992, published in the Official Gazette No. 243 of 30 September 1992, "the maternal parenthood of all children born out of wedlock shall be established by the sole fact of the child's birth."

[27] Florian Emese, *Dreptul familiei*, *op.cit.*, 2021, p. 375.

[28] Article 415 Civil Code.

[29] See Florian Emese, *Noul Cod Civil Comentariu pe articole* (Fl.A. Baias, E. Chelaru, I. Constantinovici, I. Macovei – coord.), C.H. Beck Publishing House, Bucharest, 2012, p. 446.

[30] See Article 414 Civil Code.

paternity is also established.[31] Parenthood of a child born outside marriage – where the mother was not married either at the time of conception or at the time of birth – is established, as in the case of maternity, either by the voluntary recognition of the father[32] or by a court decision,[33] in the situations provided by law.

In establishing the paternity of a child born during marriage, as well as of a child born outside marriage, recourse is made to the presumption of the legal time of conception, regulated by Article 412 of the Civil Code. According to this provision, the legal time of conception is represented by the interval between the three-hundredth day and the one-hundred-and-eightieth day prior to the child's birth. The legal time of conception constitutes a mixed legal presumption, which may be rebutted by scientific means of evidence; thus, proof may be provided that the child was conceived during a specific period within the 121-day interval or even outside that interval, in accordance with Article 412(2) of the Civil Code.

Practical difficulties in establishing parenthood in a cross-border context

The application of national rules governing the establishment of parenthood in situations involving a foreign element may, in practice, generate a series of difficulties that cannot be fully captured through a purely theoretical analysis of legal norms. These difficulties are often caused by differences between the legal systems of the member states, as well as by the absence of uniform mechanisms for the recognition of parenthood. As a result, situations may arise in which a child's parenthood is established differently from one State to another.

In the following, a case[34] will be analysed to illustrate how the strict application of domestic rules on parenthood may lead to outcomes that are contrary to factual reality and to the best interests of the child, in the context of cross-border mobility. At the same time, the case highlights the limits of national legislation and reveals the need for solutions at the level of the

[31] See Dan Lupașcu, Cristiana-Mihaela Crăciunescu, *Noul Cod civil. Studii și comentarii* (Marilena Uliescu – coord.), Vol. I, Universul Juridic Publishing House, Bucharest, 2012, p. 805.

[32] See Article 415(2) Civil Code.

[33] See Article 424 Civil Code.

[34] District Court of Drăgășani, Civil judgement no. 694, 15 September 2019.

European Union capable of ensuring the continuity and stability of parenthood relationships, such as the Proposal for a Regulation on parenthood.

As a matter of fact, on 1 October 2019, the claimant X, in proceedings against the defendant Y, requested the court to ascertain that the minor Z, born in Spain, was not his child. In support of the action, the claimant stated that he had been married to the child's mother since 2013 and that they separated in 2017, when the defendant left the marital home and moved to Spain, where she entered a cohabiting relationship with a Moroccan citizen. Since the minor resulted from the extramarital relationship with W and the marriage between the spouses had not been dissolved, the claimant requested the court to establish that he was not the father of the minor.

By the statement of defence filed, the defendant Y requested that the action brought by the claimant be upheld, seeking a finding that the minor Z did not have her husband X as her father. The defendant also stated that she had initiated divorce proceedings, which were pending at the time.

Based on the evidence submitted in the case, the court found, inter alia, that the birth certificate issued by the Spanish authorities indicated that the minor bore the surname of her biological father, namely W, and that W and Y were listed as the parents.

However, according to the birth certificate issued in Romania upon the transcription of the minor's birth certificate, the minor appeared with the surname of the claimant X, who was also recorded as her father.

The defendant acknowledged in her statement of defence that the minor had been conceived because of her cohabiting relationship with W and that the claimant was not the minor's father. Furthermore, W acknowledged before a notary public in Spain that he was the biological father of the minor.

The court held that, pursuant to Article 426 of the Civil Code, "(1) Paternity is presumed if it is proven that the alleged father cohabited with the child's mother during the legal period of conception. (2) The presumption is rebutted if the alleged father proves that it is impossible for him to have conceived the child." According to Article 414(2) of the Civil Code, the presumed paternity of a child conceived or born during marriage may be contested if it is impossible for the mother's husband to be the child's father. In accordance with Article 429 of the Civil Code, the right to bring an action is vested in the mother's husband, the child's mother, the biological father, the child, or the heirs of any of them. Furthermore, under Article 430 of the Civil Code, the mother's husband may bring an action contesting

paternity within three years from the date on which he became aware that he was presumed to be the child's father or from the date on which he learned that the presumption did not correspond to reality.

By bringing an action for the contestation of paternity before the court, the aim is to remove the parenthood established through the application of the presumption of paternity.

Based on the evidence administered in the case, it was established with certainty that the claimant X was not the biological father of the minor Z. Consequently, the court found that the action brought by the claimant was well-founded and upheld it. The court established that the claimant X was not the father of the minor Z and ordered the removal of the claimant's surname and given name from the "father" section of the transcription of the minor Z's birth certificate.

It is submitted that such a situation could have been avoided in the presence of uniform regulations at EU level, capable of ensuring, with due expedition and in compliance with the best interests of the child, the recognition and transcription of birth certificates issued in another member state.

Concluding remarks

The analysis of the Proposal for a Regulation on parenthood and the creation of a European Certificate of Parenthood highlights the concern of the European Union institutions to ensure the protection of the child in a cross-border context, considering the increased mobility of persons and the diversity of national legal systems. Although the proposal is not currently in force, it outlines a uniform legal framework intended to facilitate the recognition of parenthood established in one member state in other member states.

At present, numerous practical difficulties arise from the strict application of domestic rules governing the establishment of parenthood, particularly in procedures for the transcription of birth certificates issued abroad. Such difficulties may lead to solutions that do not reflect factual reality and that undermine the legal certainty of the child.

In this context, the adoption of a Union legal instrument, such as the European Certificate of Parenthood, could contribute to the harmonisation of procedures and to the prevention of similar situations, thereby ensuring

effective protection of the best interests of the child within the European Union.

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4. Lucia Irinescu*, Dreptul familiei*, Hamangiu Publishing House, București, 2014.
5. Lucia Irinescu, *Protecția modernă și implicațiile juridice: de la bioetică la biodrept*, in Transilvania, no. 11-12, 2024.
6. Civil Code.
7. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
8. European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, Brussels, 7.12.2022.
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11. ECHR in *D.B. and Others v. Switzerland*, Applications nos. 58252/15 and 58817/15, 22 November 2022 (Third Section).
12. ECHR, 10.4.2019 (GC), Advisory opinion requested by the French Court of Cassation.
13. European Convention on the Legal Status of Children Born out of Wedlock,
14. District Court of Drăgășani, Civil judgement no. 694, 15 September 2019.

DIGITAL ADMINISTRATION – BETWEEN PROPORTIONALITY AND TRANSPARENCY. THEORETICAL FOUNDATIONS AND APPLICATIONS

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ABSTRACT

One of the most subtle but persistent forms of administrative inequality in the digital age is the indirect exclusion of citizens from administrative procedures, due to the non-use or impossibility of using digital channels. In this context, the application of the principle of procedural pluralism becomes essential for maintaining equity, universal access and respect for fundamental rights in the citizen-administration relationship.

KEYWORDS: *administration; digitalization; transparency; proportionality, public authorities;*

Introductory considerations

In administrative law, the principle of proportionality represents one of the most important benchmarks in assessing the legality of measures adopted by public authorities, especially when they affect the rights or legitimate interests of citizens. Originating from the case law of the German Constitutional Court and extensively adopted in both European Union law and national legal systems, this principle operates as a balancing mechanism between the public interest and individual rights, requiring the administration not to exceed what is necessary to achieve a legitimate aim.[1]

The application of proportionality involves a three-step analysis:

- the adequacy of the measure to achieve the aim,
- its necessity in relation to the existence of other less intrusive means,

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[1] Barak, Aharon, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012, pp. 131-139.

- the fair balance between the public benefit obtained and the harm caused to the individual.

In the context of digitalised administration, this principle takes on increased relevance, as administrative decisions are no longer always the result of a human assessment, but can be generated automatically by IT systems, based on algorithms that do not allow adaptation to particular situations. Under these conditions, the application of the proportionality test risks becoming formal or even non-existent, as the technical system is not programmed to assess the context, exceptions or individual circumstances[2].

Moreover, digitalization can produce measures with disproportionate impact, even when they are apparently legal. For example, the automatic exclusion of a beneficiary from a social program, based on a minor data error or a rigid criterion, may be administratively justified but legally disproportionate. In the absence of human intervention capable of applying the proportionality reasoning, the administrative act becomes excessive, unfairly affecting the legal position of the citizen.

Another significant risk is the standardization of administrative decisions in digital format, which can lead to uniform treatment in profoundly different situations. However, this algorithmic uniformity runs counter to the essence of proportionality, which requires a specific, contextual and balanced analysis. Paradoxically, the very logic of optimization that underpins digitalization can produce excessive or unfair effects, in the absence of rigorous legal control[3].

We consider that, in order to be compatible with the principle of proportionality, digitalized administration must meet at least the following conditions:

- allow human intervention in cases requiring contextual assessment;
- provide algorithmic transparency, so that the citizen understands the criteria that led to the administrative decision;
- ensure effective access to a remedy, through which not only the result, but also the method of decision can be challenged.

[2] Busuioc, Madalina, *Accountable Artificial Intelligence: Holding Algorithms to Public Standards,* Oxford University Press, 2023, pp. 89-94.

[3] Mantelero, Alessandro, *AI and Public Administration: A Risk-Based Approach to Fundamental Rights,* Computer Law & Security Review, Vol. 37, 2020, pp. 11-15.

Philippines: digital administrative identity and disproportionate exclusion

A relevant case for analyzing the application of the principle of proportionality in digital administration is provided by the Philippines, a state that, starting in 2020, launched a large-scale digital population registration program through the PhilSys system – a national electronic registry that assigns each citizen a PhilID (unique digital identity), necessary for accessing essential public services: education, health, social benefits or administrative transactions[4].

Although the official objective of the program is to facilitate access to public services and reduce bureaucracy, in practice, the absence of registration in the PhilSys system leads to the automatic exclusion of the citizen from multiple administrative procedures. In poor, rural areas or areas affected by internal migration, millions of people have not been able to complete the process of digitizing their identity, either due to lack of infrastructure, lack of knowledge of the procedure or digital illiteracy. This reality raises serious proportionality issues, since a general administrative measure – the mandatory digital identification – has disproportionate consequences for a vulnerable category of citizens[5].

The principle of proportionality, in its established form, requires that measures adopted by the public authority are not only appropriate and necessary, but also balanced in relation to the impact they have on the individual. In the case of the PhilSys system, the authorities have made access to fundamental rights conditional on a digital requirement, without providing viable alternatives for people who do not meet the technical criteria or are unable to complete the registration procedure. This approach can be considered disproportionate, as it effectively restricts access to essential services through a technological condition that is not due to the will or fault of the person concerned.

Another critical aspect is the automatism of the administrative sanction: failure to register is not sanctioned by an individual motivated administrative act, but by implicit, invisible and automatic exclusion from the system.

[4] Philippine Statistics Authority (PSA), *PhilSys Implementation Update and Policy Brief,* Manila, 2021, pp. 3-6.

[5] UNDP Philippines, *Leaving No One Behind in the Philippine Digital ID System: Socioeconomic Implications of PhilSys*, Manila, 2022, pp. 12-17.

Thus, the citizen does not have a real possibility to know, contest or remedy the decision, which affects not only the proportionality of the measure, but also the right to defense and transparent administrative treatment.

In addition, the lack of effective administrative mechanisms to compensate for digital vulnerability – such as assistance centers, alternative procedures or exemptions in justified cases – accentuates the disproportionate nature of public policy. Thus, digitalization becomes not only a means of modernization, but also a selection criterion that structurally penalizes precisely the social categories for whom access to the administration should be the most protected[6].

This case study shows that overreliance on digital tools, in the absence of legal and social filters, can lead to a formally correct but substantially unjust administration. In a state of law, proportionality cannot be sacrificed in the name of efficiency, and administrative policy must be built inclusively, flexibly and adapted to social realities, not just technologically standardized.

Italy: the "IO" platform and digital discrimination in the distribution of social benefits

Italy provides a significant example of the accelerated digitalization of public administration in the context of the implementation of large-scale social policies. Launched in 2020, the government app "IO" (acronym for Io, cittadino – "I, citizen") was designed as a unique tool for digital interaction between the citizen and the state, integrating a wide range of services, including official communications, tax payments, administrative alerts and the request for state-guaranteed social benefits[7].

During the COVID-19 pandemic and afterwards, the IO app became the main channel for distributing bonuses and social benefits, such as the "Bonus vacanze", the "Bonus cultura" or energy compensation. Accessing them required having a compatible smartphone, downloading the app and authenticating with the Italian digital identity (SPID or CIE).

[6] Eubanks, Virginia, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor,* St. Martin's Press, 2018, pp. 186-191.

[7] Agenzia per l'Italia Digitale (AgID), *Relazione annuale sull'app IO – Interazione digitale tra Stato e cittadini,* Roma, 2021, pp. 5-11.

Although this method was promoted as efficient and transparent, in practice it generated indirect discriminatory effects, disproportionately affecting certain social categories. The elderly, people with disabilities, migrants without digital status and citizens in rural areas faced de facto exclusion from access to guaranteed benefits, as they did not have the technical means or the knowledge necessary to access the app[8].

From an administrative law perspective, this situation implies a potential violation of the principle of proportionality. Although the purpose of using the IO platform – increasing efficiency and reducing fraud – is legitimate, the chosen means affects access to a social right automatically and without contextual analysis. In the absence of accessible and functional alternatives (physical forms, personalized institutional support), the citizen is administratively sanctioned for the inability to access a technological tool, not for culpable conduct.

Moreover, decisions to award or refuse bonuses, issued exclusively through the platform, were not always accompanied by a clear legal justification, and in some cases, citizens were not aware of the rejection of the application until the legal deadline had expired. This lack of communication and decision-making traceability undermines not only proportionality, but also the principle of legality and the right to defense.

The Italian experience thus reveals the systemic risks of exclusive digitalization in the provision of social benefits: when access to a right is conditioned by a single technological channel, without alternative options, a form of structured administrative exclusion is created. This does not derive from the will of the legislator, but from a technocratic implementation of public policy, which does not respect the diversity of individual situations[9].

The need for a clear and unified regulatory framework

The transition of public administration towards an integrated digital model has generated, in parallel with undeniable efficiency benefits, legal gaps and structural inadequacies in the regulation of administrative decision-making. Clearly, the current regulatory framework – especially in the

[8] Demoskopika Institute, *Digital Divide e Disuguaglianze nell'accesso ai Bonus statali via App IO*, Studi e Ricerche, Napoli, 2022, pp. 14-18.

[9] Mantelero, Alessandro, *AI and Public Administration: A Risk-Based Approach to Fundamental Rights*, Computer Law & Security Review, Vol. 37, 2020, pp. 21-24.

Romano-Germanic legal systems – was not designed to meet the challenges of algorithmic decisions, digital platforms or automatically generated administrative acts.

From this perspective, it is imperative to develop a clear, coherent and uniformly applicable regulatory framework, which would expressly regulate the legal nature of the digital administrative act, the limits of automated decisions and the procedural rights of the citizen in relation to the technological tools used by the authorities[10].

Currently, national legislation does not contain a legal definition of the digital administrative act nor express rules on the procedure for issuing automated decisions. Law no. 554/2004 on administrative litigation and the Administrative Code refer to the administrative act in its traditional meaning, assuming an identifiable human author, an explicit legal justification and a verifiable formal content. This framework is not adapted to situations where the decision is issued by means of an algorithm, without human intervention, or where the communication of the decision is automated and without a qualified signature[11].

This lack of regulation has direct effects on judicial review, which requires the identification of the author, the legal reasoning and the normative basis of the contested act. In the absence of these elements, challenging digital acts becomes problematic, and the citizen is deprived of the guarantee of a fair trial.

On the other hand, in the absence of clear legislation, public administration risks adopting technological solutions without uniform criteria, which leads to unequal and, in some cases, arbitrary administrative treatment. The standards of accessibility, comprehensibility, motivation and redress of automated decisions must be regulated in a uniform manner, in order to avoid administrative fragmentation and inequality between citizens depending on their degree of digital literacy or geographical location[12].

[10] Craig, Paul, *EU Administrative Law*, 3rd ed., Oxford University Press, 2021, pp. 256-263.

[11] *Legea nr. 554/2004 a contenciosului administrativ*, publicată în Monitorul Oficial nr. 1154 din 7 decembrie 2004, art. 2 alin. (1) lit. c).

[12] OECD, *Digital Government Review of Romania: Fostering the Digital Transformation of the Public Sector,* OECD Digital Government Studies, Paris, 2022, pp. 42-45.

An adapted regulatory framework must contain at least the following elements:

- express definition of the digital administrative act and establishment of the conditions of formal and material validity (format, signature, date, issuer, motivation, appeal);
- regulation of automated decision: types of acts that can be automated, permitted areas, obligation of human intervention in sensitive cases or with significant impact on fundamental rights;
- traceability of algorithmic decision, with obligation of archiving logs, minimum explainability and comprehensible motivation for the citizen;
- establishment of an administrative and legal audit mechanism for the technologies used, including the obligation of prior testing of the impact on citizens' rights;
- ensuring procedural pluralism: the citizen must have a real option between the digital procedure and an alternative (physical or assisted) variant, when affected by technological barriers.

One of the most discussed issues in the context of the digitalization of public administration is related to the elimination of the human factor from the decision-making process. Although technology brings undeniable advantages in terms of efficiency and speed, administrative law is based on principles that presuppose legal will, reasoning and responsibility – elements that cannot be fully replaced by an algorithm.

In the doctrine and in the emerging European practices, the need to establish a mandatory human control mechanism (human oversight) for all automated administrative decisions is becoming increasingly clear[13], especially those that affect fundamental rights, involve assessments of opportunity or produce negative effects on the person.

Human control should not be understood as a simple formal supervision, but as an active, conscious and responsible intervention, capable of verifying, correcting or, if necessary, blocking the algorithmic decision before it produces legal effects. In the absence of such verification, the risk of systemic error or violation of proportionality becomes substantial.

The need for this mechanism derives from several considerations:

- The principle of administrative liability presupposes the existence of an identifiable author who can be held accountable for the content, effects and

[13] Busuioc, Madalina, *Accountable Artificial Intelligence: Holding Algorithms to Public Standards,* Oxford University Press, 2023, pp. 102-109.

legality of the administrative act. If the decision is issued automatically, and the human official has only a passive or non-existent role, liability becomes diffuse and difficult to engage.

- The principle of transparency requires that the citizen be able to understand the logic of the decision that affects him.

An opaque algorithm, accompanied by an impersonal notification, does not meet this requirement, and the absence of human intervention makes it impossible to reformulate the decision in understandable language.

- Respecting proportionality requires adapting the decision to the individual context. An automated system cannot assess the personal circumstances of the applicant, cannot interpret exceptions and cannot decide fairly in an atypical situation. Only a human factor can introduce the flexibility necessary for a fair administration.

In terms of regulations, the introduction of human control could be achieved through a double regulation:

- General regulation, at the level of the Administrative Code, which would provide that any administrative act issued by digital means must be validated by a responsible public official before producing legal effects in the charge of or in favor of a person.

- Special regulations, applicable in sensitive areas – taxation, social benefits, health, education -, where the obligation of prior human review is expressly established for any negative or restrictive automated decision.

A model of good practice can be inspired by the regulations proposed by the European Union in the draft Regulation on Artificial Intelligence ("AI Act"), which provides, in the case of high-risk systems used in the administration, the obligation of effective, not symbolic, human intervention in the decision-making process [14].

Algorithmic transparency and the obligation to motivate the digital administrative act

One of the most important principles of administrative law, with constitutional and European value, is the obligation of the administration to motivate its acts. This obligation ensures the transparency, controllability and fairness

[14] *Propunere de Regulament al Parlamentului European și al Consiliului de stabilire a normelor armonizate privind inteligența artificială* (Actul privind inteligența artificială – „AI Act"), COM(2021) 206 final, art. 14.

of the public decision, and the absence of motivation is equivalent, in many situations, to the nullity of the administrative act.

In the context of digitalization, this obligation takes on a new dimension, given that decisions can be generated by automated systems, algorithms and technical platforms, without substantial human intervention. In such cases, the classic motivation, in legal and administrative language, is replaced by a simple digital notification (such as "your request has been rejected"), without a comprehensible explanation and without indicating the legal basis, the evaluation criteria or the possibilities of contestation.

This practice clearly contravenes the fundamental requirements of decision-making transparency. The citizen has the right not only to receive a decision, but also to understand the reasoning behind it, in order to be able, if necessary, to effectively challenge it. In the absence of this explanation, the right to defense and litigation becomes illusory.

In digitalized administration, algorithmic transparency must be understood as an extension of the obligation to provide reasons. It implies that the administration has the duty to:

- explain the functioning of the algorithm used, in an accessible language (without disclosing the source code, but the general logic of the decision);
- specify the criteria taken into account for the respective decision (e.g. age, income, type of application);
- inform the citizen whether the decision was issued automatically or by a human official;
- allow the decision to be challenged within a reasonable time, through a clear and effective procedure.

Algorithmic transparency is not just an ethical or technological requirement, but a requirement of legality within the meaning of art. 20 of the Law on Administrative Litigation, which obliges the authority to justify in fact and in law the acts issued. Without this justification, the litigant cannot effectively refer the case to the court, and the judge cannot exercise real control over the merits and legality of the decision[15].

Likewise, European case law – both of the Court of Justice of the European Union and of the European Court of Human Rights – has consistently established the need for clear, precise and intelligible reasoning,

[15] *Legea nr. 554/2004 a contenciosului administrativ*, art. 20 alin. (2), Monitorul Oficial nr. 1154 din 7 decembrie 2004.

including in areas where the decision is supported by technical or statistical elements[16].

In order for digital administration to remain faithful to these standards, it is necessary that the obligation to provide reasons be expressly extended to documents issued through digital and algorithmic systems, and that authorities have a legal obligation to provide the citizen with:

- an automatically generated but legally interpretable supporting document,
- an administrative contact address for requests for clarification,
- a formalized procedure for contesting the outcome of the decision.

Procedural pluralism implies the existence of multiple ways of accessing public administration, depending on the capacities, needs and individual context of each citizen. In a democratic legal system, digitalization cannot completely replace the traditional procedure without creating major risks of discrimination, especially for the elderly, the disabled, those with low incomes or those from marginalized communities.

The exclusively digital administration of social benefits, the issuance of official documents or the conduct of public tenders exclusively online can, in the absence of alternatives, become systemic administrative barriers. In such cases, the state is no longer a universal provider of public services, but becomes an agent of technological selection, in which exclusion does not result from the law, but from the procedural structure of digital interaction.

To prevent this effect, the regulatory framework should expressly enshrine:

- the citizen's right to choose between the digital and physical procedure (where reasonable);
- the administration's obligation to make digital assistance solutions available (support centers, assisted counters, telephone lines);
- the prohibition of conditioning access to a public right or service on the exclusive use of a technological channel, if there is no equivalent alternative.

In this sense, procedural pluralism becomes a form of protection of equality before the administration, and its absence may constitute an indirect violation of the principle of proportionality and the right to good administration.

It is also important for administrations to develop mechanisms to monitor administrative accessibility. It is not enough for a digital platform to be

[16] *CJEU, C-342/12*, Wolters Kluwer, Hotărârea din 6 martie 2014, § 38.

technically functional; it must be usable, understandable and inclusive. Social and technological impact assessments on various categories of the population must become standard in the implementation of any digital administrative solution[17].

A state based on the rule of law cannot function without the real possibility of any act of public administration being subject to effective judicial control. This fundamental requirement derives from the Constitution, from the jurisprudence of the Constitutional Court, as well as from the provisions of art. 6 and art. 13 of the European Convention on Human Rights[18].

In the context of the digitalization of administration, however, this control encounters new legal and technical obstacles, which must be recognized and corrected through appropriate legislative and jurisprudential interventions.

The digital administrative act, whether issued automatically or through a technological interface, must be enforceable, verifiable and contestable, under the same conditions of legality as a traditional act. In practice, however, courts face difficulties regarding:

- identifying the issuer of the act when the decision is generated algorithmically, without an individualizable electronic signature;
- the lack of a comprehensible justification for the act, essential for filing a complaint in litigation[19];
- the absence of official communication, given that digital documents are accessed only through applications, without certain proof of notification;
- the ambiguity of the applicable legal regime, in the absence of a special regulation on digital documents in Law no. 554/2004.

[17] OECD, *Principles of Digital Government: Towards a Human-Centric Approach*, Paris, 2020, pp. 24-27.

[18] Constituția României, art. 21 alin. (1) și (2); art. 52 alin. (1) – consfințesc accesul liber la justiție și dreptul persoanei vătămate de o autoritate publică de a obține repararea prejudiciului. Vezi și CEDO, art. 6 (dreptul la un proces echitabil) și art. 13 (dreptul la un recurs efectiv); a se vedea în special cauza *Kudła c. Poloniei*, Hotărârea din 26 octombrie 2000, § 152.

[19] Lenaerts, Koen, *The Principle of Effective Judicial Protection in EU Law*, Yearbook of European Law, Vol. 34, 2015, pp. 322-326.

In order to guarantee authentic judicial control over digitalized documents, the following measures are necessary:

- The express extension of the scope of administrative documents to those issued by digital or algorithmic means, regardless of the technical support used.
- Legal clarification of the form of the digital administrative document, including the requirements for electronic signature, timestamp, proof of communication and identification of the author.
- The obligation of the administration to provide, at the request of the court or the plaintiff, the decision-making logic and the algorithmic path (in a summarized and interpretable form), which led to the issuance of the contested document.
- Regulating a distinct time limit for the exercise of litigation in the case of digital communication, in order to ensure legal certainty and the right to defense.

In addition, it must be borne in mind that the courts must be properly trained and equipped to understand the technical nature of the contested acts. Judicial control over automated decisions is not a simple transposition of traditional logic, but requires the adaptation of judicial culture and analysis tools to the new realities of algorithmic administration.

Conclusions

The digitalization of public administration is not just a technological transformation, but a profound reconfiguration of the relationship between the citizen and the public authority. In this process, the fundamental principles of administrative law – legality, proportionality, transparency, accessibility and judicial control – do not lose their relevance, but on the contrary, are subject to increased pressure for adaptation and reconfirmation.

The paper has demonstrated that digitalization, in the absence of a clear regulatory framework and effective protection mechanisms, can lead to subtle forms of exclusion, inequality and administrative opacity, despite apparent efficiency. Administrative acts issued through automated systems, non-transparent algorithms or standardized digital applications must be subject to the same legal requirements as acts issued in classic format.

No technological innovation can justify abandoning the fundamental guarantees of the rule of law.

The case studies analysed also highlighted that the risks are not hypothetical, but have already materialised in concrete administrative practices, in which the right to good administration, equal access and judicial protection has been directly affected. In the face of these challenges, it is essential that regulation does not lag behind technology and that digitalisation is accompanied by clear mechanisms for human oversight, algorithmic transparency, procedural pluralism and institutional accountability.

The question is therefore not whether public administration should digitize, but how to maintain the balance between innovation and the protection of essential legal values. In this sense, the solution lies not in resisting progress, but in anchoring technological transformation in a robust legal framework, capable of tempering the excesses of automation and guaranteeing the citizen his status as a subject of law, not a simple recipient of an opaque decision.

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16. Lenaerts, Koen, *The Principle of Effective Judicial Protection in EU Law,* Yearbook of European Law, Vol. 34, 2015

ONE HEALTH AND SUSTAINABLE DEVELOPMENT: A RENEWED PERSPECTIVE ON POLICY AND EDUCATION

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ABSTRACT

The COVID-19 pandemic has exposed the structural vulnerabilities of public health systems, demonstrating that the lack of an integrated and cross-sectoral approach leads to major institutional, social, and economic disruptions. In this context, the One Health concept – which advocates for the recognition of the interdependence between human, animal, and environmental health – becomes an indispensable governance framework in contemporary societies. This article aims to emphasize the strategic role of the One Health concept in shaping and aligning public policies with the Sustainable Development Goals (SDGs) of the UN 2030 Agenda, through the lens of the European legal and institutional framework. The relationship between One Health and sustainable development is explored as one of a structural nature, in which health is understood not only as a result but as an essential determinant of ecosystem balance and state stability. On this basis, the article argues for the need to integrate One Health into all relevant public policies – from health and agriculture to trade, environment, and education – through explicit regulations, unified legal instruments, and educational strategies with systemic impact. The analysis is based on the framework provided by Article 168 TFEU, recent recommendations from the Scientific Advisory Mechanism (SAM), and lessons learned from the global health crisis. It concludes that the operationalization of One Health in European law and public policy is not just a policy option, but a condition for health and institutional resilience.

KEYWORDS: *One Health; EU Law; Sustainable Development; Public Health Governance; Education and Prevention;*

Introduction

The COVID-19 pandemic has highlighted, with unprecedented acuity, the fragility of public health systems in Europe and around the world. The health crisis has demonstrated not only the vulnerability of medical infrastructures in the face of a global epidemiological risk, but also the

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limitations of sectoral, uncoordinated approaches to health.[1] In this context, it has become clear that protecting the health of the population cannot be achieved effectively without an integrated vision that considers the interdependencies between human, animal, and ecosystem health.[2]

The European Union's institutional response to this challenge has resulted in a paradigm shift towards strengthening a common governance framework in the field of health. The European Health Union project, currently under development, aims not only to provide more effective protection for public health, but also to develop administrative, institutional, and regulatory capacities that will enable a coordinated and proactive response to emerging health threats.[3] At the heart of this reconstruction is the *One Health* concept*,* which is becoming a strategic framework for integrating public policies with an impact on health in the broadest sense.[4]

This transformation is also relevant from the perspective of health law, a rapidly evolving field that is no longer limited to regulating medical services but extends to the structural determinants of health: environment, nutrition, work, education, food safety, and mobility.[5] The *One Health* approach contributes to redefining the normative content of the right to health, consolidating it as a multidimensional fundamental right that imposes on states not only obligations to guarantee access to care, but also to regulate in a coherent, preventive, and cross-sectoral manner the factors that influence the health of the population.

[1] European Court of Auditors, (2024). *The EU's response to the COVID-19 pandemic. Special Report 12/2024, https://www.eca.europa.eu/ECAPublications/SR-2024-12/SR-2024-12_EN.pdf*

[2] European Commission: Group of Chief Scientific Advisors and Directorate-General for Research and Innovation, One Health governance in the European Union, Publications Office of the European Union, 2024, *https://data.europa.eu/doi/10.2777/8697309*

[3] European Commission, 2020, Building a European Health Union: Reinforcing the EU's resilience for cross border health threats, *www.eur-lex.europa.eu*

[4] WHO Regional Office for Europe. (2021). Response to the COVID-19 pandemic: Lessons learned to date from the WHO European Region (EUR/RC71/6 Rev.1). World Health Organization. *https://www.who.int/europe/publications/i/item/EUR-RC71-6-Rev-1.*

[5] Forman L, Abdool Karim S, Kolawole O., *Global Health "With Justice": The Challenges and Opportunities for Human Rights in Global Health Law*. Journal of Law, Medicine & Ethics. 2025;53(S1):18-22. doi:10.1017/jme.2025.1

1. Historical landmarks of the One Health concept and its role in building sustainable health in line with the Sustainable Development Goals

Although the contemporary formulation of the *One Health* concept was formalized relatively recently, the fundamental idea behind it – that human health is inseparable from animal health and the state of the environment – has deep roots in the history of medical and scientific thought. Over time, different medical and philosophical traditions have advocated, in distinct ways, for an integrative view of health, seen as the result of the interaction between humans, nature, and society. This holistic perspective, temporarily forgotten in the era of biomedical hyper specialization, is now being rediscovered and valued as an essential solution to today's global challenges.

In ancient times, Hippocrates – considered the father of Western medicine – argued in his treaties *On Airs, Waters, and Places* that health is deeply influenced by environmental factors such as climate, water and soil quality, and the lifestyle of the population.[6] The 19th century was a turning point in the scientific consolidation of this integrative vision. Rudolf Virchow, founder of modern cellular pathology, was the first to define the term *zoonosis,* referring to infectious diseases transmissible from animals to humans. In his view, human medicine and veterinary medicine could not be treated as separate disciplines because their scope was convergent. His famous statement is that "there is no dividing line between human and veterinary medicine – nor should there be. Their objects differ, but the experiences gained form the basis of medicine as a whole".[7] Virchow was also a promoter of public hygiene, preventive health measures, and social reforms as means of protecting collective health – aspects that are now recognized as key components of health sustainability.[8] In the 20th century, this vision was revisited and systematized by Calvin Schwabe, an American

[6] Jones, W. H. S. (Ed. & Trans.). (2001). Hippocrates: Volume I – Ancient Medicine, Airs, Waters, Places, Epidemics I and III, The Oath, Precepts, Nutriment.
https://search.worldcat.org/search?q=bn%3A9780674991620&qt=sort&se=yr&sd=desc

[7] Gibbs, E.P.J. (2014). The evolution of One Health: A decade of progress and challenges for the future. Veterinary Record, *www.researchgate.net*

[8] Porter, R. (1997). The Greatest Benefit to Mankind: A Medical History of Humanity from Antiquity to the Present, *www.researchgate.net*

veterinary epidemiologist, who proposed the concept of *One Medicine* in 1964.

The official establishment of the *One Health* concept took place in the early 21st century, in the context of health crises caused by emerging infectious diseases of zoonotic origin – HIV, SARS, H1N1, Ebola, COVID-19 – which demonstrated the interdependence between human health, animal health, and the global environment. A defining moment was the adoption in 2004 of *the Manhattan Principles* by the Wildlife Conservation Society, which advocated for global health governance based on interdisciplinary collaboration and cross-sectoral integration. In the years that followed, international organizations such as the World Health Organization (WHO), the Food and Agriculture Organization of the United Nations (FAO), the World Organization for Animal Health (WOAH), and the United Nations Environment Program (UNEP) actively promoted the idea of a common agenda for global health under the umbrella *of One World, One Health.*[9] This collaboration was first institutionalized in 2009 through the establishment of the One Health Commission in the United States, and has since evolved through the adoption of the One Health Joint Action Plan 2022-2026 and the Guide for National Implementation (2023), developed by the four organizations mentioned above. These documents provide a strategic framework for operationalizing the concept at the national and regional levels, promoting its integration into public policies on health, agriculture, the environment, and food security.

At the European Union level, the *One Health* concept is recognized and explicitly integrated into public health, food safety, and antimicrobial resistance strategies. The *One Health* approach was enshrined in the European Commission's 2017 Action Plan on Antimicrobial Resistance, which states that maintaining the effectiveness of treatment for infections in humans and animals requires coordinated interventions at the interface between human, veterinary, and ecosystem health. This plan reinforced the 2001 Community Strategy and the actions planned for 2011-2016, which were aimed at improving cooperation between human and veterinary medicine, optimizing the use of antimicrobials, and promoting transdisci-

[9] Zinsstag, J., Schelling, E., Waltner-Toews, D., & Tanner, M. (2011). *From "One Medicine" to "One Health" and systemic approaches to health and well-being.* Preventive Veterinary Medicine, 101(3-4), 148-156.
https://doi.org/10.1016/j.prevetmed.2010.07.003.

plinary research. In fact, the European Union has also included the *One Health* approach in the EU4Health program for 2021-2027, which provides for strengthening the capacities of health systems in Member States, integrating health crisis management, and developing a network for epidemiological surveillance and control of communicable diseases. In 2024, five European agencies (ECDC, EMA, EFSA, ECHA), and the European Environment Agency – formed an interinstitutional working group to coordinate the implementation *of One Health* at the EU level. The strategic objectives of this collaboration are to develop analytical capacities, promote joint research, and develop harmonized standards for intervention in health risk situations.[10]

World Health Organization plays a key role in developing and promoting the concept, coordinating *the Joint Plan of Action One Health*, in close collaboration with the FAO, WOAH, and UNEP. WHO emphasizes the need for an integrated multisectoral approach, particularly in the context of global threats such as pandemics, antimicrobial resistance, zoonotic diseases, and climate change. By adopting the *Health in All Policies* approach, WHO actively supports the transposition of *One Health* principles into all relevant areas of governance: public health, agriculture, environment, food safety, urban planning, and international trade. In addition, WHO contributes technical expertise and plays a coordinating role in harmonizing national legislation and institutional frameworks, while supporting the development of functional and cross-sectoral public policies that can sustainably address zoonotic disease prevention, food safety, antimicrobial resistance reduction, and ecosystem protection.[11] According to an analysis by the FAO and the World Bank, the effective implementation of *One Health* policies can generate global economic benefits estimated at USD 37 billion annually, while the investments required to achieve them are less than 10% of this amount. For example, policies to prevent deforestation can produce quantifiable positive side effects of over $4 billion by reducing CO_2 emissions and protecting ecosystems with indirect health value.[12] The integration of these initiatives into the European and international legal and institutional architecture demonstrates that *One Health* is no longer just a

[10] Sîrbu, M. (2025) *Interconnectivity in health. The challenges of operationalizing the "One Health" concept*. Curierul Judiciar.

[11] *Ibidem,* 10.

[12] *Ibidem*.

theoretical framework, but a strategic direction for multisectoral action, essential for achieving sustainable development goals. By adopting it as a cross-cutting principle, the European Union and the WHO are promoting a vision of health focused on prevention, equity, and systemic resilience – a vision that, in turn, calls for a rethinking of health policies in an integrative logic based on collaboration and legislative coherence.

2. One Health and the Sustainable Development Goals in the context of the European Union's public health policy.

The European Union's public health policy is deeply rooted in the United Nations' 2030 Agenda, taking full advantage of the architecture of the 17 Sustainable Development Goals.[13] Although responsibility for organizing health systems lies primarily with Member States, the Union plays an essential role in complementing and guiding them through legislative, financial, and strategic instruments built in convergence with global objectives. These provide not only a reference framework for prioritizing interventions, but also a logic of cross-cutting coherence between seemingly distinct areas. The approach Current global challenges – emerging health crises, antimicrobial resistance, zoonotic diseases, climate change risks, and food insecurity – transcend the boundaries of institutions, disciplines, and states. These phenomena call for integrated, collaborative governance based on data sharing, multisectoral expertise, and coordinated interventions, which requires precisely the respect and integration of the One Health concept in all public policies.

Can the One Health approach and the Sustainable Development Goals be analyzed and applied separately, or is there a structural interdependence between them that calls for systemic integration? The *One Health* approach contributes significantly to achieving the strategic goals set out in the UN 2030 Agenda, providing an integrative framework for public policies that simultaneously address health, the environment, food security, agricultural production, biodiversity, and climate change adaptation. This vision transcends sectoral boundaries and promotes a systemic understanding of human health, closely linked to the state of ecosystems, the quality of natural

[13] European Commission. (2023). A One Health approach to support EU health security: Enhancing prevention, preparedness and response, *https://www.ema.europa.eu/en/partners-networks/one-health-approach*

resources, and social and economic sustainability.[14] This logic is explicitly reflected in the structure of the Sustainable Development Goals (SDGs). Although *One Health* is most associated with SDG 3 "Good Health and Well-being," its impact is cross-cutting and directly supports other goals such as SDG 2 (Zero Hunger)**,** SDG 6 (Clean Water and Sanitation), SDG 13 (Climate Action), and SDG 15 (Life on Land). In terms of food and agriculture, the *One Health* concept supports food safety, animal health, and the reduction of antimicrobial use in production, thus contributing to the prevention of malnutrition and foodborne diseases (SDG 2) (European Commission, 2020a). For example, public policies that promote the reduction of the uncontrolled use of antibiotics in agriculture support not only public health, but also food safety, biodiversity protection, and the reduction of water and soil contamination. The *One Health* approach is becoming an essential pillar in achieving the sustainable development goals by 2030, as it acts as a bridge between sectors, enabling not only efficiency in implementation but also consistency in reporting and monitoring progress. Concrete examples of the application of this cross-sectoral logic can be found in recent UNDP initiatives, which promote integrated policies in the areas of health, energy, and the environment, demonstrating the benefits of inter-institutional collaboration and the use of digital technologies in strengthening the resilience of public systems.[15]Regarding water resource management, *One Health* offers an essential perspective for the control of pharmaceutical and biological contaminants, integrated into European directives on water and sanitation (SDG 6).[16] In the field of climate, the approach contributes to preventing the risks associated with emerging diseases favored by climate change, being included in European adaptation strategies (SDG 13). (European Commission, 2021). And in the sphere of ecosystem protection, *One Health* is found in the argument for protecting biodiversity, recognized as a factor of health and ecological

[14] WHO Regional Office for Europe. (2021). Response to the COVID 19 pandemic: Lessons learned to date from the WHO European Region (EUR/RC71/6 Rev.1). World Health Organization. *https://www.who.int/europe/publications/i/item/EUR-RC71-6-Rev-1.*

[15] UNDP (2025). Integrated approaches in health, climate and energy: Strengthening systems for sustainability and resilience. United Nations Development Program, *https://www.undp.org/sites/g/files/zskgke326/files/2025-02/hce-en.pdf.*

[16] European Environment Agency. (2022), Emerging chemical risks in Europe – "PFAS" in drinking water, *https://www.eea.europa.eu/en/analysis/publications/emerging-chemical-risks-in-europe*

stability (SDG 15)[17]. This interconnectivity supports the need for a coherent regulatory and institutional framework to ensure the functional integration of *One Health* into European public policy. Without such a systemic approach, the achievement of sustainable development goals remains partial, and policies risk developing in parallel, without synergy. Uniform regulation of the concept, coupled with operational applicability, thus becomes a necessary tool for translating the Union's political commitments into concrete and sustainable results.

From a health perspective, preventing communicable diseases, combating antimicrobial resistance, and strengthening health systems are already European priorities reflected in initiatives such as EU4Health and AMR action plans.[18] The *One* Health concept, closely linked to the sustainable development goals, provides a coherent strategic framework for developing public policies that go beyond crisis response. We are changing the paradigm and focusing on building systemic institutional capacity where prevention, anticipation, and coordinated intervention take center stage. In this context, it is essential that the health system is not designed solely as a response mechanism, but as a resilient system capable of absorbing shocks, dynamically adapting to the risks generated by complex medical contexts and functioning in an integrated manner with other relevant sectors. *The OECD Guide to Testing the Resilience of Health Systems* (2024) proposes a practical methodology based on simulating crisis scenarios – such as pandemics, natural disasters, or digital collapses – with the aim of identifying systemic vulnerabilities and guiding the formulation of preventive policies and strategic investments. Resilience testing is thus designed not only as a technical exercise, but as a tool for political dialogue between multisectoral actors, aimed at contributing to the development of robust, proactive institutional capacities that have learned from recent crises. The current dynamics of contemporary life, marked by factors such as natural disasters, pandemics, and epidemics, exert constant pressure on health systems. In this context, it becomes essential for public systems to periodically assess their ability to adapt and respond to crisis situations to ensure the resilience and

[17] European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats. COM (2020) 724 final. Brussels, 11 November 2020. Available at*: https://ec.europa.eu*.

[18] *Ibidem,* 2.

continuity of medical services under conditions of major stress. The systemic approach to assessing vulnerabilities directly reflects the One Health principles, which call for integrated governance based on the interdependencies between human, animal, and ecosystem health. Integrating health into a broader framework of cross-sectoral policies is becoming essential to achieving global sustainability goals. For example, in the European Green Deal, health is treated as an indirect benefit of climate, agricultural, and biodiversity protection policies.[19]The Common Agricultural Policy, the Water Framework Directive, and the Climate Change Adaptation Strategy are other examples where health objectives are included as a cross-cutting dimension, thus demonstrating the applicability of the One Health approach in policies with systemic impact.[20] Through this approach, the European Union does not limit itself to declarative statements, but includes the *One Health* principle in legal instruments and institutional mechanisms, strengthening health as both a result and a prerequisite for sustainable development. This vision is reflected in the orientation of funding programs, in the proposed structural reforms, and in the new standards for assessing the impact of public policies.[21] Without its real integration into the architecture of policies and norms, efforts to achieve the SDGs risk remaining fragmented, with partial and uneven results between states. The sectoral fragmentation of competences within Member States, including Romania, is one of the main barriers to the integrated application of the concept. Health institutions, sanitary-veterinary authorities, environmental agencies, food safety authorities, and entities responsible for agricultural policies often operate in parallel administrative paradigms. Overcoming these limitations requires the adoption of a coherent legislative framework, the interconnection of data collection systems, the creation of platforms for institutional collaboration, and the inclusion of the *One Health* approach in national sustainable development strategies. For this concept to become truly operational and effective at the European level, a unified and binding legal framework is needed that goes beyond the purely consultative nature of current strategies and enshrines the One Health approach as a fun-

[19] *Ibidem*, 17.

[20] *Ibidem*, 14.

[21] OECD/European Observatory on Health Systems and Policies (2024), Strengthening Health Systems: A Practical Handbook for Resilience Testing, OECD Publishing, Paris, *https://doi.org/10.1787/3a39921e-en.*

damental principle in all public policies with an impact on health.[22] Regulation in this area should support the development of a common vision, stimulate cooperation between sectors and states, facilitate the exchange of good practices, and create the conditions for concrete, financially supported actions. The European Union's ongoing concern to transform the *One Health* principles into a cross-cutting regulatory instrument is reflected in the initiatives coordinated by the Directorate-General for Health (DG SANTE), the Directorate-General for Climate Action (DG CLIMA), and the Scientific Advice Mechanism (SAM). These steps demonstrate the institutional commitment to scientifically substantiate and legally operationalize the integration of the *One Health* concept into public health policies and beyond. Human, animal, and plant health and the state of ecosystems are conceived as interdependent elements of a single system and regulating them separately becomes ineffective in the face of global risks. The recommendations developed within these interinstitutional platforms aim to concretely integrate the *One Health* approach into the European legislative architecture through harmonized standards, coordinated budget allocations, and governance mechanisms that transcend traditional sectoral logic.[23] The publication in November 2024 of the report *One Health Governance in the European Union* (Opinion No. 16), produced by the Scientific Advisory Mechanism (SAM) with the support of SAPEA, marks a moment of strategic coherence in the evolution of European health policies. The document makes a strong case for the need for integrated governance, based on a clear definition of the One Health concept, alignment between relevant sectoral areas, and the removal of institutional barriers that perpetuate decision-making fragmentation. It is remarkable that the report goes beyond programmatic discourse and proposes an applicable operational framework – including monitoring tools, performance indicators, cost-benefit assessments, and institutional architectures for transdisciplinary coordination. Through these recommendations, the European Union confirms its commitment to transforming One Health into a cross-cutting principle of action, applicable in real terms to all relevant public policies.[24]

[22] *Ibidem*, 2.

[23] *Ibidem*.

[24] Science for Environment Policy, European Commission DG Environment News Alert Service, edited by the Science Communication Unit, The University of the West of England, Bristol, *https://environment.ec.europa.eu/news/how-can-we-apply-one-health-approach-eu-policies-2025-07-24_en*.

3. Education as a strategic infrastructure for One Health

Public health has become an essential pillar of national security, as clearly highlighted by recent crises such as the COVID-19 pandemic, antimicrobial resistance, zoonotic diseases, and climate change. The pandemic has demonstrated that a fragile health system can trigger institutional collapse, impacting the functioning of the state and generating dramatic economic consequences. At the European Union level, the impact on productivity, supply chains, and public finances has been significant, with structural effects on all essential sectors of the state.[25] International organizations such as the World Health Organization and the United Nations have defined health as an integral part of human security. In this logic, the state's inability to prevent and manage health threats represents a strategic vulnerability. When the health system is overwhelmed, reactive measures – such as quarantines, economic restrictions, and institutional closures – affect internal stability and the state's ability to provide essential services.[26] Public health is now recognized as a pillar of national security**,** especially in the context of emerging risks: pandemics, antimicrobial resistance, zoonotic diseases, and climate crises. In this sense, health is no longer just a matter of social protection, but of the strategic resilience of the state**:** if the health system collapses, the entire functioning of the state is jeopardized. Education becomes a central tool for prevention and resilience building. Training in the spirit of One Health contributes not only to protecting individual health, but also to strengthening the collective capacity to respond, anticipate, and adapt to health crises. Investing in health education is therefore an investment in national security. Article 168(1) of the Treaty on the Functioning of the European Union establishes the obligation to "ensure a high level of human health protection in the definition and implementation of all Union policies and activities." This wording makes public health a cross-cutting principle in the Union's legislative architecture, and health protection is no longer just a policy option but a legal benchmark. Furthermore, the same provision extends the scope of Union action to key areas such as disease prevention, combating major epidemics, monitoring cross-border health risks and – essential to the One Health approach – health

[25] *Ibidem*, 1.

[26] Kosal M, How COVID-19 is reshaping U.S. national security policy. Politics and the Life Sciences, *2024;43(1):83-98. doi:10.1017/pls.2023.13*.

information and education. This explicit inclusion of education confirms that training in the interdependence of human, animal, and environmental health is not an ancillary addition, but a legitimate normative tool for fulfilling the obligation to protect health. In this context, education becomes an integral part of institutional and social resilience, and without it, the application of One Health principles remains fragmented and vulnerable. Therefore, the integration of One Health education into public strategies must be understood as a direct institutional response to the mandate set out in Article 168 TFEU – a mandate that involves not only governance in the classical sense, but also the strengthening of anticipation and prevention capacities at the level of society. "High level of human health protection", enshrined in Article 168(1) TFEU, is not purely rhetorical, but expresses a legal requirement that obliges the European Union and the Member States to treat public health not as a residual good, but as a priority. From a functional perspective, health protection can be achieved through two main types of intervention: treating the effects (the curative dimension) and preventing the causes (the proactive dimension). However, in the logic of modern, sustainable governance, prevention becomes the main instrument for guaranteeing a high level of protection, and education plays a decisive role. Not only as a vector of information, but as an institutional mechanism for reducing systemic risks and for cultural transformation in the way society perceives and responds to health challenges. The integration of the One Health principle into education, from school curricula to professional training, thus becomes an operational component of the obligation to protect: if we want effective prevention, we must train citizens and professionals to understand the interdependencies between human, animal, and environmental health. Without this educational dimension, the legal standard of "high level of protection" risks remaining unachieved in practice. For the One Health principles to be truly functional in society, it is essential that education is not treated as an auxiliary measure, but as the foundation for forming a collective mindset capable of supporting the implementation of the concept. Just as the grammar of a language is taught so that students can communicate correctly and coherently, so *One Health* should become an essential formative dimension for living beautifully, healthily, and harmoniously – in balance with others, with animals, and with the environment. Building this mindset starts in school, but must be continued in the family, community, and profession. There is a need for a civic culture of mutual responsibility that provides citizens with clear

guidelines for understanding not only what health means, but also how it is produced and protected through interconnected public policies. In this light, a fundamental question arises: *to what extent can education contribute to the realization of states' obligation to ensure sustainable health governance, in the spirit of the One Health principle, as an integral part of the fundamental right to health?* The SAM report (2024) emphasizes that the sustainable integration of the One Health concept cannot be ensured exclusively through legal regulations or administrative mechanisms. This transformation requires a reconfiguration of collective consciousness, a process that involves the implementation of a coherent, sustained, and long-term educational strategy. The Report proposes the inclusion of *One Health* in formal and non-formal education systems, from early childhood education to the professional training of medical, veterinary, and environmental professionals, as well as those working in public policy, administration, and justice.[27] Education in the spirit *of One Health* has the potential to produce the most profound form of transformation: changing the way citizens understand the link between their health, the food they eat, the environment in which they live, and the policies that govern them. Thus, *One Health* no longer appears as an abstract or technical concept, but as a concrete element of everyday life, easy to understand, accept, and support. To achieve this goal, dedicated curricula should be developed as early as preschool, cultivating systemic thinking, respect for nature, the importance of hygiene, healthy eating, and cross-sectoral cooperation. At the same time, continuing professional development should include inter/transdisciplinary modules for doctors, veterinarians, lawyers, agricultural engineers, urban planners, economists, and civil servants. Moreover, civic education can play a decisive role in strengthening a society that demands and supports One Health policies, precisely because it understands the interdependence between fields and the impact of public decisions on common health. An informed society is more receptive to reforms and less susceptible to resistance to multisectoral regulations.

[27] *Ibidem*, 2.

Conclusion

Education is a form of invisible but essential social infrastructure, without which no institutional or legislative reform can produce sustainable results. The future of One Health governance begins not in parliament or ministries, but in schools, universities, and communities. However, this transformation cannot be achieved simply by updating technical standards. It requires sustained political commitment and, above all, a profound change in the culture of decision-making and norm. The change in mindset – essential for the integration of One Health – begins with education. From the earliest years of training, learning about the interdependence between human, animal, and environmental health becomes a vector of civic and professional responsibility.[28] Early education, followed by continuous training in relevant fields, contributes decisively to shaping a society capable of understanding, accepting, and supporting complex legislative reforms. An informed population is not only more aware of its rights and obligations but also more receptive to transposing One Health principles into binding rules. Thus, aligning European health policy with the 2030 Agenda is not just an exercise in strategic coherence, but a process of systemic transformation, in which health is reconfigured as a cross-cutting element with normative, institutional, and societal relevance for the entire architecture of European sustainability. However, building a global governance framework around One Health principles cannot be achieved quickly or exclusively through technical means. First and foremost, it requires political will at the national and international levels, but also a profound recalibration of regulatory reasoning. This change can be cultivated through public education policies that promote a holistic understanding of health and systemic interdependencies from the earliest years of life. Education in the spirit of One Health must begin in kindergarten and be supported throughout professional training so that future generations understand not only the concepts but also their legislative, institutional, and cultural implications. A society educated in the spirit of health interconnectivity is more receptive to regulations that transpose One Health into binding rules, thus contributing to the real sustainability of public policies.

[28] *Ibidem*, 2.

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PRE-CONTRACTUAL PROTECTION OF THE ELECTRICITY INDIVIDUAL CONSUMER

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ABSTRACT

Contractually, the protection of the individual consumer is achieved in two ways: through common law (regulated mainly by the Civil Code) and consumer law (regulated mainly by the Consumer Code). In the pre-contractual phase, specific expressions of will can include agreements in principle, preferential pacts, option pacts, unilateral and bilateral promises, framework agreements, etc. A framework contract is defined as an agreement by which the parties "agree to negotiate, conclude, or maintain contractual relations whose essential elements are determined by it" (Art. 1176 para. 1 Civil Code). Practically, the framework contract proves its usefulness in regulating the distribution, supply, and transmission of electricity and natural gas, and implicitly, in protecting the energy consumer, as an individual. On the other hand, the protection of relations between the trader and the consumer is achieved based on the principles and objectives derived from the provisions of the Consumer Code. The work is structured into three sections: "Formation of the contract. Preparatory contracts and framework contracts"; "Particularities of the electricity supply framework contract"; and "Consumer protection for the individual electricity user. Principles and objectives".

KEYWORDS: *preparatory contracts, framework contract, consumer protection;*

I. Formation of the Contract. Preliminary contracts and framework agreements

The main institution of civil law is the contract (at least in terms of regulation, ed.). The common rules of the institution are provided by the general theory of the contract (general law, in the matter).

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According to Art. 1166 of the Civil Code, the contract is "an agreement of wills between two or more persons with the intention of creating, modifying, or extinguishing a legal relationship."[1]

Consequently, it is the concordant individual wills that determine the conclusion of the contract (and implicitly give rise to the obligations assumed by the contracting parties, ed.)[2].

In its detailed form, the contract includes the following main stages: formation of the contract, conclusion of the contract, execution of the contract, and termination of the contract.

We note that, among the four stages mentioned above, the formation of the contract is at least as important as the other three.

A. The Contract: Conditions of Validity and Conclusion

For its validity, the contract must meet the conditions imposed by law, known as "validity conditions."

According to Article 1179 of the Civil Code, the conditions for the validity of the contract are: "the capacity to contract, the consent of the parties, a determined and lawful object, a lawful and moral cause," and "a certain form of the contract."

Under the conditions of Article 1180 of the Civil Code, "any person who has not been declared legally incapable or prohibited from entering into certain contracts" can contract.

Those without capacity to exercise rights include: a minor under the age of 14 and a person judicially prohibited. Consent must be validly expressed, serious, free, and made with full knowledge of the facts[3].

Consent is flawed when it is given due to error, obtained through fraud, or extracted through violence. Likewise, consent is flawed in cases of injury (art. 1206 Civil Code).

[1] A contract is an agreement. Since its purpose is to create obligations, it can be preceded by agreements, more or less binding: preliminary contracts; see Ph. Malaurie, L. Aynes, Ph. Stoffel-Munck, Les obligations, Defrenois, 2011, p. 213.

[2] "The contract is inseparably linked to the will enlightened by manifested and conscious reason"; see M.-L. Belu Magdo, Theory of the Contract, Hamangiu Publishing, Bucharest, 2021, p. 2.

[3] See D. Cosma, The Theory of the Civil Legal Act, Scientific Publishing House, Bucharest, 1969, pp. 150-151.

The object of the contract is represented by the legal transaction, such as sale, lease, loan, and other similar acts agreed upon by the parties, as it results from the set of contractual rights and obligations (art. 1225 Civil Code).

The object of the contract must be 'determined and lawful' (art. 1179 para. 1 item 3 Civil Code). The cause is the reason that motivates each party to enter into the contract (art. 1235 Civil Code). It appears as a psychological process preceding the agreement of wills, consisting of the reason (motive, incentive, impulse, etc.) that drives the parties to conclude the contract.

Every contract has a form. By the form of the contract (in the strict sense) is meant the manner of expressing the manifestation of will made with the intention to create, modify, or extinguish a specific civil legal relationship.

B. Preparatory contracts

In the pre-contractual phase, the contract may be preceded by agreements between the parties, through which, for example, organization or summary of the negotiations is carried out[4]. Preparatory contracts are provisional contracts that precede the contract envisaged by the parties (to be concluded, ed.).

Preparatory contracts include: the agreement in principle, the right of first refusal pact, the option agreement, unilateral and bilateral promises, and the framework contract.

The agreement in principle (partial agreement) is a contract in which the parties agree on a number of common aspects (for example, regarding the essential elements of the proposed contract or concerning the manner of conducting negotiations).

As a result of concluding the agreement in principle, subsequently, the parties can no longer discuss the common elements on which they have agreed. The right of first refusal is a contract through which a person undertakes, in the event that they decide to sell something, to first make an offer to the other party under predetermined conditions or conditions already proposed to third parties.

[4] See L. Pop, I.-F. Popa, S.I. Vidu, Elementary Treatise on Civil Law. Obligations, Universul Juridic Publishing, Bucharest, 2012, p. 94; C. Spasici, Contractual Consent. Civil and Consumer, University Publishing, Bucharest, 2023, p. 20.

In the above case, the beneficiary has a preemptive right when concluding the proposed contract.

The option pact is a unilateral contract through which one of the parties undertakes to conclude another contract, under specified conditions and within a certain period. Under these conditions, the beneficiary of the promise has an option right.

The bilateral promise is a contract in which the parties mutually undertake to enter into another contract. In practice, the bilateral promise of sale and purchase is known as a 'preliminary agreement' (due to its particular frequency).

C. Framework contracts: binding force without obligational content

The framework contract is the agreement through which the parties "agree to negotiate, conclude, or maintain contractual relations whose essential elements are determined by it" (art. 1176 para. 1 Civil Code).

The method of executing the framework contract, in particular the term and volume of the services, as well as, if applicable, their price, are specified through subsequent agreements.

Consequently, through the framework contract, the contracting parties establish the main rules that will govern the conclusion of future contracts.

The framework contract is a prospective contract because it considers a future "application" or "execution" contract. Therefore, the framework contract has two objectives.

First of all, the framework agreement allows the contracting parties to ensure the necessary conditions for closeness and collaboration between them over a relatively long period of time and to organize, through obligations to do and not to do.

For example, a distribution framework agreement contains numerous and diverse obligations, such as those of exclusivity, assistance, operation, provision, etc. Nevertheless, it is an independent contract.

Secondly, the framework agreement establishes in advance the conditions for concluding future application and execution contracts.

The framework agreement is a preparatory contract, a preliminary legal framework established for the conclusion of future application contracts[5].

[5] The most well-known framework agreements are distribution contracts, employment contracts, banking contracts, insurance contracts, etc.; see L. Pop, Treaty of Civil

In national legislation and practice, the framework contract is found particularly in the fields of electricity and natural gas distribution, supply, and transportation[6].

II. Specifics of the framework contract for electricity supply

By Order No. 13/2023 of the ANRE President, the framework contract for the supply of electricity under the universal service regime was regulated[7].
In practice, the Order sets out the content of the framework contract for electricity supply (in the annex).

A. Framework contract for electricity supply: purpose, legal characteristics, execution

The contracting parties are: the ANRE license holder as the supplier-seller and the client-buyer. The subject of the contract is the supply of electricity under the universal service regime and the establishment of the relationships between the supplier and the client regarding the conditions of supply, billing, and payment of electricity (Article 1 of Annex 1 to the Order).

The duration of the contract and the conditions for its termination[8]. According to Article 3 of Annex 1 to the Order, the billing of active electricity supplied to the place of consumption covered by the contract will take into account:

- the monthly determined electricity consumption;

Law. Obligations, Volume II. The Contract, Universul Juridic Publishing, Bucharest, 2009, p. 218.

[6] For an overview of the field, see C. Spasici, Protection of the Vulnerable Energy Consumer under Law no. 226/2011: social protection or consumer protection? Hamangiu ed., In Honorem, Nicolae Popa, p. 381.

[7] Order of the President of A.N.R.E. no. 13/2023 was published in the Official Gazette, Part I no. 228 of March 21, 2023, and came into force on April 1, 2023.

[8] It should be noted that, after the termination of the contract, the parties will no longer be bound by the terms and conditions of the contract except for the enforcement of rights and obligations arising from the execution of the contract, up to the date of its termination (Article 2, paragraph 2 of Annex 1 to the Order).

- the universal service price from the universal service offer communicated by the supplier or, where applicable, the price established by the applicable regulations;

- the regulated tariffs for network services in force during the billing period;

- taxes, duties, and contributions established by legal provisions.

The adjustment of electricity consumption is included in the first invoice issued after the meter reading by the distribution operator.

If, following the adjustment, the amount overpaid by the customer exceeds 100 lei, the supplier is obliged to refund the amount to the customer within 5 days from the date of issuing the adjustment invoice.

The invoice for the electricity supplied is issued monthly by the supplier.

Any change to the time interval in which the invoice is issued is communicated in advance to the customer by the supplier through the invoice, without the need to conclude an additional agreement to the contract. (Art. 4 para. 2 of Annex 1 to the Ordinance).

Invoices issued by the supplier under the contract will be paid by the customer within a 15-day term from the date of issuance, with the invoice date and payment due date stated on the invoice.

Payment is considered made on the date it is recorded in the supplier's account statement (art. 6 para. 1 of Annex 1 to the Order).

Electricity consumption is billed based on the meter reading recorded and communicated by the distribution operator.

For billing periods for which there is no reading communicated by the distribution operator, electricity consumption is billed based on: the meter reading provided by the client or the data from the consumption agreement.

Under art. 10 of Annex 1 to the Order, the client has the right to receive compensation and, where applicable, penalty interest for the supplier's failure to fulfill its obligations.

Based on the principle of confidentiality, the parties do not have the right to disclose confidential information obtained under the contract to persons not authorized to receive such information (Art. 11 of Annex 1 to the Order).

Exceptions to the principle are made in cases where:

- written consent is obtained from the party whose interests may be affected by the dissemination of the information;

- the information is already public;

- the party is obligated or has permission to disclose the information in order to comply with an order or decision of the National Energy Regulatory Authority (ANRE) or with the applicable legal provisions;
- the information needs to be transmitted in the course of performing the normal activities that constitute the object of the contract, including situations where the activities are carried out by third parties, provided that these third parties comply with the confidentiality conditions.

Exceptions to the principle are made in cases where:

- written consent is obtained from the party whose interests may be affected by the dissemination of the information;
- the information is already public;
- the party is obligated or has permission to disclose the information in order to comply with an order or decision of the National Energy Regulatory Authority (ANRE) or with the applicable legal provisions;
- the information needs to be transmitted in the course of performing the normal activities that constitute the object of the contract, including situations where the activities are carried out by third parties, provided that these third parties comply with the confidentiality conditions.

Disputes arising from the contract, which cannot be resolved amicably or through the dispute resolution committee appointed by the decision of the ANRE president, shall be submitted for resolution to the competent court (Art. 13 of Annex 1 to the Order).

The contract is non-transferable. Thus, neither party may assign, in whole or in part, the rights and obligations arising from this contract without the agreement of the other party.

By entering into the contract, the parties agree that in all contractual relations they will comply with the general conditions for the supply of electricity under the universal service regime and the general conditions for the provision of the electricity distribution service[9].

The contract concluded by the parties may be supplemented with specific clauses, according to the parties' agreement, provided that they do not conflict with the provisions of the master agreement and the applicable legal regulations in force.

The contract is concluded in two copies, one for each contracting party.

[9] The general terms of supply must be published on the supplier's website and, upon the client's request, made available to them free of charge by one of the following means (art. 16 para. 1 of Annex 1 to the Order).

B. Particularities of the master agreement for electricity transport

Annex 1 of the A.N.R. Order presents the content of the framework contract for the transport of electricity.

The parties to the contract are the electricity transmission service provider and the beneficiary.

The object of the contract consists in the provider ensuring the electricity transmission service and the system service[10].

According to art. 16 para. 1 of Annex 1 to the Order, the provider has some specific obligations.

Likewise, according to Article 5 of Annex 1 to the Order, throughout the duration of the contract, no later than 15 working days after the beginning of each contractual month, the contractor shall issue an invoice to the beneficiary for the previous contractual month[11].

The beneficiary shall pay the invoice by the due date, namely within 10 days from the date of its receipt; upon the expiration of this term, the beneficiary shall be considered to be in default (Article 6 of Annex 1 to the Order)[12].

The invoice payment shall be made in lei to the contractor's account. The date of payment shall be considered the date on which the amount paid appears in the beneficiary's account statement.

After the due date, the parties may agree to settle mutual debts by offsetting. The payment date shall be the date of registration of the minutes in which the parties agreed on the offset (Article 11 of Annex 1 to the Order).

According to Art. 12 para. 3 of Annex 1 to the Order, the contract terminates in three cases:

[10] According to Art. 13 para. 1 of Annex 1 to the Order, the framework contract documents are: the provider's license for the provision of electricity transmission services; the beneficiary's license for the supply of electricity or electricity distribution; the performance standard for the electricity transmission service and for the system service; the operational procedure regarding the establishment of financial guarantees in framework contracts for the provision of electricity transmission services and system services; the connection certificate, in the case of users connected to the electricity transmission network; the operating agreement.

[11] The invoice related to the beneficiary's payment obligation is issued and sent electronically (by e-mail), with the date of the e-mail being considered the date of receipt of the invoice (art. 5 para. 2 of Annex 1 to the Order).

[12] For invoice payment, the beneficiary may choose any legal method of payment (art. 7 of the annex to the Order).

- the parties mutually agree to terminate the contract;
- by termination, after a prior notice of 21 days, without the need to follow any other procedure or court intervention, in case of non-fulfillment of contractual obligations by one of the parties, in which case compensation may be requested by the other party;
- in the event of dissolution, liquidation, bankruptcy, or the withdrawal of the license of one of the contracting parties.

The services provided under this contract may be interrupted or limited in the following cases[13]:

- in case of force majeure;
- in the event of non-fulfillment of the payment obligation by the user directly connected to the transmission electricity network;
- in the situation where the national power system is in a state of alert, emergency, collapse, or restoration, or is affected by a similar state of a neighboring interconnected power system;
- in the situations provided for in the National Risk Preparedness Plan.

Disputes arising from the interpretation or execution of this contract, which cannot be resolved amicably, will be submitted for resolution to the competent court of law.

The contract is concluded on [date] in two original copies (one for the beneficiary and one for the provider).

C. Specifics of framework contracts for electricity distribution

Through the Order of the President of ANRE no. 90/2015, two framework contracts for electricity distribution services were regulated[14]:

- the framework contract for providing electricity distribution services concluded between the concessionary distribution operator and the supplier[15], and

[13] The parties may agree to interrupt or limit the services provided in other justified situations as well (art. 20 para. 2 of the annex to the Order).

[14] The order of the president of A.N.R.E. no. 90/2015 was published in the Official Gazette, Part I, no. 462 of June 26, 2015, and came into force on 01.07.2015.

[15] We specify that Annex No. 2 to A.N.R.E. Order No. 90/2015 includes the general conditions for the provision of electricity distribution services by the concessionaire distribution operator in cases where the distribution contract for the place of consumption is concluded between the concessionaire distribution operator and the supplier.

- the framework contract for electricity distribution services concluded between the distribution operator and the user.

For reasons of brevity, we present the main provisions (with legal implications, ed.).

a). The framework contract for the provision of electricity distribution services concluded between the concessionary distribution operator and the supplier.

The parties to the contract are the concessionary distribution operator (hereinafter referred to as D.O.) and the supplier.

The object of the contract is the provision of electricity distribution services for users, who are the supplier's end customers, whose installations are connected to the electricity network.

According to Article 12, paragraph 1 of Annex 1 to the Order, D.O. has a number of rights, while art. 13 of Annex 1 to the Order, the DSO establish the main obligations.

The contract is non-transferable. Thus, the parties cannot partially or fully assign the rights and obligations arising from this contract (without obtaining the prior written consent of the other party) (Art. 18 para. 2 of Annex 1 to the Order).

The contract terminates in the following situations:

- upon the expiration of the contract's validity period;
- if all supply contracts concluded by the supplier with the end customers for the consumption points covered by the distribution contract are terminated[16].
- by termination by the Distribution Operator (DO), in the event that the supplier fails to fulfill payment obligations;
- in case of dissolution, liquidation, bankruptcy, or withdrawal of the license of one of the contracting parties;
- by mutual agreement of the parties;

The termination of this contract has no effect on the contractual obligations arising from the contract (Art. 20 para. 2 of Annex 1 to the Order).

b). Framework contract for the electricity distribution service concluded between the distribution operator and the user.

[16] In this case, the supplier is obliged to notify the OD regarding the termination of the supply contract, at least 5 working days before the termination date.

The parties to the contract are the licensed distribution operator and the user.

The object of the contract is the provision of electricity distribution services by the distribution operator to the user, at the point of consumption[17].

The distribution operator ensures the measurement of active electrical energy and reactive electrical energy corresponding to the point of consumption (Art. 6 of Annex 3 to the Order).

Meter readings are carried out by the distribution operator at the intervals agreed upon by the contracting parties.

According to Art. 6 para. 1 of Annex 3 to the Order, the user pays the distribution operator: the value of the electricity distribution service and the value of reactive electrical energy.

The amount of electricity is determined based on the readings of the measuring units.

In the first 10 working days of the month following each contract month, the distribution operator issues the invoice to the user with the amount due for the concluded contract month (Art. 11 para. 1 of Annex 3 to the Order).

The user is obliged to pay the invoice within 10 working days from the date of issue (Art. 12 para. 1 of Annex 3 to the Order).

The invoice payment is made in lei, to the account of the distribution operator listed on the invoice[18].

If the user does not pay the amount due, the distribution operator gives notice to the user regarding the disconnection of the consumption point.

In the event that an error in the measurement of electricity is found or it is not recorded, the distribution operator recalculates the distributed electricity (Art. 16 para. 1 of Annex 3 to the Order)[19].

[17] According to Article 9 of Annex 3 to the Order, the contract documents are: a copy of the identity card, of the registration certificate with the trade register, or other operating permits issued by the competent authorities for the user; the connection certificate and the technical connection notice; the operation agreement; the tripartite or multipartite agreement concluded in accordance with the Supply Regulation.

[18] In case of non-fulfillment, within 30 days from the invoice due date, the user will pay, in addition to the amount owed, a penalty interest on this amount (art. 13 of annex 3 to the Order).

[19] The value of the difference between the recalculated amount of energy and the billed amount of energy, established by the distribution operator, is gradually adjusted in the invoices of the following months, according to the agreement between the parties (art. 16 para. 2 of annex 3 to the Order).

The distribution operator is entitled to request financial guarantees from the user in some specific cases.

III. Consumer protection of the electricity user, natural person. Principles and objectives

Consumer protection, as a natural person in their property relations with the merchant, is achieved through consumer law and its specific institutions.

The main regulatory act in this matter is the Consumer Code (Law no. 296/2004), which governs the legal relations established between economic operators and consumers regarding the purchase of products and services, including financial services, providing the necessary framework for access to products and services, complete and accurate information about their essential characteristics, the protection and safeguarding of consumers' rights and legitimate interests against abusive practices, and their participation in the foundation and decision-making on matters that concern them as consumers[20].

The provisions of the Code apply to the trade of new, used, or refurbished products, and services, including financial services, intended for consumers, contracts concluded with consumers, rules regarding the advertising of products and services, products marketed as antiques, and products that need to be repaired or refurbished to be used (art. 2 Consumer Code).

In conclusion,

Contractually, the protection of individual consumers is achieved through two avenues: the general route of common law and the special route of consumer law.

In the pre-contractual phase, specific objectives can be achieved through agreements in principle, preference pacts, option pacts, unilateral and bilateral promises, framework agreements, etc.

In context, the framework contract plays a key role in ensuring the interests of both the merchant and the consumer as an individual. The practical interest of the framework contract is found particularly in the fields of electricity and natural gas distribution, supply, and transportation. In

[20] See Y. Picod, N. Picod, Consumer Law, SIREY, 2021, p. 3 et seq.; C. Spasici, Institutions of Civil and Consumer Law. Common Law and National Jurisprudence, Hamangiu Publishing, Bucharest, 2022, pp. 6-7.

consumption relationships, the pre-contractual protection of the individual is based on principles such as adversarial proceedings, promptness, proportionality, confidentiality, mutual recognition, etc., and objectives such as protecting consumers against risks, promoting and safeguarding the economic interests of consumers, providing consumers with complete, correct, and accurate information, educating consumers, effectively compensating consumers, promoting international cooperation, and preventing and combating abusive commercial practices, etc.

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DOCTRINE OF CONVENTIONALITY CONTROL AND INTERNATIONAL LAW. RELATIONSHIP AND IMPLICATIONS FOR THE EFFECTIVENESS OF HUMAN RIGHTS

Ana Victoria VILLANUEVA*

ABSTRACT

As a result of the conventionality control established by the Inter-American Court of Human Rights in the "Almonacid Arellano" case and completed by others, national judges are obliged to exercise "a kind of conventionality control" between the domestic legal norms that apply in specific cases on the one hand and the interpretation of it made by the IACHR on the other. The above-mentioned jurisprudence revealed a problem involving the collision of competences between the Supreme Courts of the countries that are party to the Pact of San José, Costa Rica (or American Convention of Human Rights)), and the Inter-American Court of Human Rights (IACHR). Some implications that we will analyse because of the collision of competences are: Control of constitutionality and conventionality, their relationship with international law; How did Europe resolve the relationship between Community law and the domestic law of the EEC Member States? From the collision of competences between the Supreme Courts of the States and the IACHR to the useful effect of the Human Rights Treaties.

KEYWORDS: *conventionality control; control of constitutionality; collision of competences; Inter-American Court of Human Rights; Supreme Court of Justice of the Nation;*

Introduction

As a result of the conventionality control established by the Inter-American Court of Human Rights in the "Almonacid Arellano" case and

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completed by others[1], national judges are obliged to exercise "*a kind of conventionality control*"[2] between the domestic legal norms that apply in specific cases on the one hand and the interpretation of it made by the IACHR on the other. In support of this imposition on national judges, recital 125 of the Arellano case states that according to international law, the obligations imposed by it must be fulfilled in good faith and domestic law cannot be invoked for non-compliance, by virtue of Article 27 of the Vienna Convention on the Law of Treaties of 1969.

In the case "Dismissed Workers of Congress (Aguado Alfaro et al.) v. Peru", of November 24, 2006[3], consid. 128, the IACHR refers directly to the control of conventionality when it states that "*the organs of the Judicial Branch must exercise not only a review of constitutionality, but also of conventionality, ex officio, between domestic norms and the American Convention, evidently within the framework of their respective competences and the pertinent procedural regulations*." The last part of this recital is very interesting because it provides that "*This function (control of conventionality) should not be limited exclusively by the statements or acts of the plaintiffs in each specific case*" – could it be an *erga omnes* effect? – and then "*although it does not imply that this control must always be exercised, without considering other formal and material assumptions of admissibility and admissibility of this type of action*".

Later cases such as "Fermín Ramírez" and "Raxacacó Reyes v. Guatemala" of 2008, reaffirmed this doctrine.

The above-mentioned jurisprudence revealed a problem involving the collision of competences between the Supreme Courts of the countries that are party to the Pact of San José, Costa Rica (or American Convention of Human Rights) hereinafter (ACHR), and the Inter-American Court of Human Rights (IACHR).

The IACHR has ordered the countries that are party to the ACHR not only to exercise "a kind of control of constitutionality" or "control of

[1] The doctrine was repeated in the cases "La Cantuta v. Peru", judgment of November 29, 2006, consid. 173, and "Boyce et al. v. Barbados", 20 November 2007, consid. 78.

[2] Recital 124 Inter-American Court. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C N° 154. Available online, accessed November 27, 2025, *https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.*

[3] Available online and accessed on October 27, 2025 *https://www.corteidh.or.cr/docs/casos/articulos/seriec_158_esp.pdf.*

conventionality" but has also forced them to "annul" or "revoke"[4] the pronouncements of the highest domestic courts.

It is important to analyze the different problems or consequences of the collision of competences between the supreme courts of the countries that are party to the ACHR and that have accepted the competence of the IACHR and its function to "hear any case relating to the interpretation and application" of the norms of the Convention that is submitted to it for judgment (Arts. 61, 62 and 63 ACHR).

This issue has recently been raised in Argentina in the "Fontevecchia" case[5] in which the Supreme Court of Justice of the Nation holds that, although the judgments of the IACHR are binding, the IACHR cannot "annul" or "annul" local judicial decisions[6].

Some implications that we will analyse because of the collision of competences are: Control of constitutionality and conventionality, their relationship with international law; How did Europe resolve the relationship between Community law and the domestic law of the EEC Member States? From the collision of competences between the Supreme Courts of the States and the IACHR to the useful effect of the Human Rights Treaties. In the conclusions of the work, we will synthesize what was analyzed in the previous items.

[4] I/A Court H.R., "Case of Palamara Iribarne v. Chile," Judgment of November 22, 2005. Series C N° 135. Available online at *https://www.corteidh.or.cr/docs/casos/articulos/seriec_135_esp.pdf* Accessed on 27 November 2025. I/A Court H.R., "Case of Tristán Donoso v. Panama," Judgment of January 27, 2009, Series C No. 193. *Available online at https://www.corteidh.or.cr/docs/casos/articulos/seriec_193_esp.pdf* Accessed on 27 November 2025. I/A Court H.R., "Case of Kimel v. Agentina, Judgment of May 2, 2008, Series C No. 177. Available online at *https://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.* Accessed on 27 November 2025. I/A Court H.R., "Case of Herrera Ulloa v. Costa Rica," Judgment of July 2, 2004, Series C No. 107. Available online at *https://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf* Accessed on 22 November 2025.

[5] CS, 14 February 2017, 368/1998 (34-M)/CS1 "Ministry of Foreign Affairs and Worship s/ report judgment handed down for the case "Fontevecchia and D'Amico v. Argentina" by the Inter-American Court of Human Rights.

[6] Hitters Juan Carlos. Control of Conventionality Can the Inter-American Court of Human Rights overturn rulings of the higher courts? La Ley, August 2, 2017.

Control of constitutionality and conventionality, its relationship with international law

Dr. Sagües[7] states that the control of constitutionality and the control of conventionality are two devices with different objectives: one attempts to affirm the supremacy of the National Constitution and the other, that of the Pact of San José de Costa Rica. Both are characterized by the invalidity of the lower norm opposed to the higher one. In the case between a law and the Constitution, this is obvious. In the event of opposition between the Constitution and the IACHR, the matter is not so simple, even considering Articles 1 and 2 of the IACHR and the doctrine of conventionality control.

Regarding the review of constitutionality, the National Constitution (NC) provides for the following articles as the hierarchical structure of the legal system:

31. This Constitution, the laws of the Nation that are enacted in consequence of it by the Congress and the Treaties with foreign powers are the supreme law of the Nation; and the authorities of each province are obliged to conform to it notwithstanding any provision to the contrary contained in the provincial laws or constitutions.

27. The Federal Government is obliged to strengthen its relations of peace and commerce with foreign powers by means of treaties which are in conformity with the principles of public law established in the Constitution.

28. The principles, guarantees and rights recognized in the preceding articles may not be altered by the laws that regulate their exercise.

The control of conventionality implies a plus for judges since in addition to controlling constitutional supremacy when exercising their work as the highest interpreters of the NC, they must rule considering the parameters, object and purpose of international treaties on human rights with constitutional hierarchy, which complement the NC (Art. 75 par. 22).

The relationship between domestic and international norms has been addressed by jurisprudence, which has fluctuated in terms of the primacy of domestic law or international law. Monism, whose greatest exponents were Kelsen and Wenzel, is characterized by the fact that the Law of Nations and

[7] Sagües, Pedro Néstor. International obligations and conventionality control. Estudios Constitucionales, Año 8, N° 1, 2010, pp. 117-136. ISSN 0718-0195 Center for Constitutional Studies of Chile, University of Talca. Available online *https://scielo.conicyt.cl/pdf/estconst/v8n1/art05.pdf* Accessed on 24 November 2025.

internal law form a single legal system. Within this theory, some gave preference to national law in relation to international law and those who attributed precedence to international law over domestic law.

The dualist theory postulated two separate and independent legal systems: international law and domestic law. They reasoned that both had different sources and governed different spheres and subjects, so that international law regulated relations between States and domestic law governed particular relations or between the State and its subjects. Because of such a theoretical formulation, a rule of international law had to be transformed into a rule of domestic law in order to be invoked and applied in the national legal system, which led to the conclusion that in the event of a conflict between them, the latter prevailed over that of international law.

The jurisprudence of the SCJN[8] began as a dualist case with the case "Chantrain, Alfonso" (1947, SCJN, Rulings 208:84), "Cabrera, Washington Julio Efrain c/ Comisión Técnica Mixta de Salto Grande (1983, SCJN, Rulings 305:2150). Both cases declared the supremacy of the NC based on Article 31. It changed the Court's position to monism in the case "Merck Química Argentina v. Gobierno de la Nación" (1948, SCJN, Rulings 211:162), with the preeminence of international law in the event of war. In successive jurisprudential cases, the Court resolved the relationship between treaties and laws by virtue of the principle that the later law repeals the previous one, as in the case of "Martín y Cía. Ltda. c/ Administración General de Puertos" (1963, SCJN, Rulings 257:99).

In successive cases of the SCJN prior to "Ekmekdjian v. Sofovich" of 1992 and in relation to the IACHR, the SCJN considered that the right to reply or rectification enshrined in art. 14. 1 of that Convention had not yet been the subject of legal regulation to be considered as positive domestic law, as it resolved in "Costa, Héctor R. v. Municipality of the City of Buenos Aires and others" of 1987. So, he opted for a dualistic position. In the cases of "Sánchez Abelenda v. Ediciones de la Urraca" and "Ekmekdjian v. Neustadt", both of December 1, 1988, the SCJN considered that the commitment assumed internationally was programmatic. In addition, it pointed out that the right to rectification or reply could not be inferred from the constitutional clause of Article 31 of implicit rights, and that the operation that gave force to that right could not be exercised by the Judiciary, because it was a matter of legislative policy outside the competence of the

[8] Supreme Court of Justice of the Nation.

courts. The difference between this interpretation and the doctrine of the control of conventionality is remarkable.

Prior to the 1994 Constitutional Reform, which gave international human rights norms the same hierarchy as the National Constitution[9] in article 75, paragraph 22, the SCJN resolved in the case "Ekmekdjian v. Sofovich" of July 7, 1992, by majority, the application of the monist doctrine. The Court found that Article 14 of the ACHR was directly and operationally applicable together with the interpretation of Articles 1 and 2 of the Convention and Article 27 of the 1969 Vienna Convention on the Law of Treaties (recital 19) and it is important to mention that in that judgment the Court stated in recital 21 that "the interpretation of the Covenant must, in addition to being guided by the jurisprudence of the Inter-American Court of Human Rights, one of whose objectives is the interpretation of the Pact of San José", anticipating the alignment of the highest Court with the doctrine of conventionality control applied for the first time by the IACHR in 2006.

Monism with preeminence in international law was also outlined by the SCJN in "Servini de Cubría, María R. S/ Amparo" of September 8, 1992. In both cases, O.C. 5/85 and 7/86 of the IACHR were considered.

Although the rulings of the SCJN based on Ekmekdjian v. Sofovich opted for the monist thesis with preeminence of international law, it is interesting to note that in the judgments "Café La Virginia S. A. s/ Apelación" of October 13, 1994 (paragraph 9) and in "Fibraca Constructora S.C.A. v. Comisión Técnica Mixta de Salto Grande" of October 13, 1994 (paragraph 3), the Supreme Court clarifies that "Article 27 of the Vienna Convention on the Law of Treaties imposes on the organs of the Argentine State – once the principles of constitutional public law have been

[9] As expressed in his opinion by Minister Dr. Antonio Boggiano in the Judgment of the CSJN "Espósito, Miguel Angel s/ Incident of criminal prescription promoted by his defense" 23/12/04 in recital 19 of his vote "it must be interpreted that the constitutional clauses and those of the treaties have the same hierarchy, are complementary and, therefore, they cannot displace or destroy each other (conf. "Arancibia Clavel" case. In the pertinent part of recital 20 it states: "Strictly speaking, when the Congress confers constitutional hierarchy on the treaty, it makes a constituent judgment by authorization of the Constitution itself according to which, by elevating the treaty to the same hierarchy as the Constitution, it establishes that the treaty is not only in accordance with the principles of public law of the Constitution, rather, the treaty does not repeal any provision of the Constitution, but rather complements it."

safeguarded – to ensure primacy to treaties in the event of a conflict with a contrary internal norm" (....)

Thus, for the Argentine Supreme Court, although monism is applicable with primacy of international law, this will not be to the detriment of the principles of constitutional public law. And this reasoning could anticipate the Court's refusal in the case "Ministry of Foreign Affairs and Worship s/ report judgment handed down in the case of "Fontevecchia and D'Amico v. Argentina"[10] by the IACHR to annul final judgments passed by authority of res judicata.

The control of constitutionality and the control of conventionality constitute the parameters that the magistrates must consider when exercising their jurisdictional work, ensuring constitutional supremacy complemented by the hierarchy of treaties on human rights. With respect to the provisions of Articles 31 and 27 of the NC, the generalized criterion in the jurisprudence reflected that the National Constitution was hierarchically superior to the treaties (dualist position of the SCJN). As for the relationship between treaties and laws, for many years the thesis of hierarchical equality was maintained[11]. Subsequently, with the constitutional reform of 1994, constitutional hierarchy was granted to the Treaties on Human Rights in Article 75, paragraph 22, in such a way that the control of constitutionality is added to the control of conventionality, with the commitment to guarantee the useful effect of the Treaties on Human Rights.

The semantic distinction between the two controls – constitutionality and conventionality – does not detract from the unique and in some cases excessive work carried out by the judges of first instance who must exercise controls in many files that they process in their jurisdiction on various matters. Added to this is what happens in the provincial jurisdictions that must exercise the diffuse control of constitutionality considering the criteria of the appeals or chambers of their region, section or judicial department and of the local superior courts (Riquert)

[10] SC, 14 February 2017, 368/1998 (34-M)/SC1.

[11] In "Martín y Cía. Ltda. c/ Administración General de Puertos (1963, SCJN, Rulings 257:99): "Neither Article 31 nor Article 100 of the National Constitution attributes priority of rank to treaties with foreign powers over laws validly enacted by the National Congress. Both norms, laws and treaties are qualified as the Supreme Law of the Nation, governing in respect of them the principle according to which the later ones repeal the previous ones."

Perhaps the dilemma arises when the IACHR wants to give precedence to the ACHR or any other treaty on human rights over the CN, when they are, for Argentine law, on a hierarchical equal footing with the NC. Then this point would constitute the crux of the matter.

How did Europe resolve the relationship between community law and the domestic law of the EEC member states and the supra-nationality of the European court of human rights?

The Judgment of the Court of Justice dated February 5, 1963, deals with the dispute between the Dutch company *Van Gend en Loos and the Nederlandse Belastingen*[12], which would be the equivalent of the tax administration of the Netherlands. The Dutch company Van Gend Loos imported chemicals from Germany to the Netherlands. From the Nederlandse Belastingen, a tariff was applied that taxed these chemical products, increasing the price of this product that came from Germany.

The company argued that this tariff was contrary to the provisions of Article 12 of the Treaty Establishing the European Economic Community (being the year 1963, the TEU had not yet been signed and historically the European institutions were in the stage prior to the formation of the EU, which was the EEC, which emerged with the signing of the Treaty of Rome in 1957). In this article, it was established that member states would refrain from establishing customs duties among themselves or increasing those already in force. The ECT also created the common market with the possibility of establishing common policies in the field of agriculture, trade, transport and development funds. Based on the arguments set out above, the Dutch court referred the matter to the Court of Justice in accordance with Article 177 of the TEC, which states that the Court of Justice will have jurisdiction to rule on the applicability of the same treaty. On the one hand, the Netherlands argues that this was a national competence and that it therefore has the competence to legislate on customs or tariff matters. They also argued that an individual cannot rely on Community legislation before the courts since that competence lies with the Commission and the Member States.

Those arguments were rejected by the Court of Justice on the grounds that nationals could rely on rights which national laws were required to

[12] Case 26/62 of 5 February 1963. ECR 3.

protect. Just as the purpose of the EEC is to establish a common market whose functioning directly affects individuals in the EEC, it implies that the Treaty is more than just an agreement.

The ECT also creates institutions that are endowed with sovereign power, the exercise of which affects member states and citizens. Hence its supra-nationality and supralegality.

The Court of Justice has as its purpose in Article 177 of the TEC to guarantee the applicability and unity of the treaty in the courts of the Member States that have recognized Community law. (Primacy of Community Law)

The Judgment of the Court of Justice dated July 15, 1964, deals with the dispute between the individual Flaminio Costa and ENEL (National Electric Power Company).[13] Costa was an Italian citizen who owned shares in the electricity company ENEL, after the nationalization of the electricity sector in Italy, Costa refused to pay the electricity bill in protest against the nationalization. The ENEL company sued him for non-payment of invoices. The argument maintained by the private Costa was that the nationalization law contradicted the provisions of the Treaty of Rome and the Italian Constitution.

As we have previously analysed in the judgment in Van Gend Loos, following what is stated in Article 177 of the TEC, the question referred to the Court of Justice for a preliminary ruling, since the Giudice Conciliatore di Milano does not have competence for the interpretation of the provisions of the treaty. Therefore, the primacy of Community Law and the cession of sovereignty before the law of the member states is reaffirmed and the institution formed by the Court of Justice is granted the power to interpret the transposition of Community Law in each of these member states.

As regards the arguments of the Italian State, it considered that the Treaty of Rome had been incorporated into ordinary legislation and therefore a new law could repeal what had previously been legislated in that area. Therefore, it was the obligation of the Judge to apply domestic law and therefore Article 177 of the ECT was not applicable.

Following the Van Gend Loos judgment, the ECT created its own legal system, integrated in the member states from the moment it entered into force and which therefore binds the courts. The EEC is a community of

[13] Case 5/64 of 15 June 1964. ECR 1143.

indefinite duration, with its own institutions, legal personality and capacity for international representation.

This is possible thanks to the transfer of sovereignty in which member states limit their competences in some matters and a body of rules is created applicable to nationals and to the states themselves (Rights and obligations).

The integration of the law in each member state makes it impossible for the state to prevail a subsequent unilateral measure, so that the legal system of each state cannot oppose Community law (Primacy of Community Law). If this were to be done, it would jeopardise the objectives of the treaty, so that the argument of the Italian State would be invalidated by the provisions of Article 5 of the TEC. This ruling reinforces the arguments of Van Gend Loos since it attributes to the EEC and its institutions competences that are ceded by the states and that Community Law must prevail over the legislation of the member states.

In response to the initial question, as regards the relationship between Community law and domestic law, the Court of Justice in the Treaties of the Community has developed the doctrine with respect to the conflicts arising between the Community legal order and that of its Member States, since until that time (Judgments Van Gend and Loos and Costa v. Enel), there was no clear delimitation of the respective competences. Community law rests on two fundamental pillars: the direct effect of the original and secondary rules and the supremacy of that legal system. The role of the European Court of Justice was indispensable, to prevent States Parties from unilaterally determining the scope of their obligations and responsibilities established in the Treaties. The direct effect of Community law means that it directly confers rights and imposes obligations not only on the Community institutions and the Member States, but also on their citizens. This was the ruling of the Court in the van Gend case in Loos (1963).

However, the direct applicability of a rule of Community law may give rise to a conflict when its content contradicts national law. This question has also been resolved by the Court of Justice in case-law by applying the principle of the primacy of Community law, since the Treaties do not contain explicit provisions on the subject. Since the case "Costa v. ENEL" (1964), the Court of Justice has applied the principle of primacy in the terms "unlike ordinary international treaties, the EEC Treaty has established its own legal order, which has been integrated into the legal system of the Member States since the entry into force of the Treaty, and that it is imposed on their jurisdictions; whereas, in effect, by creating a Community of unlimited

duration, endowed with its own institutions, personality, legal capacity, with the capacity for international representation and, more specifically, with effective powers arising from a limitation of competences or from an attribution of the States of the Community, the latter have limited, albeit in specific areas, their sovereign rights and thus created a law applicable to their nationals as to themselves".

Since then, the Court's case-law has reaffirmed both the direct effect and the supremacy of Community law, but it is interesting to mention that the principle of supremacy established in the Costa Enel doctrine was developed by subsequent judgments such as the Simmenthal judgment of 9 March 1978 (Case 106/77). This judgment established the scope of the principle of supremacy in relation to subsequent national rules. The question referred for a preliminary ruling by an Italian court was whether it should hold that a national law subsequent to the Treaty is automatically inapplicable in the event of a conflict with the Treaty without waiting for it to be repealed or declared unconstitutional on the ground that it was contrary to the Treaty. The solution in Simmenthal was to reinforce the principle of primacy not only by declaring national rules prior to the Treaty inapplicable and incompatible with it, but also by preventing "the valid formation of new national legislative acts in so far as they are incompatible with Community rules". Although it is true that this statement in the Simmenthal judgment was corrected by other subsequent judgments such as the Incoge judgment of 22 October 1998, it is made clear that such incompatibility cannot produce or determine the non-existence of the national rule since it does not fall within the jurisdiction of the Court of Justice.

The case arose because the German courts refused to recognise the primacy of Community law: "recourse to legal rules or concepts of national law, in order to assess the validity of acts of the institutions of the Community, would have the effect of undermining the unity and effectiveness of Community law". And that the validity of those acts can therefore be assessed only in accordance with Community law.

The European Court of Human Rights based in Strasbourg itself practices the control of conventionality, even on local constitutions, disapplying those contrary to the European Convention on Human Rights. Sometimes the control of conventionality is carried out to counteract the action of the States,

and in others, to attack the omission of the national legislator, in both cases against the Convention.[14]

Unlike the IACHR, the European Court of Human Rights (ECtHR)has not imposed an express obligation on States Parties to implement a conventionality check. Despite this, recent reforms to the ECHR suggest that the European system is taking a new direction in the protection of human rights. Spanish doctrine interprets the change or course that is oriented on the one hand towards a mutation of the international court into a kind of European constitutional court. On the other hand, there seems to be a loss of prominence for Strasbourg and a greater weight of the national judge, who would be consolidating himself as the European judge of human rights[15]. The antecedents of these changes can be found in what the authors have called the interpreted thing effect. This notion implies that the conventional interpretation made by the ECtHR in its jurisprudence would not only affect the specific case but would have general effects binding on all States. This mechanism, first implemented in the case of Broniowski v. Poland[16], implies that through the judgment that resolves a case, the Court tries to extend its reparation effects to other identical conflicts, still pending

[14] SAGUES, Néstor Pedro. "The control of conventionality in the inter-American system and its advances in the field of economic-social rights. Concordances and differences with the European system". Available in *https://archivos.juridicas.unam.mx/www/bjv/libros/7/3063/16.pdf* Accessed on 27 November 2025.

[15] PEROTTI PINCIROLI, Ignacio G. (2021): "The control of conventionality in Spanish law: a defective importation? Electronic Journal of International Studies, Issue 41, June 2021

[16] N° 31443/96. Judgment on admissibility of 19/12/032. Judgment on the merits 22/06/04. Judgment on friendly settlement 28/09/05. The applicant, a Polish national, claimed infringement of Article 1 of Protocol No. 1 to the ECHR (right to property) on the grounds that the Polish authorities had failed to comply with their obligation to compensate him for the property that his family owned in the territory near the Bug River and which it was forced to cede after the Second World War. As a result of the delimitation of Poland's eastern border, fixed along the banks of the Bug River, the inhabitants of the territories on the eastern side of the river had to abandon their property between 1944 and 1953, after the cession of the property to the Soviet republics of Ukraine. Belarus and Lithuania. Poland was responsible for compensating the people. About one hundred thousand people were not compensated. This is how the families have been suing the ECHR since 1996. There were 167 cases pending on this same issue before the same Court. All claims like Broniowski were sent to Section 4 of the ECtHR where the Broniowski case was initially raised and their consideration was deferred until the Grand Chamber delivered the judgment in the pilot case.

resolution. The pilot judgments[17] have contributed to strengthening both the interpretative authority of the ECtHR and the enforcement of its decisions.

It is also important to mention that through Additional Protocol No. 16 to the ECHR of October 2, 2013, the States that have ratified it can submit consultations to the ECtHR on the scope of the EC's rights, through requests sent by the highest courts. So far (2021), five advisory opinions have been requested, of which two have already been answered – France, on surrogacy, and Armenia, on the principle of criminal legality – two have been accepted for processing and one has been inadmissible[18]. By Article 5 of the protocol, these consultations do not have binding effects on States. These advisory opinions strengthen the judicial dialogue between the ECtHR and national courts.

In short, the control of conventionality can be traced in the jurisprudence of national courts[19] and in national constitutions[20]. The control of conven-

[17] A pilot judgment is understood to be a procedure in which the ECtHR selects an application from among several that respond to the same cause, in such a way that it serves as a reference in the resolution of many identical cases. Abrisketa Uriarte, Joana (2013) "The Pilot Sentences: The European Court of Human Rights, and Judge to Legislator". Available in *file:///C:/Users/avill/Downloads/3-Joana-Abrisketa-Uriarte_digital%20(1).pdf.* Accesse d on 27 November 2025.

[18] ECtHR website available at *https://www.echr.coe.int/advisory-opinions,* accessed on 27 November 2025.

[19] The Spanish Constitutional Court recognises the control of conventionality in Spanish law in STC 140/2018. The appeal of unconstitutionality had been filed in relation to the last reform of universal jurisdiction in Spain, with different arguments. On the sixth ground, the judgment developed the violation of art. 96 EC and declared that the control of conventionality in Spanish law is a mere rule of selection of applicable law that corresponds to the ordinary jurisdiction and that is forbidden to the constitutional jurisdiction itself. It is interesting to note that, for Spanish law, the control of conventionality is only a "mere rule of selection of applicable law". This interpretation is very different from that made by the Argentine SCJN when it has received and complied with the judgments of the IACHR. Although, as we have developed in this work, with the dissents of the case, both doctrinal and jurisprudential, in Fontevecchia and the Ministry of Relations and Worship.

[20] For example, the Spanish Constitution of 1978 does not contain a rule that directly specifies the position of international treaties in domestic law. However, Article 96.1 of the Spanish Constitution provides that treaties validly concluded and officially published "shall form part of the domestic legal system". Beyond the various readings on the type of system that establishes the constitutional order – a monist, moderate monist or moderate dualist system – that precept implies that domestic law must be applied and

tionality ordered by the ECtHR is still incipient, as expressed by Sagües and Perotti Pinciroli.

The supremacy of Community law could only be achieved in Europe through the cooperation of the European Court of Justice with national judges. The work of national judges in the field of direct application and primacy of Community law has been fundamental. This has been reiterated by the Court of Justice when it points out that every time the local judge departs from this primacy, he is putting at risk the very existence and fullness of the European Community.

This cooperation in European Community law between the Court of Justice and local judges is quite different from what happens at the inter-American level, where there is a lack of cooperation between supranational systems (especially IACHR judgments) and local courts, as Riquert summarizes in the expression "no dialogue" in relation to the enforceability of IACHR judgments. When in the general conclusions of his research, the author notes "a withdrawal of the national closure courts and, as a result, tensions between the two are heightened to the point of noting a 'non-dialogue'. Riquert goes on to say that these tensions are affected by the lack of funding for the systems that make up the inter-American system. In our opinion, the tensions have more to do with the collision of competences between the supreme courts of the countries party to the ACHR and the decisions and interpretations of judgments by regional bodies.

In any case, tensions exist and it would seem that many times the collision of competences occurs because there is no "dialogue between courts" (Riquert).

The lack of dialogue between courts is also noted by Gargarella, who in expressing himself critically in the face of the "Fontevecchia" ruling clarifies "that he does not intend to empty the IACHR of authority, nor does he foresee a "train wreck" with the IACHR, but considers that the Argentine Court was wrong on both ends: in the zeal with which it defended its own supremacy (...) and in the way in which (as he suggests) he will continue to defer authority, and endorse the binding nature of the decisions of the Inter-

interpreted in accordance with international law. Professor Remiro Brotóns pointed out that Article 96.1 of the Spanish Constitution stipulates the immediate acceptance and direct application of treaties in Spanish law, provided that they are self-executing. Today, Remiro leads the broad and majority position that distances itself from the discussion on the hierarchy or supremacy of treaties and postulates their preferential application in domestic law.

American Court, when they do not conflict with his own criteria in this regard." He also expresses himself with respect to the dialogue between courts when referring to Dr. Rosatti's vote: "We say that we dialogue, but in reality, we show that we are completely unwilling to change our position even when we know it is wrong. This attitude would be precisely the opposite of the attitude of the judicial dialogue that we invoke".

From the collision of competences between the supreme courts of the states and the IACHR to the practical effect of human rights treaties

As we anticipated at the end of point 2 of this work, the dilemma may arise when the IACHR wants to give precedence to the ACHR or any other treaty on human rights over the NC, when they, for Argentine law, are on a hierarchical equal footing with the NC.

This idea would constitute one of the three paradoxes that Oronesu and Rodriguez[21] analyze in their work. As for the taking of a position with respect to the hierarchical level that should be assigned to conventional norms in the domestic arena and recognize them as primacy over any provision of domestic law, including constitutional law, it would be based, among other arguments, on the application of Article 27 of the 1969 Vienna Convention on the Law of Treaties[22]. Although the authors state that this article would not be applicable because it is limited only to the international

[21] Orunesu, Claudina and Rodríguez Jorge Luis. Three paradoxes of conventionality control. Available in *https://www.academia.edu/23035307/Tres_paradojas_del_control_de_convencionalidad.* Accessed on November 26, 2025.

[22] Disagreeing with the authors, I understand that it is the obligation of States to monitor that international norms are respected and complied with in good faith in their domestic order, an obligation that arises from the 1969 Vienna Convention on the Law of Treaties. Failure to invoke domestic law as a form of non-compliance with international obligations constitutes a manifestation of the principle of good faith (Articles 18 obligation not to frustrate the object and purpose of a treaty before its entry into force and 26 "Pacta sunt servanda" every treaty in force is binding on the parties and must be complied with by them in good faith; 31 to 33 good faith interpretation of treaties). Note that these articles are applied throughout the process of concluding a treaty, even before its ratification and also when a State is about to ratify a new treaty. Thus, a State may not invoke its internal law in order not to comply with an existing treaty, which it has already ratified, nor may it oppose it against the ratification of a new treaty, unless that new treaty (generally extensive negotiation) has been the product of a manifest violation of its consent and affects a rule of fundamental importance in its internal law (Article 46).

sphere and constitutes a request for principles, the content of some of the IACHR's pronouncements seems to support the strong interpretation according to which the IACHR would require that the provisions of the Convention be assigned the highest normative hierarchy. even above constitutional norms. This would not be the case in Argentina, since by article 75, paragraph 22, the provisions of the Convention have constitutional hierarchy in the conditions of their validity and do not repeal any article of the first part of the CN and must be understood as complementary to the rights and guarantees recognized by it.[23]

The second paradox consists in the binding nature of the interpretation that the IACHR makes of the ACHR and when it speaks of "taking into account" its jurisprudence, it understands that its interpretations must be followed by the States Parties not only in those cases in which they have been denounced, but also in any other, both in judgments and in advisory opinions. Thus, the IACHR's judgments would have an *erga omnes* effect[24]. This position would be very difficult to accept by the States Parties since it would imply the annulment of the powers of interpretation of

[23] "In effect: the validity of the Convention, like that of any international convention, depends by its nature on the concurrent will of the national States that sign it, but now the control of conventionality would come to establish that the validity of all the domestic law of each State party depends, in turn, on its conformity with the provisions of the Convention." (Orunesu, Rodríguez). For the authors, it is unfeasible to interpret conventionality control as implying recognition of the supremacy of the Convention over the constitutional provisions of the States parties. There is no article of the Convention that assigns it such a hierarchy, "and a mere construction of the IACHR cannot have such an effect, since the Court does not have any competence to modify the domestic law of the States Parties, especially if it is a question of their constitutional precepts."

[24] Dr. Sagüés states that the IACHR, "thanks to the doctrine of conventionality control, has affirmed as mandatory a thesis similar, in some way, to the stare decisis, or value of the U.S. precedent of its Supreme Court of Justice." "Or if you prefer, it assumes the roles of a supranational Court of Cassation in human rights, in order to standardize the interpretation of the rights of this nature emerging from the Pact of San José de Costa Rica." In International Obligations and Control of Conventionality. Estudios Constitucionales, Año 8, N° 1, 2010, pp. 117-136. Center for Constitutional Studies of Chile, University of Talca. "The thesis of the control of conventionality wants the Covenant to always prevail, both with respect to the first and the second part of the Constitution, and that the latter be interpreted "in conformity" and not against the Covenant. This means the domestication of the Constitution by the Covenant." In Chapter XXV Operational Difficulties of "Conventionality Control" in the Inter-American System, 2016. Institute of Constitutional Studies of the State of Querétaro, Sagüés Néstor P.

national judges and an invasion of the judicial system of each country, taking into account that the degree of supralegality and supranationality that this interpretation would require has not occurred in America, as in the case of the European Union with the recognition of the supremacy and direct effect of Community law and with the "principle of solidarity" – in the terms used by the Parliamentary Assembly of the Council of Europe – which has been consolidated in the jurisprudence of the Strasbourg Court through Resolution 1226 (2000), which I will mention below.

In accordance with Articles 62.3 and 68.1 of the ACHR, the IACHR is competent to hear any case concerning the interpretation and application of the provisions of the ACHR that is submitted to it, and the States Parties to the Convention undertake to comply with the Court's decision in all cases to which they are parties. Despite what is expressed in these articles – and it should not be a limitation for the effectiveness of the IACHR's jurisprudence to acquire "direct effect" in all the States that have recognized its jurisdiction – it should be mentioned that in the pronouncement on Supervision of Compliance in the case "Gelman v. Uruguay" of March 20, 2013[25] in recital 56 regarding the control of conventionality in cases in which the State has not been a party to the international process in which jurisprudence was determined, by the mere fact of being a Party to the ACHR, all its public authorities and all its organs, including democratic bodies, Judges and other bodies involved in the administration of justice at all levels are bound by the treaty, and must therefore exercise, within the framework of their respective competences and the corresponding procedural regulations, a control of conventionality both in the issuance and application of norms and in terms of their validity and compatibility with the Convention. and in the determination, judgment, and resolution of particular situations and specific cases, taking into account the treaty itself and, as appropriate, the precedents or jurisprudential guidelines of the Inter-American Court.

In recital 61, the IACHR refers to the European Human Rights System. In this regard, it points to resolution 1226 of 28 September 2000 of the Permanent Assembly of the Council of Europe "Execution of judgments of the European Court of Human Rights", in which it is stated that the principle of solidarity implies that the jurisprudence of the (European Court of Human Rights) is part of the Convention. Thus, extending the legally binding force

[25] Available online at *https://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13.pdf*. Accessed on 25 November 2025.

of the Convention *erga omnes* (to all other parties). This means that States parties must not only implement the Court's judgments in cases to which they are parties but must also take into consideration the possible implications that judgments rendered in other cases may have on their own legal systems and legal practices. ("3. The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party but also must take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.")[26]

For the European Court of Human Rights, the interpretative effectiveness of the conventional norm has been highlighted by European doctrine with the name of "interpreted thing" or chose interprétée, which in general terms (the IACHR alleges in recital 60) alludes to the *erga omnes* effectiveness produced by the judgments of the Strasbourg Court towards all the States Parties to the European Convention that did not intervene in the international process. insofar as the interpretative criterion "serves not only to decide on the cases before the Court but, in general, to clarify, protect and develop the rules provided for in the Convention" ("Ireland v. United Kingdom", 18 January 1978).For the European Court, both the "principle of solidarity", together with the consolidated jurisprudential doctrine of the Strasbourg Court on the link to its own precedents, has progressively generated the conviction and practice of the States subject to the jurisdiction of the Court when it comes to considering their jurisprudence mandatory as part of the treaty obligations (recital 62).

The objections that part of the Argentine doctrine and jurisprudence have made to these arguments[27] find a reasonable counterweight in recital 69 of

[26] Resolution 1226 (2000) Execution of Judgements of the European Court of Human rights. Parlamentary Assembly. Available online *https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML EN.asp?fileid=16834&lang=en.* Accessed on 25 November 2025.

[27] As for the clash of competences between the IACHR and the national courts (SCJN), the preeminence or "supra-constitutionality of the Treaties", the "derogatory competence of domestic norms", "loss of judicial sovereignty" (Bianchi), among others, together with the "return to dualism" (Abramovich), or a "withdrawal from what was resolved in "Fontevecchia" with respect to the orphan interpretation of art. 27 of the NC, forgetting or omitting (...) Article 75 paragraph 22 and the jurisprudence that the same court upheld with another composition" (Riquert). With regard to the interpretation of the

the 2013 supervisory judgment in the Gelman case that we have been commenting on. There, the IACHR makes an important distinction in terms of the binding effect of the inter-American judgment for the other States Parties that did not intervene in the international process, for the sole purpose of limiting itself to "inter-American jurisprudence," that is, to the "interpreted treaty norm" and not to the entire judgment.

This interpretative effectiveness is "relative", insofar as it occurs as long as there is no interpretation that gives greater effectiveness to the conventional norm at the national level. This is so, since national authorities can extend the interpretative standard; they may even cease to apply the conventional norm when there is another national or international norm that expands the effectiveness of the right or freedom at stake, in terms of Article 29 of the ACHR. In addition, reservations, interpretative declarations, and denunciations must be considered in each case, although in these cases the IACHR may, eventually, rule on their validity and adequate interpretation, as it has done on occasion.[28]

Another argument to balance between the different positions regarding the control of conventionality, and to achieve the greatest effectiveness of the conventional norm at the national level, Orunesu and Rodriguez express that the definitive nature should not be confused with the infallible nature of a judicial decision. It is one thing to maintain that the pronouncements of the IACHR are final in the sense of definitive and unappealable; It is another thing to maintain that they are infallible. And that is precisely also expressed in recital 69 above.

If the control of conventionality were to follow the strongest version in favour of internationalization, according to which the interpretation of the international seat is the only one that should be considered for the assignment of meaning to texts of international source, certain formulations would

Magistrates of the highest Argentine Court, the position of the majority in the Fontevecchia case (impossibility of annulling the civil conviction imposed) since the IACHR does not constitute a fourth instance that reviews or annuls state judicial decisions since jurisdiction is subsidiary, adjutant and complementary, it largely highlights what was sustained by the dissenting votes of Drs. Fayt and Boggiano in the "Arancibia Clavel" proceedings, and later repeated by Dr. Fayt in his minority vote "Espósito", among others.

[28] Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, paras. 311 and 312. Available online *https://www.corteidh.or.cr/docs/casos/articulos/seriec_209_esp.pdf.* Accessed on November 1, 2025.

have a fixed meaning: that assigned to it by the international organization in question. So, to know what would the task of a judge consist of, who in a case regulated by both a constitutional norm and by a norm of international source with constitutional hierarchy, must establish what the applicable law is? (Orunesu) In order to comply with the hermeneutical guideline of non-contradiction, the task of harmonization will be limited, because now, of all the possible meanings that can be assigned to a constitutional formulation, only those that do not contradict the norm of international source will be admissible. Therefore, for the judges, fulfilling the task of harmonizing would consist, basically, in an adaptation of the constitutional norm to the norm of international source. The acceptance of the rigidity of one of the terms of the interpretative process, that is, the presence of meanings already determined by international bodies, leads to limiting the range of admissible contents for constitutional formulations as long as coherence is to be preserved. But if the norms of conventional source limit in this way the content of the possible interpretations of the constitutional texts, they would be assigned a hierarchically higher rank than the latter. If this were the case, Orunesu says[29], under the formula "under the conditions of its validity" it would no longer be possible to coherently sustain the thesis that the norms of the Constitution and those of the treaties have the same hierarchy.

Riquert states in his book[30] that the IACHR has been forceful regarding the role of national judges in relation to the application of laws and the Convention. Thus, it has said that "when a State has ratified an international treaty such as the American Convention, its judges are also subject to it, which obliges it to ensure that the practical effect of the Convention is not diminished or nullified by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary must exercise not only a review of constitutionality but also of conventionality (IACHR "Dismissed Workers of Congress v. Peru", judgment of 11/24/06).

It is also important to note that the effectiveness of treaties is reflected in the provisions of articles 26 and 27 of the 1969 Vienna Convention on the

[29] Jorge Rodríguez y Claudina Orunesu (coords) Derecho Nacional y Derecho Internacional. Paradoxes for its articulation. Mar del Plata, Eudem, 2017. Available at *https://es.scribd.com/document/735774113/Derecho-Nacional-y-Derecho-Internacional-Paradojas-en-Su-Articulacion-Orunesu-y-Rodriguez.* Accessed on November 15, 2025.

[30] Riquert, Fabian Luis. Control of Conventionality and prescription of criminal action. Impact of the Inter-American Human Rights System on the Criminal Statute of Limitations of Members of the Security Forces. Editorial Hammurabi, 2020. Page 34.

Law of Treaties. The important thing is that the treaty is complied with, that human rights are respected by giving them a useful effect, with the States themselves being primarily responsible for its effectiveness. The practical effect of the conventions implies that their effectiveness cannot be diminished by the norms or practices of the States (Sagües).

The effectiveness of international human rights law, especially the ACHR, arises from international law from the relationship between Articles 26 and 27 of the 1969 Vienna Convention and Articles 1 and 2 of the ACHR. Thus, the State must adopt all necessary measures to implement the obligations contracted in the treaty in the domestic order.

Since the existence of a general principle of international law can be deduced from the combination of these articles, the useful effect (principle), Aguilar Cavallo points out[31], responds to the Latin formula *ut res magis valeat Quam pereat*; that is, in case of doubt about the interpretation of a precept, it should be interpreted in favor of the meaning that ensures a function or an effect to the norm." The above-mentioned author includes a paragraph by Judge Cançado Trindade in the Case of James et al. concerning Trinidad and Tobago[32] that ... the elements that make up the general rule of interpretation of the treaty (formulated in Article 31 (1) of the two Vienna Conventions on the Law and Treaties, of 1969 and 1986) – namely, good faith, the text, the context and the object and purpose of the treaty – are combined in the same formulation, precisely to indicate the unity of the interpretation process. Underlying this general rule of interpretation is the principle *ut res magis valeat quam pereat*, widely supported by international jurisprudence, and which corresponds to the so-called effect utile (sometimes called the principle of effectiveness), by virtue of which treaty provisions must be assured of their proper effects in the domestic law of the States Parties.

Judge Cançado Trindade's proposal is very interesting. In many cases, domestic rules may be perfectly valid for domestic law and not for international law, this would lead to the application of Articles 26 and 27 of Vienna

[31] Aguilar Cavallo, Gonzalo. "Obligatory nature of the control of conventionality in the light of the law of treaties". Virtual Legal Library of the Institute of Legal Research of the UNAM. Year 2019. Available in *http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-46542019000100357&lng=es&nrm=iso*. Accessed on November 1, 2025.

[32] Inter-American Court of Human Rights, Provisional Measures, resolution of the IACHR of May 25, 1999. Concurring opinion of Judge A. A. Cançado Trindade, para. 12

of 1969 and, in the case of the ACHR, Articles 1 and 2. If this situation persists (internal validity and contrary to an international obligation), it could generate international responsibility of the State under international law, although this would not alter the legal structure in domestic law, but it could cause some effect, at least the modification of some aspect related to domestic law, such as annulling a final judgment in the "Fontevecchia" case. or not to apply rules of domestic criminal law (statute of limitations for criminal action) in "Espósito" and "Derecho" cases.

Conclusions

The IACHR has established the criterion of conventionality control as of 2006 and since then it has been consolidated in the international jurisprudence of the regional body, ordering the States parties to the dispute – also laying the foundations for the *erga omnes* effect of such control – to adapt – to render definitive judgments null and void – of domestic law to the object and purpose of the IACHR – an obligation that existed by virtue of Articles 1 and 3 of the ACHR – and other Human Rights Treaties and also to the interpretation made by the IACHR of the ACHR and other Human Rights treaties.

The imposition of this criterion was not received without at least some objection on the part of Argentine jurisprudence, at least in its dissenting voices in the Bulacio and Fontevecchia cases – Fayt, Rosenkrantz – as well as in the doctrine – Caminos, Bianchi, Garay – arguing in general the collision of competences between an international body – IACHR – and the Supreme Court of a State – CSJN and the supremacy between international law over domestic law and vice versa – Articles 31, 27, 75 inc. 22 of the CN; Articles 26, 27 and 31 of the 1969 Vienna Convention on the Law of Treaties.

Europe resolves the relationship between Community law and the domestic law of the Member States of the EEC taking into account two fundamental pillars: the direct effect of the original and secondary rules and the supremacy of that legal system. The role of the European Court of Justice was indispensable, in order to prevent States Parties from unilaterally determining the scope of their obligations and responsibilities established in the Treaties. The direct effect of Community law means that it directly confers rights and imposes obligations not only on the Community institutions and the Member States, but also on their citizens.

Resolution 1226 of September 28, 2000, of the Permanent Assembly of the Council of Europe "Execution of judgments of the European Court of Human Rights" states that the principle of solidarity implies that the jurisprudence of the (European Court of Human Rights) is part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all other parties).

The ECtHR has not imposed an express obligation on States Parties to implement a conventionality review. Despite this, recent reforms to the ECHR suggest that the European system is taking a new direction in the protection of human rights. The antecedents of these changes can be found in what the authors have called the interpreted thing effect. This notion implies that the conventional interpretation made by the ECtHR in its jurisprudence would not only affect the specific case but would have general effects binding on all States. The advisory opinions introduced by Protocol 16 plus the so-called pilot judgments have helped to strengthen both the interpretative authority of the ECtHR and the enforcement of its decisions.

Effet utile – *ut res magis valeat quam pereat* – is a principle of international law according to which the provisions of a treaty must be interpreted in such a way that they are not deprived of meaning or effect. This principle is embodied in the general rule of interpretation of Article 31 (1) of the 1969 Vienna Convention, which requires that a treaty be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context, having regard to the object and purpose.

The review of constitutionality and the control of conventionality serve to reinforce the useful effect of the ACHR, over which the IACHR is competent to interpret and apply in cases submitted by the States Parties – *inter partes effect*. The *erga omnes* effect of IACHR judgments is an issue that has been raised but has not yet been defined.

In addition to the interesting statements made by the authors Orunesu and Rodriguez through the paradoxes exposed in chapter 4 of this work, it is also relevant what is expressed in recital 16 of the Judgment of 12/23/04 in the "Espósito" case, in which the SCJN raises the paradox that it is only possible to comply with the duties imposed on the Argentine State by international jurisdiction in the field of human rights by strongly restricting the rights of defense and to a pronouncement within a reasonable time, guaranteed to the accused by the ACHR in charge of ensuring the effective fulfillment of the rights recognized by said Convention. The SCJN, in any case, complies with the IACHR's ruling.

A paradox is also the fact that the IACHR incurs the Argentine State in international responsibility for affecting guarantees and rights recognized in international instruments (Article 75, paragraph 22 of the NC), whose compliance it invokes.

Despite having encountered some drawbacks related to the clash of competences between the IACHR and the Argentine Supreme Court, the reality is that the doctrine of conventionality control is installed at the inter-American level. There are more acts of the SCJN that validate (acquiescence) its existence than the few examples of dissidence and opposition in recent years due to different approaches when addressing the relationship between international law and domestic law.

Perhaps our highest organ of justice, the final interpreter of the NC, when it comes to having to comply or not with a judgment of the IACHR, should rather take into account the reasonableness of the proposal of the regional court, in pursuit of the principle of *pro homine* and progressiveness. The national or international norm that expands the effectiveness of the right or freedom at stake, in terms of Article 29 of the ACHR, should be applied.

Domestic law and international law must be applied in such a way as to ensure the effectiveness of their content. If the discussion is only reduced to the supremacy of one or the other order, the answers will be circular or paradoxical. If effectiveness, pragmatism and reasonableness are sought, then the legal system that best guarantees the useful effect of human rights norms for the parties involved will be applied. It is not in vain that the constitutional hierarchy of human rights treaties has been established in the conditions of their validity. A large block of domestic and international norms (useful effect and *pacta sunt servanda*) must serve to achieve the much-vaunted effectiveness of human rights.

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Glossary

ACHR American Convention on Human Rights of 1969.
EEC European Economic Community.

ECHR European Convention on Human Rights.
IACHR Inter-American Court of Human Rights.
NC National Constitution.
CSJN Supreme Court of Justice of the Nation.
HR Human Rights.
TEU Court of the European Union.
ECT Court of the European Economic Community.
ECHR European Court of Human Rights.

POST-MORTEM TRANSMISSION OF ECONOMIC RIGHTS DERIVED FROM THE RIGHT TO ONE'S IMAGE

Christine Giulia ABAZA*

ABSTRACT

The right to one's image stands as one of the fundamental pillars of personality rights. Although expressly regulated by civil law as a right inherent to the human being, inalienable and closely linked to the holder, in the current socio-economic context, it acquires a patrimonial value by attributing a price to the reproduction of the person's image. Despite the classic characteristics provided by law and recognized by the doctrine of civil law, this commercialization of the image has established the grounds that led to the recognition of some patrimonial prerogatives derived from the person's right to image. Through this paper we propose a concise analysis of the possibility of transmitting these patrimonial prerogatives as true assets of the estate by inheritance, as well as an analysis of some practical situations involving the exercise of these rights by the heirs, in order to propose possible interpretative solutions.

KEYWORDS: *inheritance; image rights; civil law; intangible assets;*

1. Introduction

The right to one's image, although traditionally analyzed in the context of personality rights[1] and regulated from a civil point of view as an attribute of the human being meant to ensure control over one's own social representation, the current economic reality and the digital context, in particular, have substantiated a marked trend of patrimonialization[2] of this right.

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[1] In legal doctrine, it has been argued that personality rights are *"those prerogatives through which the holder is granted the faculty to enjoy and defend the essential attributes and interests to their person"* or as *"extrapatrimonial prerogatives intimately attached to the person, expressing the quintessence of the human being, being intrinsic to him."* Șerban Diaconescu, Paul Vasilescu, *Introduction to civil law.* vol. I, Hamangiu Publishing House, Bucharest, 2022, p. 303.

[2] French legal literature has admitted that, as a result of this phenomenon of patrimonialization, positive law tends to recognize even a transmissible character of the

This duality of the right to image, located at the intersection between personality rights and patrimonial rights, generates complex legal situations in the context of the death of the holder. Although the non-patrimonial side is undoubtedly extinguished with the cessation of the person's capacity legal personality, at which point an *erga omnes* enforceable obligation to respect the memory of the deceased arises, the patrimonial prerogatives derived from the right to the image (respectively, the reproduction and use of the reproduction of the person's image) persist, becoming part of the estate.

Consequently, a question arises regarding the legal fate of the patrimonial prerogatives and the related financial benefits following the holder's death, a matter where a legal resolution becomes imperative. To this end, we will examine the distinction between the right to consent to the fixation of the image and the right to consent to its use, in particular with regard to the corroboration of the provisions of art. 89 of Law no. 8/1996 on copyright and related rights, with the provisions regarding personality rights and the succession of intangible assets.

2. Legal nature of the right to image

As admitted in the legal doctrine[3] and as we have argued in previous analyses[4], the legal nature of the right to image is situated on the fine border between personality rights and patrimonial rights. Although, *stricto sensu,* the right to the image remains, without reservations, a non-patrimonial right,

right to image. Inspired by the American legislation, which recognizes a dual nature of the person's right to image, divided between *right of publicity* (which allows the commercial exploitation of the individual's personality attributes) and *right of privacy* (which protects the moral interests of the person), the French doctrine admits that the economic exploitation of the image requires the recognition of a patrimonial right to the image, along with the classical extra patrimonial right. For details, see Justine Bloch, *The patrimonialization of image rights*, 2015, pp. 10-11, *https://docassas.u-paris2.fr/nuxeo/site/esupversions/a0b5bdda-0c3f-44ac-807c-422b7cb72e4e?inline*.

[3] Roxana Matefi, "The right to one's own image from the perspective of its patrimonial component", 2018, https://www.universuljuridic.ro/dreptul-la-propria-imagine-din-perspectiva-componentei-sale-patrimoniale/#f12, accessed December 8, 2025.

[4] Christine Giulia Abaza, "The Legal Nature of Image Rights. The perspective of the duality between personality law and patrimonial law", *Universul Juridic Magazine no. 7/2025*, 16 July 2025, *https://www.universuljuridic.ro/natura-juridica-a-dreptului-la-imagine-perspectiva-dualitatii-intre-drept-al-personalitatii-si-drept-patrimonial/,* accessed 6 December 2025.

its economic exploitation has generated a scission in its legal content. We emphasize the fact that this tendency to capitalize on the right to image does not transform the right itself but gives rise to derived patrimonial prerogatives that can have an autonomous existence and a distinct legal regime. As we shall observe, the High Court of Cassation and Justice itself has confirmed a presumption of assignment of these prerogatives in favor of the author of the work containing the image of a natural person, if the person represented in the portrait is a professional model or has received remuneration to pose for that portrait, which affirms their patrimonial character.

We consider that this delimitation is not restricted only to a theoretical analysis but presents practical consequences in terms of the "exploitation" of the person's image and the *mortis causa* transmission of the deceased's rights and obligations (of a patrimonial nature). Thus, we distinguish between the right to consent to the capture of the person's image (the fixation of physical appearance) and the right to consent to the reproduction and use of the fixed image. Upon the death of the holder, when the legal subject ceases to exist, the right to permit the fixation of the person's image is extinguished, being inextricably linked to the living natural person. Therefore, any subsequent fixation or capture of the person's image may fall under the rules on the protection of the memory of the deceased, pursuant to art. 79 of the Civil Code.

Regarding the right to consent to or prohibit the reproduction or the use of the reproduction, we consider that these two patrimonial prerogatives can survive the holder. Images fixed during the person's lifetime constitute existing assets that can be the subjects of legal acts even after the death of the holder, with the limitations generated by the provisions relating to respect due to the person even after death and the related copyright. Limiting strictly to the right of image, we specify that the heirs do not acquire the abstract right to image, but may acquire the patrimonial right to authorize or prohibit the reproduction or use of the reproduction of the person's image and to collect the resulting civil fruits. These derived prerogatives, detached from the person, become an asset in the succession estate, susceptible to be capitalized under the law.

The analysis of the legal regime of the right to image in the context of inheritance cannot be dissociated from the regulatory framework provided by copyright legislation, given the interdependence between the fixation of

the image and its subject. Reiterating previous conclusions,[5] we note that, in applying the provisions of art. 89 of Law no. 8/1996,[6] the right to image may coexist with copyright when the author obtains the consent of the natural person regarding the fixation of his image. However, this overlap does not constitute an *identity* between the right to image and the copyright over the work, the absorption of the right to image into copyright is unacceptable. Moreover, even if the legislator uses the same notions of "reproduction" and "use" within art. 73 of the Civil Code, we do not consider that the intent was to confuse the right to consent to the reproduction of the image and the use of the reproduction with the economic copyright regarding the reproduction or use[7] of the work, but rather to establish a relationship of interdependence. These rights coexist, having different holders, and once the image is fixed in a work, patrimonial rights consisting of the reproduction or use of the work arise, from the perspective of the special law.

In this context, we note that the legislator regulates a presumption of assignment of the right to use the image in the hypothesis where the represented person has received remuneration for the fixation of their image or is a professional model, which confirms the patrimonial nature of these derived prerogatives and superimposes the non-patrimonial legal relation-

[5] *Ibid*.

[6] Article 89 of Law No 8/1996 provides: *(1) The use of a work containing a portrait requires the consent of the person represented in that portrait, under the conditions provided for by Articles 73, 74 and 79 of the Civil Code. Furthermore, the author, owner or possessor thereof does not have the right to reproduce or use it without the consent of the successors of the represented person, for 20 years after their death, in compliance with the provisions of art. 79 of the Civil Code. (2) In the absence of a clause to the contrary, consent shall not be required if the person represented in the portrait is a professional model or has received remuneration to pose for that portrait. Furthermore, the existence of consent is presumed under the conditions of art. 76 of the Civil Code.*

[7] Moreover, the concept of the *use of the work* has a much broader meaning compared to the use of the reproduction *of the person*'s image. Within art. 13 of Law no. 8/1996 it is stipulated that *the use of a work gives rise to distinct and exclusive economic rights of the author to authorize or prohibit: a) the reproduction of the work; b) the distribution of the work; c) the import for trading on the domestic market of copies made, with the author's consent, after the work; d) the rental of the work; e) the lending of the work; f) the public communication, directly or indirectly, of the work, by any means, including by making the work available to the public in such a way that the public may access it from a place and at a time individually chosen by them; g) the broadcasting of the work; h) the cable retransmission of the work; i) the making of derivative works; j) the retransmission of the work.*

ship (the exercise of the right to consent to the fixation of the image) with an obligational legal relationship (the assignment of the patrimonial right of reproduction or use of portrait).

Specifically, when a person accepts remuneration, the legislator presumes the existence of consent for the use of the work containing the portrait. This interpretation is confirmed by the High Court of Cassation and Justice,[8] and from a succession perspective, this legal relationship is no longer grounded (solely) in the right to image as an attribute of personality, which is extinguished upon the person's death, but in an obligational relationship governed by the *pacta sunt servanda* principle.

Therefore, in our opinion, the legal nature of the right to the image is that of a non-patrimonial right, as an attribute of personality, the content of which is divided between the non-patrimonial aspect and a patrimonial aspect. The patrimonial prerogatives derived from the right to image allow for its exercise in various commercial contexts, within which the holder may claim remuneration for the use of the reproduction of his image (or voice). However, we emphasize that this mode of exercising the right, including the admission of the assignment of prerogatives, does not constitute, from a legal standpoint, a transformation of the right to image into a patrimonial right (intangible asset). Moreover, even if it stands in a relationship of interdependence with the copyright over the work in which the person's image is fixed, this aspect does not alter the civil nature of the right to image.

3. Inheritance transfer of patrimonial prerogatives derived from image rights

Once the thesis of *mortis causa* transmission of patrimonial prerogatives is admitted, the legal regime governing their exercise by the heirs is limited by the provisions regarding the prohibition of infringing upon the memory of the deceased and by the respect due to them. Thus, these *post-mortem* obligations translate, on a legal level, into a duty of respect towards the memory of the deceased, as a moral obligation of the heirs to watch over the dignity of the deceased. In this case, infringements upon the image or

[8] *The High Court of Cassation and Justice, Civil Section I, decision no. 1458 of 16 May 2014*, 2014,
https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=87115#highlight=##, accessed December 8, 2025.

dignity of the deceased may constitute a civil tort, a source of the liability of the guilty party.

A nuanced analysis of reading the provisions of art. 89 para. (1) of Law no. 8/1996, as a special law, in conjunction with those of art. 73 of the Civil Code, as common law provisions, reveals a temporal limitation which, in our opinion, supports the thesis of the *mortis causa* transmission of the patrimonial prerogatives derived from the right to image.

For 20 years after the death of the represented person, the author, owner or possessor of the work has the right to reproduce or use the work containing their portrait only with the consent of their heirs and in compliance with the provisions of art. 79 of the Civil Code regarding the protection of the memory of the deceased. Thus, for 20 years *post-mortem*, the derived patrimonial prerogatives remain protected and are transmitted to the successors of the person represented in the work, in which case the heirs may condition their consent upon the payment of royalties. After the exhaustion of this term, the reproduction and use of the work enter a zone of freedom of use, subject to compliance with the provisions of Art. 79 of the Civil Code.

Therefore, the literal and systematic interpretation of the two aforementioned articles validates the thesis admitting the *mortis causa* transmission of the right to consent to the reproduction or the use of the reproduction of the person's image (or voice).

A distinct issue of major practical importance is raised by the hypothesis of the death of represented person during the execution of an image use contract, such as an advertising contract with successive or continuous execution, for a fixed term. In a cursory approach, one might invoke the *intuitu personae* character of the contract to argue for its termination by operation of law (*de jure*) upon the death of the natural person; however, in our opinion, the effects of the contract must be nuanced.

Thus, we distinguish between obligations to do with an *intuitu personae* character (for example, the obligation to participate in a photo session specially organized to facilitate the creation of promotional materials necessary for the execution of the contract) and transmissible obligations to do (the assignment of rights for reproduction and use of the reproduction of the person's image).

If death occurs after the fixation of the image but during the validity of the contract, we consider that the legal relationship will continue with the universal heirs or heirs with universal title of the person, in their capacity as

successors in interest, substituting the deceased regarding the ongoing patrimonial rights and obligations (including the right to claim the related remuneration, which is maintained and benefits the heirs).

From the perspective of the cause of the contract, naturally, this event may determine the cessation of its existence from the perspective of the work's possessor (the mediate cause from the merchant's point of view being the active association of the person's image with their products or services, for a determined duration). However, a potential termination of the obligational relationship, in this case, would have as its source a new mutual consent of the parties (the merchant and the heirs of the person represented in the work), not the fortuitous impossibility of performance resulting from the person's death. Moreover, if the deceased was remunerated, the aforementioned presumption of assignment operates with full effects until the expiration of the contractual term, in which case the heirs, as continuators of the deceased's legal personality, are bound by the effects of the contract, as regulated. The use of the reproduction remains, in our opinion, at the merchant's choice, being, as a rule, a right, not an obligation.

The *mortis causa* transmission of the prerogatives of reproduction and use of the reproduction of the person's image presents particular relevance in the case of a plurality of heirs. In this case, these prerogatives enter, alongside the other assets of the estate, into a state of indivision, being governed by common law rules until the moment of partition.

The legal qualification of acts having as their derived object the reproduction or use of the reproduction of the person's image raises issues regarding the heirs' agreement, within the meaning of Art. 641 of the Civil Code. We consider that if the heirs intend to consent to an assignment of the right of use or to a use for a long period (more than 3 years), we are in the presence of an act of disposition, where the agreement of all heirs is required.

Conversely, a use agreement concluded for a fixed term of less than 3 years is deemed to have the valences of an act of administration, and may be concluded with the agreement of the heirs holding the majority of the quotas.

Regarding the simple collection of due royalties resulting from contracts concluded by the author of the succession, this represents an act of conservation, which may be performed by any of the heirs, with the obligation to distribute the benefits among the successors, in proportion to their share of the inheritance estate.

4. Conclusions

It is our opinion that the possibility of the *mortis causa* transmission of patrimonial prerogatives derived from the right to image is confirmed by the legislator through the regulations analyzed throughout this paper. Thus, although the right to image, viewed *stricto sensu* as a personality right, is inevitably extinguished upon the death of the natural person, its economic valorization generates effects that "survive" the lifetime of the holder.

The relationship of interdependence between the right to image and the copyright over the work in which the person's portrait is incorporated makes the exploitation of the work conditional upon the consent of the person whose image is reproduced. In light of the objective of this paper, we acknowledge that the heirs acquire a *sui generis* succession asset: the right to authorize or prohibit the reproduction of the deceased's image or the use of such a reproduction. The exercise of these rights, governed by the common law rules regarding the succession estate but subject to public policy limitations regarding the protection of the memory of the deceased, highlights a complex regime of circulation.

Therefore, within this legal structure, the establishment of the presumption of assignment in the event of the remuneration of the person and the regulation of the 20-year term of post-mortem protection validate the patrimonial nature of these prerogatives. Although we do not accept the qualification of the right to image as an intangible asset, we argue for the existence of derived patrimonial attributes, which allow the heirs of the deceased, for a determined period of 20 years *post-mortem*, to consent to the reproduction and the use of the reproduction of their predecessor's image.

From the perspective of contractual dynamics, we have highlighted that heirs are subrogated to the patrimonial rights and obligations assumed by the deceased, being bound to respect the effects of contracts concluded by their predecessor, by virtue of the *pacta sunt servanda* principle, while also having the possibility to collect the related civil fruits. Furthermore, the situation of a plurality of heirs imposes a careful qualification of the acts they may conclude, ensuring the fluidity of civil transactions.

Finally, we state that admitting the *mortis causa* transmission of these prerogatives responds to a dual necessity: ensuring the security of commercial relationships initiated by the deceased and preserving the economic value of the image within the estate. The right to image proves to be, therefore, a complex concept, the commercial exploitation of which by

successors is governed by a balance between the rigor of civil obligations and the respect due to the memory of the deceased.

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5. *High Court of Cassation and Justice, Civil Section I, decision no. 1458 of 16 May 2014*, 2014, *https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=87115#highlight=##*, accessed 8 December 2025.

6. Law no. 287/2009 on the Civil Code, republished, with subsequent amendments and completions.

7. Law no. 8/1996 on copyright and related rights, republished, with subsequent amendments and completions.

ADAPTING LABOUR LEGISLATION TO REGULATE THE USE OF ARTIFICIAL INTELLIGENCE (AI) IN EMPLOYMENT RELATIONSHIPS

Tudor APETRI[*]

ABSTRACT

Amidst the accelerated digitalization of employment relations, the deployment of Artificial Intelligence (AI) systems is increasingly common, presenting a host of legal, ethical, and financial challenges. This study examines the consequences of inappropriately leveraging AI technologies in decision-making processes concerning employee recruitment, evaluation, and dismissal. A particular focus is placed on the resultant financial risks and the sanctions outlined in European legislation. The paper underscores the necessity of balancing technological innovation with the protection of fundamental rights within the digitized labour market, proposing legislative and institutional measures designed to mitigate the risks associated with the excessive delegation of critical decisions to algorithmic systems.

KEYWORDS: *artificial intelligence; labour law; automated decision-making; automated dismissal;*

1. General aspects

The emergence of the phenomenon known as Artificial Intelligence (AI) has created the necessity for regulating this new domain. The advent and widespread adoption of AI are no longer just a technological novelty, but rather a fundamental architectural change in the organization of labour. While the balance point between efficiency and fundamental rights remains to be determined, current indicators signal the urgent need for a normative framework that can provide coherence to existing applications without stifling innovation[1]. Within the European Union, this role is now fulfilled by

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[1] European Parliament & Council. (2024). Regulation (EU) 2024/1689 (Artificial Intelligence Act), *https://eur-lex.europa.eu/ (EUR-Lex)*

the AI Act, which institutes a differentiated regime according to risk levels and links technical compliance requirements with robust legal safeguards. This represents a promising approach, although the details of its implementation remain, in part, open to interpretation and susceptible to further political adjustments[2].

The shift that AI is bringing to the labour market appears to be primarily one of task transformation rather than the outright replacement of jobs. However, the magnitude of this change remains uncertain and is distributed unequally across different sectors[3]. Several assessments suggest that the exposure of various occupations to generative technologies is substantial, likely leading to potentially asymmetric effects based on gender and skill level. At the same time, a significant portion of this impact is emerging as the augmentation of human labour, rather than its complete integral automation[4]. In practical terms, this implies that labour regulation should aim – at least initially – to facilitate the predictable adaptation of employment relationships. This requires implementing transition instruments such as comprehensive worker information, provisions for continuous training, and accessible mechanisms for contesting automated decisions[5].

In the recruitment sector, the most noticeable example is the shift toward conversational interfaces and semantic search capabilities. Major platforms have implemented natural language AI-assisted search and the generation of recruitment project outlines based on a brief articulated in common language. While this trend reduces initial friction in candidate sourcing, it simultaneously intensifies the reliance on data and opaque criteria[6]. However, the claimed efficiency does not eliminate underlying problems: matching models have the potential to "freeze" historical patterns, thereby marginalizing atypical profiles or transferable skills that are inherently

[2] The Guardian. (2025, 7 nov.). EU could water down AI Act amid pressure from Trump and big tech, *https://www.theguardian.com/* (The Guardian)

[3] OECD. (2024). The impact of Artificial Intelligence on productivity, distribution and growth (Working Paper), *https://www.oecd.org/* (OECD)

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[6] LinkedIn. (2024, 4 mar.). 5 Ways to Use New AI-Assisted Search and Projects in LinkedIn Recruiter, *https://www.linkedin.com/business/talent/blog/* (linkedin.com)

difficult to quantify. Consequently, what appears to be a time saving for the recruiter can, in the medium term, introduce risks of homogenization in selection, particularly when the underlying datasets reflect pre-existing imbalances[7].

At the opposite end of the spectrum, performance monitoring raises the most visible questions. The case of Amazon France Logistique, which was sanctioned by the CNIL (the French Data Protection Authority) with a €32 million fine for a system deemed "excessively intrusive" (granular collection of scanning times, inactivity periods, performance indicators, and lengthy data storage), demonstrates that "operational efficiency" cannot justify every intensity of surveillance[8]. The findings also concern the issue of transparency towards employees – namely, the deficit of information provided to the data subject – a central and essential aspect within the framework of the General Data Protection Regulation (GDPR)[9]. Even if Amazon is contesting the decision, the case functions as a practical benchmark: data minimisation, limiting the storage duration, and clear information provision are not mere formalities, but rather conditions of proportionality.

A particularly more sensitive area is automated decision-making regarding careers – ranging from automatic warnings to the termination of employment relationships. EU Law grants the data subject the right not to be subject to a decision based solely on automated processing which produces legal effects concerning him or her or similarly significantly affects him or her[10]. Recent jurisprudence from Amsterdam, notably in the Uber litigation, suggests that courts are taking a severe view of the refusal to explain the logic and factors taken into account in automated decisions. The imposition of fines as penalties for non-compliance with transparency orders signals that the concept of "human in the loop" must be more than a mere formality[11].

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[7] OECD. (2024). The impact of Artificial Intelligence on productivity, distribution and growth (Working Paper), *https://www.oecd.org/* (OECD)

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[9] Regulation (EU) 2016/679 (General Data Protection Regulation), *https://eur-lex.europa.eu/* (EUR-Lex)

[10] *Ibidem.*

[11] ADCU. (2023, 5 oct.). Uber ordered to pay €584,000 in penalties for failure to comply with court order for algorithmic transparency... *https://www.adcu.org.uk/news-*

One of the most prevalent ways AI contributes to the hiring process is through Curriculum Vitae (CV) analysis. Algorithms identify the most suitable candidates based on experience, competencies, and established preferences. This capability allows employers to accelerate the filling of vacant positions and significantly reduce the recruiter workload.

A notable example is LinkedIn's 2024 launch of Recruiter, which is designed to enable recruitment professionals to articulate job requirements using natural language processing. Leveraging this input against a massive database, AI will generate lists of compatible candidates, resulting in substantial time and effort savings. Nevertheless, it remains at the discretion of each employer to weigh the importance of such an automated and standardized process, which will frequently fail to perceive the genuine potential and comprehensive compatibility of workers for vacant roles.

Beyond facilitating recruitment, Artificial Intelligence also aids in retaining valuable employees. By analyzing data related to performance, engagement, and professional history, AI can proactively anticipate which employees are predisposed to voluntary turnover. This predictive capacity allows employers to intervene preemptively, engaging in open dialogue and attempting to provide enhanced conditions or development opportunities.

Another essential pillar is compliance with the General Data Protection Regulation (GDPR). AI does not operate in a legal vacuum, and the processing of personal data necessitated by these systems imposes supplementary obligations on employers. Data Protection Impact Assessments (DPIAs), the identification of lawful bases for processing, and the guaranteeing of data subjects' rights become imperative requirements. Any automated decision that significantly impacts an individual must be justified and fully transparent.

Historically, Amazon has faced accusations of employing an automated system for the monitoring and dismissal of employees who failed to meet established productivity norms.

Essentially, the CNIL concluded that Amazon exceeded the admissible limits concerning the collection and storage of personal data. The system used by the company meticulously recorded every employee's activity, including scanning times, inactivity intervals, and performance indicators,

posts/uber-ordered-to-pay-eu584-000-in-penalties-for-failure-to-comply-with-court-order-for-algorithmic-transparency-in-robo-firing-case-brought-by-worker-info-exchange-adcu (adcu.org.uk)

retaining this information for an extended period. According to the French authority, this storage duration was assessed as disproportionate, contravening the GDPR principles governing data minimisation and the limitation of storage duration.

Another problematic aspect identified by the CNIL was the lack of transparency towards employees. Workers were not adequately informed about the nature of the data collected or the manner in which it was used to evaluate their performance. This directly contradicts the GDPR provisions, which mandate companies to ensure clear and accessible communication regarding the processing of personal data.

Furthermore, the monitoring system implemented by Amazon was deemed excessively invasive. The near real-time tracking of every movement and any delay, even if only for a few seconds, created a strained working environment, with potential negative effects on the psychological health of the employees. The CNIL assessed that such practices surpass the legitimate necessities of an efficient work environment and fall into the category of abusive surveillance.

In response, Amazon expressed its disagreement with the CNIL's decision. A company spokesperson argued that warehouse management systems are industry-standard and essential for maintaining levels of safety, quality, and operational efficiency. The company announced that it reserves the right to contest the decision through an appeal.

The CNIL's ruling serves as a warning for all companies operating within the European Union, underscoring the importance of respecting the balance between operational necessities and the fundamental rights of employees. Amazon France Logistique, which manages the retail giant's large warehouses in France, will be required to review its monitoring practices to comply with legal requirements and avoid potential future sanctions. Although the company denied that dismissal decisions were made without human intervention, internal documents revealed that the system automatically generated warnings and dismissal decisions.

However, the use of AI for dismissals represents the most controversial facet of this phenomenon. Some companies have begun using algorithms to evaluate performance and determine which employees should be terminated. A 2023 survey[12] conducted by Capterra shows that 98% of

[12] Bower Alexandra, The 3 Biggest Project Management Trends of 2023, available at:*https://www.capterra.com/resources/project-management-trends/*

interviewed Human Resources leaders plan to use software and algorithms to reduce labour costs.

In October 2023, the Amsterdam District Court ruled that Uber had violated a court order issued in April 2023 by the Amsterdam Court of Appeal[13], which obliged the company to provide transparency in the automated dismissal decision-making process concerning two drivers from the United Kingdom and Portugal. The Court imposed total penalties on Uber amounting to €584,000, with an additional penalty of €4,000 for each subsequent day of non-compliance. The case was initiated by the Worker Info Exchange (WIE) organisation, supported by the App Drivers & Couriers Union (ADCU), seeking detailed information on how Uber's algorithms reached the decision to dismiss the drivers. The Court found that Uber failed to provide meaningful information about the logic of the automated decision, the factors considered, and their weighting, thereby preventing the drivers from reasonably contesting the decision.

Judge R.A. Dudok van Heel underscored the severity of the failure to comply with the order and suggested that Uber might be deliberately attempting to conceal information to protect its business model. She deemed that the imposed penalties were not disproportionate and represented an adequate incentive for compliance.

This case highlights the imperative need for strict regulation of automated decision-making in employment relationships and emphasizes the critical importance of transparency and accountability in AI-driven decision processes.

On an empirical level, the temptation to resort to algorithms during periods of cost adjustment is real. The 2023 Capterra survey (300 HR leaders in the US) recorded that 98% planned to use software and algorithms for workforce cost reduction decisions in the context of a recession; paradoxically, less than half stated they felt comfortable following technological recommendations regarding dismissals[14]. This suggests a pragmatic caution: organisations desire analytical tools but are not prepared to fully outsource human judgment – a stance that is also legally sound.

[13] Eurofound (2023), Amsterdam Court of Appeal Decision in Uber case (Court ruling), Record number 4401, Platform Economy Database, Dublin, *https://apps.eurofound.europa.eu/platformeconomydb/amsterdam-court-of-appeal-decision-in-uber-case-110150.*

[14] Capterra. (2023, 9 ian.). Biased Algorithms May Fire You in the Next Recession (comunicat Business Wire). *https://www.businesswire.com/* (Business Wire)

Looking at the broader picture, labour law is called upon to act as a buffer framework between the productivity promises of AI and the imperative of dignity at work. Several guiding principles can already be extracted from existing practice and norms:

a. Data Protection Impact Assessments (DPIAs) in High-Risk AI Uses in HR

In cases where the employer utilizes Artificial Intelligence systems for recruitment, performance evaluation, or disciplinary decisions, the Data Protection Impact Assessment (DPIA) should not be treated as a mere bureaucratic exercise. Regulation (EU) 2016/679 (GDPR) mandates the completion of such an analysis when the processing is "likely to result in a high risk to the rights and freedoms of natural persons"[15]. In the context of labour, where a subordination relationship exists, the risk is practically permanent.

In a substantial interpretation, the DPIA should become a genuine deliberative process, involving the representatives of the employees and the effective consultation of the Data Protection Officer (DPO), rather than just a paper formality. The involvement of these actors ensures a balance between the organization's interest and the protection of individual rights, which reflects the principle of transparency and accountability stipulated in the same regulation[16].

b. Operational Transparency and the Right to Understand the Decision

Transparency in automated decisions is not limited to providing a legal notification. Employees must have the opportunity to understand the operational logic of the system, not merely the final outcome – an idea perfectly captured by the statement, "I cannot challenge what I cannot understand."

The Uber case in the UK (ADCU v. Uber, 2023) perfectly illustrated this issue: drivers affected by the automated suspension of their accounts lacked access to the explanations behind the algorithmic decisions, which was

[15] European Parliament & Council. (2016). Regulation (EU) 2016/679 (General Data Protection Regulation). Official Journal L 119/1.

[16] European Data Protection Board (EDPB). (2020). Guidelines 4/2019 on Article 25 Data Protection by Design and by Defaul

deemed a violation of the right to transparency and fair treatment in employment. Consequently, operational transparency requires not only access to general information about the AI but also a form of practical intelligibility that allows for the effective contestation of automated decisions[17].

c. Proportionality and Minimisation in Monitoring

The principles of proportionality and data minimisation mandate that the surveillance of employees must be justified and strictly limited to what is necessary for the intended purpose. In recent years, the French Data Protection Authority (CNIL) sanctioned Amazon for the excessive use of productivity monitoring tools, demonstrating that data considered "useful for management" is not necessarily "legally required"[18].

This lesson is relevant to any employer using dashboards, sensors, or algorithmic metrics: visual efficiency does not justify a constant invasion of the worker's professional life. Essentially, labour law must prevent the transformation of digital transparency into total surveillance[19].

d. Technical Governance and Auditability

An often-overlooked, yet crucial, aspect is the technical governance of AI systems deployed in Human Resources. Here, recent international standards – including OECD recommendations (2024) and the Artificial Intelligence Act (EU Regulation 2024/1689) – mandate the clear documentation of data, training criteria, and model versions. Practically, every system should be accompanied by a "technical data sheet" (model card, data sheet) that describes what data was utilized, for what purpose, and how potential discriminatory effects were tested.

This traceability is not merely a technical formality: it enables a genuine ex post audit, through which it can be verified whether the AI decisions were

[17] *European Data Protection Board (EDPB). (2020). Guidelines 4/2019 on Article 25 Data Protection by Design and by Default.*

[18] *CNIL. (2024, January). Délibération SAN-2024-003: Amazon France Logistique – sanction relative à la surveillance des salariés. Commission Nationale de l'Informatique et des Libertés.*

[19] *De Stefano, V., & Taes, S. (2021). Algorithmic Management and Collective Rights. International Labour Review, 160(4), 489-511.*

proportional, justified, and non-discriminatory. Without this governance infrastructure, legal control remains purely theoretical[20].

Finally, it is essential to state explicitly that the AI Act is not a derogation from the GDPR, but rather a complementary regulatory overlay intended to particularise obligations based on specific risk classes. Within the HR domain, the synergy between the AI Act (addressing requirements for design, testing, and model governance) and the GDPR (covering legal basis, transparency, rights, and Article 22) already outlines a coherent path to compliance. It appears probable that, as further guidelines and codes of good practice emerge, the emphasis will decisively shift from the question of "whether we are permitted" to "how we adequately document and justify our actions"[21].

2. The Regulation of Artificial Intelligence at the European Level

Given these new necessities, the European Union adopted Regulation 2024/1689 establishing harmonised rules on the use of artificial intelligence. The purpose of this regulation is to enhance the functioning of the internal market by instituting a unitary legal framework for the development, commercialisation, placing into service, and use of Artificial Intelligence (AI) systems within the European Union, in alignment with its values.

Consequently, the Regulation aims to stimulate the adoption of safe, human-centric, and trustworthy AI systems, ensuring a higher level of protection for health, safety, fundamental rights (in accordance with the EU Charter of Fundamental Rights), as well as democracy, the rule of law, and the environment. Simultaneously, it seeks to prevent the negative impact of AI systems and to promote innovation.

Among its objectives is also the assurance of the free movement of AI-based goods and services within the EU, prohibiting Member States from imposing restrictions on the development, commercialisation, or use of these systems, except in cases expressly provided for by the Regulation.

As stated, each state has the obligation to ensure the maintenance of a balance between social protection, economic efficiency, and the fairness of

[20] OECD. (2024). *AI, Employment and Accountability: Towards a Responsible Governance Framework. Organisation for Economic Co-operation and Development*.

[21] European Parliament & Council. (2024). *Regulation (EU) 2024/1689 (Artificial Intelligence Act).* Official Journal of the European Union

the labour legislation system's functioning, within every era and every societal change or stage.

In the era of accelerated digitalisation, the integration of AI-based technologies into the professional sphere is increasingly common. Although AI promises efficiency, automation, and process optimisation, its use in employment relationships entails a series of significant risks, particularly concerning the fundamental rights of workers, the protection of personal data, and the fairness of decision-making processes. The European AI Regulation, by classifying systems according to their degree of risk, establishes a complex, yet necessary, legal framework to limit abuses and guarantee the respect of EU values.

One of the most important provisions is the prohibition of using AI to deduce employees' emotions in the workplace. This practice is considered an unacceptable risk, as it gravely infringes upon human dignity and private life, colliding with fundamental rights enshrined at the European level. The emotional surveillance of employees is not only devoid of necessary scientific accuracy but can also generate psychological stress, discrimination, and an abusive organisational climate.

At the European Union level, AI systems used in recruitment, evaluation, promotion, or even the termination of employment relationships are considered high-risk, as they can decisively influence individuals' professional trajectories. Any system that analyses behaviours, traits, or personal characteristics to make decisions in employment relationships risks introducing elements of discrimination or arbitrariness, especially if it operates based on biased historical data. Although certain applications with a strictly procedural role may be exempted from this classification, any tool that creates employee profiles or influences final decisions automatically falls into the high-risk category.

In this context, companies have a series of strict obligations that ensure the use of artificial intelligence does not infringe upon workers' rights, with the employer's culpability being a matter of great gravity when proven. Firstly, they must comply with the instructions provided by AI system suppliers and ensure active monitoring of the system's functioning. Furthermore, human oversight of high-risk systems is essential, requiring the designation of qualified and trained individuals who can correctly interpret the results offered by the AI and, when necessary, contest or disregard them. Employees must also be transparently informed about the use of these

systems and must have access to clear explanations regarding the AI's role in decisions that concern them.

Artificial Intelligence (IA) is revolutionising not only the creative sphere of numerous concerns but also the contemporary work environment, bringing both benefits and challenges for both employees and employers, aspects that can shift the balance of social peace.

This article explores the legal implications of AI in the sphere of labour, identifies the main challenges, and proposes regulatory solutions. The study, focused on the European Union's legal framework, underscores the necessity of a robust legal framework to balance the advantages of AI with ethical considerations.

On one hand, AI promises to increase efficiency, automate repetitive tasks, and offer innovative solutions in human resource management. On the other hand, this technology raises complex questions related to the fundamental rights of workers, including personal data protection, equal opportunities, and workplace safety. In this context, it is essential to analyse the impact of AI on labour legislation and to identify ways of regulation that balance technological benefits with ethical and social considerations.

Today, AI is used extensively in recruitment processes, performance monitoring, and task allocation. These applications, while efficient, necessitate careful analysis of their impact on labour legislation and employee rights. How does AI influence existing regulations? What risks does it pose to employees, and how can we ensure an equitable transition towards a technology-dominated future? These are just some of the questions that must be addressed to construct a legal framework adapted to the new realities. One of the biggest challenges of AI in the workplace is personal data protection. AI-based monitoring systems collect enormous volumes of information about employees, ranging from biometric data to behavioural analyses. This severely tests confidentiality legislation, even within the context of strict GDPR regulations. Although these regulations offer certain guarantees, automated decisions raise serious issues related to the control employees have over their own data, especially concerning data collected through employer-provided equipment during non-working hours. It is necessary to regulate clear limits and ensure transparency in the use of these technologies so that individual rights are protected.

Equal treatment is another domain affected by AI. Algorithms used in recruitment, promotion, or salary setting processes can, unintentionally, generate discrimination. For example, if an algorithm is trained on historical

data reflecting prejudice, it can perpetuate inequities. Existing anti-discrimination laws must be adapted to address these new forms of digital discrimination. It is essential to implement audit and correction mechanisms to ensure that AI systems are fair and objective.

Workplace safety is also affected by the increased use of AI. Automation can introduce new risks related to human-machine interaction, and the intensification of the work pace can negatively impact employees' mental health. It is crucial to develop safety standards that account for these new challenges and ensure that employees are not subjected to stressful or unsafe working conditions.

Algorithmic management represents a major concern regarding the decision-making process. The replacement of traditional human oversight with AI-based decisions brings with it a series of ethical and legal dilemmas. For example, productivity monitoring systems using biometric data or wearable devices can create a sense of excessive surveillance, affecting employee trust and morale. Furthermore, automated decisions that influence promotions, performance evaluations, or even dismissals require human intervention to ensure equity and correctness. It is essential to establish the legal framework that regulates these practices and protects employees from potential abuses.

An example of this algorithmic management practice is presented, at the time of drafting this article, by the actions of the Department of Government Efficiency in the US, which requested employees to list their latest activities undertaken in the workplace during the past week, with the enumeration to be analysed using AI to decide who would be dismissed. It can be argued that such a practice is extremely harmful to both the employee and the employer due to the restrictive evaluation of activity over a very short time frame, failing to validate workers for their concrete competencies in task resolution, the specificity of their duties, or their overall contribution to the institutional activity process.

For the employee, this practice can lead to decreased motivation, stress, and a perception of injustice, as their long-term efforts and results are disregarded in favour of narrow and sometimes inadequate metrics. Furthermore, restrictive evaluations may not reflect the reality of the work performed, as they fail to account for factors such as team collaboration, creativity, or involvement in projects that require time to bear fruit. This can create a strained work environment where employees feel unappreciated and insecure about their value to the organisation.

On the other hand, for the employer, such an approach can have negative long-term consequences. Superficial evaluations can lead to poor decisions regarding promotions, dismissals, or the allocation of responsibilities, potentially affecting the organisation's overall productivity and efficiency. Instead of identifying and rewarding true talent and contributions, the employer risks losing valuable employees or placing them in positions that do not suit their skills. Additionally, this practice can erode trust between employees and management, harming the organisational climate and reducing company loyalty.

Thus, a restrictive and short-term evaluation of employee activity only underestimates the complexity of work and ignores the genuine competencies of workers. This approach is not only unfair but also counterproductive, affecting both employee morale and organizational performance. To achieve optimal results, it is essential to adopt more comprehensive evaluation methods that account for the specifics of duties, long-term contribution, and the factors that influence an employee's true value within the institution.

3. Regulation at the National Level

The rapid advancements in Artificial Intelligence (AI) have redefined the employment landscape, particularly in the technology sector, where the impact of automation is felt with increasing intensity. While AI brings undeniable benefits in terms of efficiency and innovation, its use raises numerous legal, social, and ethical challenges. One of the most controversial themes relates to layoffs caused by the implementation of new technologies, a phenomenon increasingly frequent among major global companies, yet with direct reverberations in national legislations, including in Romania.

According to the Future of Jobs Report published by the World Economic Forum (WEF)[22], 77% of the hundreds of large companies surveyed globally intend to reskill and upskill their employees between 2025 and 2030 to work more efficiently alongside AI. However, unlike the 2023 edition, this year's report no longer asserts that the majority of technologies, including AI, will have a net positive impact on job numbers.

[22] Word Economic *Forum, Future of jobs Report*, available at: *https://edition.cnn.com/2025/01/08/business/ai-job-losses-by-2030-intl/index.html*

In recent years, artificial intelligence has become a key player in the Romanian labour market, reshaping both recruitment processes and the daily dynamics of the workplace. According to the aforementioned World Economic Forum (WEF) Future of Jobs Report[23], over 65% of large companies active in Romania already utilize some form of AI in their Human Resources processes, ranging from automated CV screening to advanced performance evaluation systems.

Although Romania does not yet have legislation dedicated exclusively to Artificial Intelligence, the National Supervisory Authority for Personal Data Processing (ANSPDCP)[24] has published a guide on the ethical use of these technologies in the professional environment. Furthermore, the Competition Council has initiated an investigation[25] into the potential anti-competitive effects of algorithms used in recruitment.

Therefore, we can consider that the labour market in Romania, and beyond, is directly impacted by the emergence of Artificial Intelligence (AI) tools, which are predominantly found in every sphere of employment relationships.

Given the dynamic nature of labour activity, the legislation regulating employment relationships must balance technological innovation with the protection of rights arising from work; although practice has demonstrated that the activity of the Romanian legislator does not always keep pace with the changes that arise practically in the labour market.

On the Romanian legal ground, the rules stipulated in the Labour Code[26] delineate a minimum discipline for the restructuring decision, intended to temper the temptation of managerial arbitrariness. This legal framework does not prohibit reorganisation, but it imposes a logic of proportionality and explicit employer responsibility concerning the effects of its decision on employees.

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[23] *Ibidem.*

[24] Autoritatea Naţională de Supraveghere a Prelucrării Datelor cu Caracter Personal, guide available at*: https://www.adr.gov.ro/wp-content/uploads/2024/04/Plan-national-de-actiune-roadmap-pentru-publicare_28.03.2024.docx*

[25] *https://www.economica.net/consiliul-concurentei-tehnologiile-big-data-pot-conduce-la-comportamente-anticoncurentiale_193586.html?uord=RQ-0XfTrgzXCQR%3DtIXgalrRzMXcvmphIOG-zRhp8M1UfiWIoQCGqIE2LvbOoRH5NlbBlSXJM-ie2SRg3qDLEPEmqJk1ynrWANc7vlpZF/b-87Rd8JSHugDXyQaHeKUEkyu-CMXQA*

[26] Legea nr. 53/2003 – Codul muncii, republicată, cu modificările și completările ulterioare (art. 65; art. 68-74; art. 194).

Thus, Article 65 of Law no. 53/2003 stipulates that the abolition of the job must be effective and based on a real and serious cause. In theory, this appears to be a formal requirement, but court practice demonstrates the contrary. The High Court of Cassation and Justice (ICCJ) has shown in numerous decisions – for instance, in Decision no. 2792/2014[27] and Decision no. 3778/2016[28] – hat a dismissal justified by a mere internal reorganisation, without concrete evidence regarding its necessity and sustainability, is unlawful. The real and serious cause must reflect an objective interest of the employer, not a circumstantial preference or an emotional reaction to a tense employment relationship. In another ruling (ICCJ, Decision no. 4930/2012)[29], the court underscored that reorganisation cannot be used as a screen for individual dismissals motivated by subjective factors, but must be supported by a clear and verifiable plan for activity streamlining.

This requirement, far from being an administrative impediment, institutes a test of economic and legal rationality: has it been effectively proven that the job abolition was necessary, that the duties were not artificially redistributed, and that the measure does not mask a personal preference? In a climate where technology is increasingly present, these verifications appear even more critical, as the temptation to "digitize" positions without a rigorous analysis of their utility is real.

Regarding collective dismissals, Articles 68 and subsequent articles of the Labour Code establish a procedural architecture that mandates the effective consultation of trade unions or, where they are absent, of the employees' representatives. This is not a bureaucratic formality, but an obligation with concrete social substance. Through this consultation, the employer must seek solutions to avoid dismissals or mitigate their consequences, such as staff redistribution, temporary reduction of working hours, or reskilling. Notification to the County Agency for Employment (AJOFM) – required by law at least 30 days in advance – is not a simple act

[27] Înalta Curte de Casație și Justiție (ICCJ). (2014). Decizia nr. 2792/2014 privind nelegalitatea concedierii sub pretextul reorganizării.

[28] Înalta Curte de Casație și Justiție (ICCJ). (2016). Decizia nr. 3778/2016 privind condițiile de legalitate ale concedierii individuale.

[29] Înalta Curte de Casație și Justiție (ICCJ). (2012). Decizia nr. 4930/2012 privind caracterul real și serios al cauzei desființării postului.

of informing, but a procedural guarantee intended to activate social protection mechanisms[30].

In this regard, the High Court of Cassation and Justice (ICCJ) underscored in Decision no. 5942/2019[31] that the non-compliance with the consultation and notification stages can lead to the nullity of the collective dismissal, even if the economic reasons invoked are real. In fact, the emphasis shifts from the cause to the decision-making process: if the state and the workers' representatives were not involved in a timely manner, the entire protection mechanism becomes illusory.

A separate dimension is brought by Article 194 of the same Code, which mandates employers to ensure the professional training of employees when new technologies are introduced. This is, in a way, a legislative expression of the European principle of "just transition"[32], pursuant to which technological change must be accompanied by concrete measures for reskilling and social protection. In Romania, this rule provides a legal anchor for adapting the workforce to automation, even if, in practice, it is rarely applied with rigour.

Jurisprudence confirms that ignoring the professional training obligation can affect the validity of the dismissal. In Decision no. 2338/2018, the High Court of Cassation and Justice (ICCJ)[33] held that the employer cannot dispose a dismissal for technological reasons without having analysed the possibility of employee reconversion and without having offered corresponding training programmes. In other words, before abolishing a position, the employer must prove that they have reasonably attempted to conserve the employment relationship, in accordance with the principle of proportionality.

This normative ensemble – Articles 65, 68-74, and 194 – configures a balance between economic freedom and social protection. It is not a perfect balance, but it mandates a question that every employer should ask before deciding on a restructuring: Were real alternatives offered? If the answer is negative, then the decision becomes vulnerable, both legally and morally.

[30] Art. 68-74, Legea 53/2003 privind dreptul muncii, op.cit.

[31] Înalta Curte de Casație și Justiție (ICCJ). (2019). Decizia nr. 5942/2019 privind nulitatea concedierilor colective neconsultate.

[32] European Commission. (2021). *Just Transition Mechanism: Supporting the regions most affected by the transition towards climate neutrality*. Bruxelles: Comisia Europeană.

[33] Înalta Curte de Casație și Justiție (ICCJ). (2018). Decizia nr. 2338/2018 privind obligația de formare profesională la introducerea tehnologiilor noi.

Moreover, in the context of the expansion of Artificial Intelligence, these rules seem to acquire a new meaning. They no longer regulate merely the "classical" dismissal, but also situations where positions are eliminated under the pretext of automation, without a concrete analysis of the possibility of integrating the worker into the new digital processes. In this sense, it can be said that Romanian labour law, although constructed in a different era, still possesses the conceptual resources to offer protection in an automated economy – provided that institutions apply it not just formally, but with social intelligence.

Another important aspect is the impact of AI on the quantity of available work. Although technology can create new jobs, many traditional roles risk becoming obsolete, leading to technological unemployment. This phenomenon necessitates a re-evaluation of social security systems and reskilling programmes. It is essential to ensure that those affected by automation have access to training and professional reconversion opportunities so they can cope with changes in the labour market.

The growing influence of AI in the sphere of work requires a balanced legal framework that protects employee rights and supports innovation. Existing regulations must be updated to address the challenges posed by technology, and new AI laws must be integrated into labour legislation to ensure equitable and ethical working conditions. It is essential to find a balance between technological progress and the protection of workers' fundamental rights, so that we can build a future of work that is both efficient and humane.

AI does not have the exclusive effect of eliminating jobs, but also of redefining them. Nevertheless, in the context where companies reduce costs through automation, layoffs become inevitable. In Romania, the Labour Code (Law no. 53/2003) obliges employers who introduce new technologies to offer professional training and reconversion to employees affected by these technological changes (Art. 194). In the absence of this obligation, the dismissal can be considered unlawful.

This principle was also reflected in the case of the American company IBM[34], which was accused of dismissing thousands of older employees to make room for the "millennial generation" (Case 7:19-cv-02729), in parallel

[34] Case 7:19-cv-02729*, STEVEN ESTLE, MARGARET AHLDERS, LANCE SALONIA, and CHERYL WITMER, Plaintiffs, v. INTERNATIONAL BUSINESS MACHINES CORPORATION,* available at*: https://regmedia.co.uk/2019/03/27/estlevibmfilings.pdf*

with the massive integration of AI solutions. In a lawsuit filed in the US, IBM was investigated for discriminatory practices in layoffs, and this case highlights the major risks related to the transparency of dismissal criteria.

Pursuant to Article 65 of the Labour Code, dismissals must be based on objective reasons, such as the effective abolition of the position. In the case of mass redundancies (collective dismissals), the employer is obligated, under Article 68 and subsequent articles of the Code, to consult trade unions or employee representatives and to notify the County Agency for Employment (AJOFM) in writing at least 30 days in advance. Failure to comply with these obligations can lead to administrative sanctions and, in some cases, the reinstatement of illegally dismissed employees.

The Google case from 2023 is illustrative, where over 12,000 employees were made redundant, and some of them filed lawsuits alleging that the selection was not transparent and was assisted by automated evaluation systems that failed to account for individual context. Although these practices have not been tested in Romanian courts at the same level, both authorities and workers should anticipate the obligation to clearly and legally justify any AI-assisted dismissal decision.

Another major challenge posed by AI is the risk of algorithmic discrimination. Algorithms can learn from biased historical data and may perpetuate systemic inequities, even without human intent. In Romania, Law no. 202/2002 on equal opportunities and the Labour Code prohibit any form of discrimination, including indirect discrimination, in the recruitment or dismissal process.

If an AI system disproportionately favours a certain gender, age group, or ethnicity, the employer may be considered to be in breach of anti-discrimination legislation. Consequently, employers must regularly audit the algorithms used and maintain transparency in the decision-making process, though this sphere is covered by the legislation previously mentioned and requires no further clarification.

Affected employees have the right to file a complaint with the Territorial Labour Inspectorate (ITM) and to seek redress in court for abusive or discriminatory dismissal, with judicial institutions subsequently ruling specifically on each situation.

4. Conclusions

In conclusion, the integration of AI into employment relationships necessitates a cautious approach, strictly based on the respect for employee rights and legal norms. While technology offers genuine opportunities for Human Resources optimisation, it cannot replace the discernment and empathy of the human factor.

The digital transformation of work, accelerated by the development of Artificial Intelligence, has brought about a paradigm shift in how we view employment relationships and the balance between efficiency and the protection of human rights. This is no longer just about modernising work tools, but about a profound realignment of the relationship between human beings, technology, and the legal norm.

In this context, it is increasingly clear that the integration of Artificial Intelligence systems into the domain of labour cannot be left solely to the market's discretion. There is a need for a coherent legal framework, capable of maintaining a balance between innovation and responsibility. Technology can bring evident benefits – reducing repetitive tasks, optimising processes, efficiency in decision-making – but, without clear guarantees, it can transform the workplace into a space of permanent control, where transparency and dignity become optional.

In Romanian labour law, the principles already established – the reality and seriousness of dismissal causes, the consultation of employee representatives, the obligation of professional training – acquire a new meaning in the face of automation. They function as a legal anchor in a period of uncertain transition. It is not sufficient for the employer to invoke "technological reasons" to justify restructurings; they must demonstrate that they have analysed alternatives, offered reskilling opportunities, and that the measure adopted is not disproportionate to the intended goal.

At the European level, the direction is clear: Artificial Intelligence must be regulated by norms that account for the degree of risk and the impact on the individual. Romania, as a member state, has the opportunity – and the obligation – to translate these principles into its own legal language, adapted to its economic and social realities. It would be desirable for this transposition to occur not through fragmentary norms, but through a coherent vision that integrates data protection, algorithmic ethics, and occupational safety into a single frame of reference.

A useful direction would be the experimentation with flexible regulatory mechanisms – the so-called regulatory sandboxes – where technological solutions can be evaluated under conditions of transparency and under the supervision of authorities. Such an approach would allow the adaptation of norms to the technological pace without sacrificing the legal protection of employees. Simultaneously, the creation of a specialised national authority to oversee the use of AI in sensitive domains, such as labour and human resources, could provide a solid foundation for proactive regulation.

Ultimately, it remains essential for Romania to align itself with international standards and European best practices. Alignment with OECD guidelines and the principles promoted by the International Labour Organisation can offer a framework for stability, as well as support in developing a culture of technological responsibility.

In the end, the key lies not just in the quality of the norms, but in the manner in which they are applied. High-performing legislation without institutions capable of implementing it becomes a theoretical exercise. The future of employment relationships depends, therefore, on a combination of regulatory firmness, application flexibility, and, above all, a vision that does not forget that work, regardless of its degree of digitalisation, remains an expression of the human element.

Artificial Intelligence should not substitute reason or empathy, but rather complement them. The challenge is to construct a legal framework that allows technology to support the human, not replace them. If Romania succeeds in maintaining this balance – between progress and protection, between innovation and social justice – the digital transition could become not just bearable, but a step forward towards a form of preventive social equilibrium, where anticipation and adaptation prevail over conflict.

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LEGAL FOUNDATIONS OF BLOCKCHAIN TECHNOLOGY IN EUROPEAN LAW

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ABSTRACT

The article examines, from a legal-academic perspective, the impact of blockchain technology on the European legal order, starting from the technical premises of distributed ledgers and moving towards the new regulatory frameworks. The first part clarifies the main concepts – DLT, blockchain, token, crypto-asset and services related to crypto-assets – highlighting the distinction between the technical infrastructure and the digital representations of value. It then analyses the potential legal functions of the distributed ledger, both as a market infrastructure and as an electronic means of proof, with a focus on the implications in terms of legal classification and allocation of liability.

The central sections of the study are devoted to smart contracts and the tension between the "rule of law" and the "rule of code", discussing issues related to consent, algorithmic error and traditional remedies. At the normative level, the article presents the evolution from European programmatic documents to the adoption of Regulation (EU) 2023/1114 (MiCA) and the DLT pilot regime, emphasizing the paradigm shift in the treatment of crypto-assets and decentralized infrastructures. Finally, it analyses the relationship between blockchain and data protection, as well as digital identity projects, arguing for the need for a governance framework that combines technological innovation with the requirements of the rule of law and the effective protection of market participants.

KEYWORDS: *blockchain, distributed ledgers (DLT), crypto-assets, smart contracts, MiCA, data protection, digital identity;*

I. Introduction

1.1. Technological Context and Legal Transformations

Blockchain technology has entered the sphere of legal concerns only relatively recently; however, the pace at which it has begun to reshape business models, financial infrastructures and forms of social organisation is forcing the legal system to review and adapt its classical instruments. In the specialised literature, blockchain is often described as a distributed

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ledger technology (DLT), which enables the recording and validation of transactions in a decentralised manner, without a single trusted intermediary[1].

This shift of trust from traditional institutions to computer code and to a network of anonymous or pseudonymous participants calls into question many legal presumptions: who is the "controller" or "administrator" of the data, who is liable for errors in the code, and which law governs transactions executed globally, within milliseconds, between nodes located in different jurisdictions?

At the same time, the European Union has begun to move from a "wait and see" approach to the construction of a coherent regulatory framework for crypto-assets and DLT-based infrastructures, crystallised in particular in Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA)[2] and Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology[3].

1.2. Terminological Delimitations

In everyday language, the term "blockchain" is often used in an imprecise manner, to cover two different realities:

a) on the one hand, the technical infrastructure itself, namely a distributed ledger structured in blocks of transactions interconnected through cryptographic mechanisms;
b) on the other hand, the range of applications built on this infrastructure, such as cryptocurrencies, platforms for the automatic execution of smart contracts, digital identity solutions or various forms of non-fungible tokens (NFTs).

[1] European Commission, REPORT / STUDY Publication 28 February 2020, Study on Blockchains – Legal, governance and interoperability aspects (SMART 2018/0038), available at: *https://digital-strategy.ec.europa.eu/en/library/study-blockchains-legal-governance-and-interoperability-aspects-smart-20180038?utm.*

[2] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937

[3] Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU

From a legal perspective, a clear conceptual separation is required on several levels:

a) the technological level (DLT) – which concerns the underlying infrastructure, namely the network of nodes, the consensus mechanisms used and the set of cryptographic algorithms that ensure the functioning of the distributed ledger;
b) the level of digital representations – materialised in "tokens", understood as digital records capable of incorporating various rights or interests (claims, property rights or access to a certain service);
c) the level of legal qualification – which concerns the regulatory regime applicable to each category of token, determined according to its economic and legal nature (for example, financial instrument, means of payment, so-called utility token, etc.).

This distinction is also reflected in MiCA, which proposes different definitions for asset-referenced tokens, e-money tokens and other types of crypto-assets.

II. The Technical Architecture of Blockchain and Its Legal Relevance

A blockchain can essentially be understood as a chronological ledger of transactions grouped into blocks, each block being cryptographically linked to the previous one. Once a block has been validated through the network's consensus mechanism (for example, "proof of work" or "proof of stake"), it becomes, in principle, immutable: any subsequent modification would require "rewriting" the entire chain or controlling a significant majority of the computing power or of the validation rights[4].

This immutability has immediate legal relevance: it turns the blockchain into a potentially robust means of electronic evidence, particularly for proving the integrity and prior existence of documents, statements or operations (for example, document timestamping, intellectual property registers, supply chains). At the same time, the rigidity of the ledger becomes problematic in relation to institutions such as the revocation of consent, the rectification of personal data or the right to erasure.

[4] UvA-DARE (Digital Academic Repository), João Pedro Quintais, Balázs Bodó, Alexandra Giannopoulou, Valeria Ferrari, *Blockchain and the Law: A Critical Evaluation*, 2019.

III. Legal Classification of the Distributed Ledger and of Tokens

3.1. Blockchain Between Market Infrastructure and Means of Evidence

In financial law, DLT is increasingly viewed as a potential market infrastructure – an alternative to centralised clearing and settlement systems. This is the reason why Regulation (EU) 2022/858 establishes a pilot regime for market infrastructures that use DLT, allowing limited derogations from the classical framework applicable to financial market infrastructures, in order to test the use of the technology under controlled conditions[5].

Outside the financial sector, blockchain is also analysed as a means of electronic evidence: the recording of a hash of a document on a public blockchain can prove the integrity and the time of existence of that document, even if the document itself is not stored in the ledger. Legal scholarship discusses the extent to which presumptions of authenticity and integrity recognised for other instruments (such as qualified electronic signatures or time stamps) may be extended, by analogy, to blockchain-based timestamps[6].

At the procedural level, an open question remains: who certifies that a given hash corresponds to a particular document, and who guarantees the correct configuration of the technical procedure? In the absence of recognised technical standards, there is a risk that the judge may rely excessively on ad hoc expert reports or on unilateral statements made by the parties.

3.2. The Legal Nature of Tokens: Currency, Financial Instrument, Digital Asset

The debate on the legal nature of tokens is one of the most controversial. MiCA starts from the idea that not all tokens must be "forced" into

[5] See Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022

[6] European Law Institute, Principles on Blockchain Technology, Smart Contracts and Consumer Protection, Report of the European Law Institute, available at: *https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection.pdf?utm*

existing categories, but nonetheless creates sub-categories subject to different regimes:

- **asset-referenced tokens (ART)** – tokens that aim at stability by reference to a basket of assets (currencies, commodities, etc.);
- **e-money tokens (EMT)** – tokens that aim at stability by reference to a single fiat currency;
- **other crypto-assets**, including utility tokens, which grant access to a product or service[7].

Depending on their characteristics, certain tokens may fall under the legislation on financial instruments; others may be assimilated to intangible assets, to claims (rights of credit), or even to "access titles" to digital services. The courts' autonomy in legal classification remains essential: a technical label ("utility token") is not decisive if, in fact, the token performs the functions of a financial instrument or of electronic money.

IV. Smart contracts and „rule of code"

4.1. Concept, Structural Elements and Differences from the Traditional Contract

In a narrow sense, a "smart contract" designates a computer program implemented on a blockchain platform, which automatically executes certain instructions when the predefined conditions are met (for example, the automatic transfer of a token when a certain input is received)[8].

In legal terms, a smart contract may:

- either incorporate the contract between the parties itself (the contractual text being reproduced, in whole or in part, in code);
- or represent only the technical mechanism for performing a contract concluded in another form (for example, the contract is concluded in a traditional manner, and the code merely automates payment and delivery).

[7] Regulation (EU) 2023/1114 and the summary presentation of the national financial supervisory authority (Commission de Surveillance du Secteur Financier – CSSF), available here: *https://www.cssf.lu/en/markets-in-crypto-assets-mica-micar/?utm*

[8] European Law Institute, Principles on Blockchain Technology, Smart Contracts and Consumer Protection, Report of the European Law Institute, available at: *https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection.pdf?utm*

The essential difference compared to the traditional contract does not lie in the absence of consent, but in the way in which consent is expressed and performed: the parties express their will not only through words, but also through code that runs, as a rule, on a distributed network and may be difficult to stop or modify unilaterally.

In this context, legal scholarship refers to the gradual transformation of the "rule of law" into the "rule of code": legal norms are, at least partially, transposed into code, and non-compliance with them becomes technically impossible or at least significantly more difficult[9].

4.2. Party Autonomy, Algorithmic Error and Traditional Remedies

Even if performance is automated, smart contracts do not escape the general rules on the formation, validity and interpretation of contracts. One can easily imagine situations of:

- error in the code (a condition programmed incorrectly);
- discrepancy between the text and the code (the parties agree on one thing, the code executes something else);
- exploitation of a vulnerability (a participant takes advantage of a logical flaw in the program).

In such cases, classical principles – mistake, fraud (dol), abuse of rights, hardship/imprévision – acquire a new content: the issue is no longer merely one of words wrongly interpreted, but of algorithmic instructions that produce significant patrimonial effects. The Principles developed by the European Law Institute on blockchain and smart contracts emphasise that the judge must be able to intervene in order to correct manifestly unjust outcomes, even if these have been produced by code that has been executed "correctly"[10].

At the same time, the issue of the applicable law and jurisdiction arises, especially in the case of global platforms with no obvious place of localisation. In the absence of an explicit choice of law by the parties, the classical connecting factors (place of performance, place of conclusion of the

[9] Primavera De Filippi, Aaron Wright, Blockchain and the Law. The Rule of Code, Harvard University Press, 2018, available at: *https://www.jstor.org/stable/j.ctv2867sp?utm*

[10] See the sections on remedies and judicial intervention in the European Law Institute, *Principles on Blockchain Technology, Smart Contracts and Consumer Protection*, Report of the European Law Institute.

contract, etc.) become difficult to apply in a distributed environment, which justifies harmonisation initiatives at EU level.

V. European Regulation of the Blockchain Ecosystem

5.1. From Policy Papers to Normative Intervention

The first institutional reactions at European level to blockchain technology had a markedly programmatic character: reports, studies and resolutions of the European Parliament, which highlighted the potential of the technology for supply chains, international trade, fraud prevention and the traceability of flows[11].

The European Parliament Resolution of 3 October 2018 on distributed ledger technologies and blockchain in the areas of trade and supply chains invites the Commission to examine the need for a European legal framework to address issues of jurisdiction, liability and recognition of the legal effects of distributed ledgers[12].

In parallel, the Commission commissioned studies on the legal, governance and interoperability dimensions of blockchain, underlining both the potential of the technology and the risks of regulatory fragmentation and arbitrage[13].

[11] European Parliament, *Report on Blockchain: a forward-looking trade policy*, A8-0407/2018, available at: *https://www.europarl.europa.eu/doceo/document/A-8-2018-0407_EN.html?utm ;*

[12] European Parliament resolution of 3 October 2018 on distributed ledger technologies and blockchains: building trust with disintermediation (2017/2772(RSP)), Distributed ledger technologies and blockchains: building trust with disintermediation, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A52018IP0373&utm*

[13] European Commission, REPORT / STUDY Publication 28 February 2020, Study on Blockchains – Legal, governance and interoperability aspects (SMART 2018/0038), available at: *https://digital-strategy.ec.europa.eu/en/library/study-blockchains-legal-governance-and-interoperability-aspects-smart-20180038?utm*

5.2. The MiCA Regulation and the Pilot Regime for DLT Infrastructures

The shift from soft law to binding rules occurred with the adoption of Regulation (EU) 2023/1114 (MiCA). This Regulation establishes a harmonised framework for:

- the issuance of crypto-assets (including the obligation to publish a white paper and rules on investor disclosure);
- the authorisation and supervision of providers of services related to crypto-assets (crypto-asset service providers – CASPs);
- the specific regime for ARTs and EMTs, taking into account the risks to financial stability and monetary policy[14].

Regulation (EU) 2022/858, for its part, introduces a pilot regime under which certain market infrastructures (trading venues, settlement systems) may be authorised to use DLT for financial instruments, under conditions and within limits that are strictly defined. The objective is to allow experimentation under controlled conditions, with temporary derogations from certain requirements, while maintaining a high level of investor protection, market integrity and financial stability[15].

Taken together, MiCA and the pilot regime mark a paradigm shift: blockchain is no longer regarded merely as a technological curiosity, but as a potentially systemic infrastructure that must be integrated into a framework of prudential rules, conduct requirements and transparency.

VI. Data Protection, Digital Identity and Network Governance

6.1. Immutability of Ledgers and the Right to Erasure

One of the most discussed tensions between blockchain and EU law concerns its relationship with Regulation (EU) 2016/679 (GDPR). The

[14] For an up-to-date overview of the state of implementation of MiCA, see the recent summaries on delegated acts and level 2-3 guidelines, *The EU's Markets in Crypto-Assets (MiCA) Regulation – a status update*, 20 February 2025, available at: *https://www.hoganlovells.com/en/publications/the-eus-markets-in-crypto-assets-mica-regulation-a-status-update?utm*

[15] Reg. (EU) 2022/858 and the explanatory materials on the DLT pilot regime, *Regulation (EU) 2022/858 on Distributed Ledger Technology Market Infrastructures*, available here: *https://www.ey.com/en_gr/technical/tax/tax-alerts/regulation-eu-2022-858-on-distributed-ledger-technology-market-infrastructures?utm*

"immutable" nature of a blockchain appears, at least at first sight, to be incompatible with the data subject's right to obtain the erasure or rectification of their data[16].

The literature and working documents at European level propose several strategies for reconciliation:

- off-chain storage of personal data, with the blockchain containing only hashes or references;
- the use of advanced cryptographic solutions (e.g. "chameleon hashes", deletion-key cryptography) which make it possible to "invalidate" the effects of a block without physically deleting it;
- a careful definition of the notion of "personal data" in the context of pseudonymisation (addresses, public keys) and the real possibility of re-identification.

From the perspective of the GDPR, the issue of identifying controllers and processors within a decentralised network also arises: in public blockchains, it is difficult to pinpoint a single "entity" that determines the purposes and means of processing. One practical solution consists in identifying certain "contact points" (for example, protocol developers, operators of major nodes, wallet providers) to whom specific roles can be attributed.

6.2. Digital Identity and the Responsibility of Actors

In parallel with the regulation of crypto-assets, the European Union is developing a framework for the European Digital Identity (EUDI Wallet), in the context of the revision of the eIDAS Regulation. Blockchain-type technologies are being tested as potential infrastructures for identity wallets and for electronic attestations of certain attributes (such as the status of student, citizen of a Member State, regulated professional, etc.)[17].

[16] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937

[17] See the documents on the European digital identity and the EUDI Wallet pilot projects, in conjunction with eIDAS, LEGAL ISSUES OF DIGITALISATION IN EUROPE, MEASURES TO EFFECTIVELY HELP COMPANIES ADVANCE THEIR DIGITAL STRATEGIES, available here: *https://www.businesseurope.eu/wp-content/uploads/2025/02/2017-09-29_legal_issues_of_digitalisation_in_europe-aec-2.pdf?utm*

In these scenarios, the issue of network governance and liability arises acutely:

- who issues and revokes attestations?
- who is liable for an erroneous or expired attestation that nonetheless remains valid in the ledger?
- what happens when a node does not correctly implement the validation rules?

The European Commission's study on governance and interoperability aspects underlines the need for a clear structure of responsibility, even in distributed architectures, as well as the importance of common technical standards that allow interoperability between different networks[18].

In the absence of well-defined governance, there is a risk that the rhetoric of "decentralisation" will in fact conceal a concentration of power in the hands of a few technical actors (developers, major token holders, cloud infrastructure providers), who are not always visible and are not necessarily subject to transparency obligations.

VII. Conclusions and Perspectives

Blockchain technology is neither inherently "anarchic" nor "salvific". It represents a technical infrastructure that can be oriented, through design and regulation, towards very different outcomes: from increased transparency and trust in transactions to new forms of opacity and concentration of power.

From the perspective of European law, several trends can be identified:

1. **Normalisation of the technology** – MiCA and the DLT pilot regime show that legislation no longer treats blockchain as an exotic exception, but as a technology that must be integrated into the existing architecture of financial law and consumer protection.
2. **Focus on governance and responsibility** – The ELI documents and the Commission's studies emphasise the need to identify responsible actors even within distributed architectures, in order to avoid a "liability vacuum".

[18] European Commission, REPORT / STUDY Publication 28 February 2020, Study on Blockchains – Legal, governance and interoperability aspects (SMART 2018/0038), available at: *https://digital-strategy.ec.europa.eu/en/library/study-blockchains-legal-governance-and-interoperability-aspects-smart-20180038?utm.*

3. **Tension with data protection** – The immutability of ledgers requires a rethinking of how GDPR is applied, without turning the technology into a "de facto" area of exception.
4. **Integration with digital identity** – The projects concerning the EUDI Wallet indicate that blockchain may become the support for essential elements of legal status (identity, professional qualifications), with direct implications for fundamental rights and freedoms.

In the near future, the legal debate will probably focus on:

- articulating blockchain with the new regulations on artificial intelligence and digital operational resilience (DORA);
- developing technical standards that allow interoperability between networks without sacrificing the principles of the rule of law;
- redefining certain classical concepts – property, evidence, consent – in the light of a world in which code increasingly becomes the primary "interpreter" of legal norms.

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THE EUROPEAN ARREST WARRANT. THE TENSION BETWEEN THE PRINCIPLE OF MUTUAL RECOGNITION AND THE PROTECTION OF FUNDAMENTAL RIGHTS AS THE SOURCE OF THE NEED TO AMEND THE FRAMEWORK DECISION

Cristian COJOCARU[*]

ABSTRACT

The application of the principle of mutual recognition to extradition procedures within the European Union has fundamentally reshaped the responsibilities of Member States concerning the protection of the fundamental rights of the requested person. Article 1(3) of the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW) establishes a presumption of trust in the issuing judicial authority, a presumption grounded in the shared obligation of Member States to uphold fundamental rights as enshrined in Article 6 TEU. Nevertheless, several Member States have expressly transposed Article 1(3) as a basis for non-execution. In its 2014 legislative resolution adopted on its own initiative, the European Parliament urged the establishment of a mandatory refusal ground whenever substantial indications suggest that executing a European Arrest Warrant would conflict with the executing Member State's duty to uphold Article 6 TEU and Article 52(1) of the Charter, in line with the principle of proportionality. During the same period, the Court of Justice of the European Union significantly reshaped its interpretation of Article 1(3) of the Framework Decision on the EAW: current jurisprudence now allows, contrary to earlier case-law, executing judicial authorities to deny surrender based on fundamental-rights concerns in "exceptional cases".

KEYWORDS: *European arrest warrant; fundamental rights; European Parliament; European Commission; CJEU; amendment of the Framework Decision;*

Introduction

For many years, extradition within the European Union relied on bilateral or multilateral agreements governing judicial cooperation in criminal matters. These arrangements frequently proved slow and were hindered by

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exceptions grounded in national sovereignty. As European integration advanced, Member States chose to restructure cooperation around the principle of mutual recognition of judicial decisions, moving away from a system in which extradition was ultimately subject to executive authority. This principle was formally established in the 2002 Council Framework Decision on the European Arrest Warrant and surrender procedures, adopted after accelerated negotiations.

The Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW) revolutionised judicial cooperation by replacing traditional extradition with a mechanism of automatic recognition of judicial decisions, drastically limiting the discretion of executing authorities, which may refuse surrender only on an exhaustive list of mandatory or optional grounds.

Fundamental-rights considerations are not expressly included among these grounds, although Article 1(3) FD EAW provides that the instrument "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles enshrined in Article 6 TEU".

Although the importance of mutual trust is undeniable, defining its normative content and the legal consequences flowing from it remains a topic of debate within the European Parliament, the Commission, and doctrinal and jurisprudential currents. The principle is not expressly mentioned or defined in the EU treaties; it is a jurisprudential construction of the CJEU, progressively developed through its reasoning on foundations, content, and legal effects. Preliminary references from national courts – reflecting functional mistrust between jurisdictions – played a decisive role in allowing the Court to delineate the limits of mutual trust.

The principle is premised on the presumption that each Member State shares a common set of values with the others, as stated in Article 2 TEU. When evidence arises that these values are unevenly respected, fundamental questions emerge:

– Can national authorities be required to trust one another when the factual reality suggests otherwise?

– Is genuine trust, or only normatively imposed trust, the true foundation for reciprocal execution of EAWs and judicial decisions?

In recent years, the CJEU has repeatedly been called upon to offer guidance on handling tensions generated by rule-of-law backsliding and its impact on EAW execution and other mechanisms built on mutual trust and

mutual recognition. The Court responded by strengthening the two-step test used to evaluate and, where necessary, suspend EAW executiona test consistently upheld across subsequent decisions. Exercise of "legitimate mistrust" – meaning suspension of automatic mutual recognition and performance of additional scrutiny regarding fundamental-rights and rule-of-law guarantees in the issuing State – is permitted only exceptionally.

This study aims to analyse the monitoring conclusions of the Commission and European Parliament and the CJEU's responses to national courts' concerns in the context of EAW implementation, focusing particularly on grounds that may justify refusal of surrender. The topic is especially relevant as it illustrates the tension between normatively imposed trust and actual trust among Member State judicial authorities.

The study also supports the doctrinal and jurisprudential expectation for amending the FD EAW to include explicit grounds for refusal where violations or imminent violations of fundamental rights by the requesting State are identified, even suggesting an EU-level legislative initiative to standardise procedural safeguards.

Chapter I – Findings and Actions of EU Institutions Anchored in CJEU Jurisprudential Trends

CJEU case-law, which requires executing courts to assess, concretely and individually, potential violations of the right to a fair trial in the requesting State, has produced divergent solutions even for EAWs issued by the same State.

Detention conditions are generally more straightforward to evaluate than broader questions concerning compliance with fundamental rights and the foundational values of the European Union. The Commission therefore strongly encourages the enhanced use of resources provided by the Fundamental Rights Agency (FRA) and Eurojust, as well as systematic reliance on information supplied by requesting States. In this context, the Commission also advocates reinforcing cooperation with, and financial support for, international bodies responsible for monitoring detention facilities, while ensuring that their findings are duly acted upon by Member States.

Considerable emphasis is likewise placed on EU funding aimed at modernising detention infrastructures and assisting Member States in remedying inadequate detention conditions. Such financial support must,

however, be accompanied by meaningful structural reforms within national criminal justice systems.

The standards developed by the Council of Europe and the case-law of the European Court of Human Rights should constitute a minimum benchmark for constructing a framework tailored to the particular demands of transnational cooperation based on mutual recognition within the Area of Freedom, Security and Justice. In light of the insufficient separation between pre-trial detainees and convicted persons in many Member States, the implementation of these measures could generate positive systemic effects across national penitentiary systems.

The Commission's annual Rule of Law Report, the Article 7(1) TEU procedure launched against Poland[1], and a similar procedure initiated by the European Parliament against Hungary[2] have served as mechanisms for safeguarding EU fundamental values.

Although CJEU case-law provides a functional tool to balance mutual recognition with the protection of fundamental rights, it does not ensure uniformity or fully safeguard rights. Only an amendment of the FD EAW introducing a specific refusal ground for such cases would provide legal certainty – especially since the second step of the test (the individual impact on the requested person) remains extremely difficult to apply in practice. The CJEU thus departs from pure mutual-trust-based recognition, placing the burden of resolving practical shortcomings upon executing courts.

From our perspective, the requirement to demonstrate a "real risk" of a "flagrant denial of justice" is an excessively high threshold, which may result in surrendering individuals even where there is substantial likelihood that the essence of the right to a fair trial would be compromised.

Deteriorated detention conditions and prison overcrowding constitute major causes of declining mutual trust.

The Commission has noted[3] that some EAWs issued by Poland, Hungary, and Romania have been suspended. Judicial authorities in Germany, Austria, the Netherlands, and Ireland show increasing reluctance to execute

[1] Council Decision Proposal, 835 of 20 December 2017

[2] European Parliament Resolution of 12 September 2018 calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131).

[3] Meeting of the LIBE Committee, European Parliament, exchange of views on the own-initiative implementation report regarding the Framework Decision on the European Arrest Warrant, 20 February 2020.

warrants in sensitive criminal matters. France and Spain, conversely, have expressed concerns that the principle of mutual recognition is being sidelined, jeopardising effective criminal cooperation.

Examining the effects of the Aranyosi judgment on Member State practice (Romania, Bulgaria, Greece, France, Poland, Belgium, Croatia, Italy, Latvia, Hungary, and Portugal), the Commission observes that certain issuing States pose identifiable risks; others continue executing EAWs from these States; and some authorities fail to raise detention-condition concerns ex officio, despite the requirements of LM.

To facilitate assessment, FRA developed a unified database on detention conditions[4], compiling data on cell space, sanitary conditions, medical access, and violence prevention.

A crucial issue is monitoring post-surrender compliance with assurances provided by the issuing State. Since assurances are often overly generic, legislative reform establishing clear consequences for breach of such assurances is urgently needed.

Given that the notion of "criminal proceedings" under Article 82(2) TFEU encompasses all forms of detention, a directive setting minimum standards for both pre-trial and post-conviction detention would significantly enhance the efficiency of EAW procedures.

Chapter II – Judicial Cooperation and the Rights of the Requested Person

II.1. Detention

Judicial cooperation concerning EAW execution has adapted to the reality that not all EU Member States consistently comply with detention-condition standards; ECtHR judgments are not always fully implemented; and recommendations of UN and Council of Europe treaty bodies are applied only superficially.

In *Aranyosi and Căldăraru*, the CJEU held that Article 51(1) of the Charter obliges Member States to respect the Charter when implementing EU law, including Article 4, prohibiting inhuman or degrading treatment. The Court for the first time accepted suspension of EAW execution – and

[4] FRA – European Union Agency for Fundamental Rights, Criminal Detention in EU.

thus limitations on mutual trust and mutual recognition – where systemic deficiencies in the issuing State pose a risk of fundamental-rights violations.

The Court established a two-step test for executing courts:

(1) assess evidence of systemic or generalised deficiencies in detention conditions in the issuing State;

(2) determine whether the requested person faces a real risk of inhuman or degrading treatment if surrendered.

If, after consulting the issuing authority, the risk cannot be ruled out within a reasonable time, the executing authority must decide whether to terminate the surrender procedure.

This jurisprudence was refined in *ML*[5], limiting assessment to the specific facilities where the requested person would be detained. When issuing authorities provide information and assurances, the executing State must rely on them unless specific indications suggest a risk of prohibited treatment. The use of assurances has been criticised[6] as insufficient to ensure effective protection, especially in systems with systemic deficiencies.

Compliance with ECtHR standards could be secured only if the CJEU allowed executing courts to request comprehensive assurances obliging the issuing State to ensure full respect for Article 4 of the Charter throughout the person's detention.

II.2. Independent and Impartial Courts. Fair Trial

In *ML*, the Court extended the *Aranyosi/Căldăraru* logic to judicial independence. Under Article 1(3) FD EAW, the two-step test applies equally here. A key development was the Court's recognition that exceptions to mutual trust are possible even when the right at stake is not absolute – such as Article 47 Charter – provided that the "essence" of the right is at risk.

To suspend surrender on grounds of lack of judicial independence, the executing authority must:

(1) establish systemic deficiencies affecting the rule of law in the issuing State, creating a "real risk" of breach of the right to a fair trial, based on objective, reliable, specific, and up-to-date evidence;

[5] CJUE, ML, Case C-220/18

[6] Caeiro P., "Scenes from a Marriage": trust, distrust and (re)assurances in the execution of a European Arrest Warrant..., EUI, 2020, pp. 231-240

(2) demonstrate, "specifically and precisely", that the individual concerned would face such a risk in the concrete circumstances, considering personal situation, offence, and factual context.

The Commission emphasises that judicial cooperation cannot function where serious concerns exist about the independence of judicial authorities[7].

Where a requesting State is subject to Article 7(1) TEU proceedings due to a clear risk of serious breaches of EU values, executing courts must evaluate whether, in the specific case, serious grounds exist to believe the individual risks a violation of the right to a fair trial.

Relevant here are the decisions of the Higher Regional Court of Karlsruhe, which annulled an EAW issued by Poland on grounds that legislative reforms affecting disciplinary liability of judges undermined the guarantee of a fair trial[8]. The Amsterdam District Court subsequently developed a similar, near-uniform practice.

EU efforts to ensure effective protection of fundamental rights, including judicial independence, follow the trajectory set by CJEU case-law. The European Parliament has even called for the establishment of an inter-institutional agreement creating an EU mechanism for monitoring democracy, the rule of law, and fundamental rights. The Commission now conducts a rule-of-law review cycle culminating in an annual Rule of Law Report covering all Member States[9].

Chapter III – Conclusions and Proposals

The Commission acknowledged[10], even in the early stages of EAW implementation, the need to improve judicial cooperation by harmonising procedural rights of requested persons – particularly regarding access to legal counsel and interpretation, conditional release, and rules governing trials in absentia. These efforts underpinned Directives that facilitated both EAW execution and the provision of essential safeguards.

[7] Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158, 19 March 2014, p. 2

[8] District Court of Amsterdam, 24.03.2020

[9] European Parliament Resolution, 25.10.2016, on establishing an EU mechanism for democracy, the rule of law and fundamental rights

[10] Proposal for a Council Framework Decision on the European arrest warrant and surrender procedures – 19.09.2001

From our perspective, this confirms that the only viable option for ensuring uniform and rights-compliant EAW application across Member States is a profound legislative reform of the FD EAW – grounded in CJEU and ECtHR case-law as well as in doctrinal and judicial analyses identifying the major deficiencies in current practice.

What was considered premature in 2014 has become imperative today: the spirit of judicial cooperation in EAW matters has eroded significantly, undermining the mechanism's effectiveness and, ultimately, its raison d'être.

Beyond scholars and practitioners referenced in our analysis – numerous and largely aligned – the studies and reports of FRA and STREAM[11], together with Eurojust's work, further demonstrate the pressing need for broad procedural reform of judicial cooperation, especially regarding the issuance and execution of EAWs.

Without claiming pioneering status, we firmly support the need for a new legislative instrument, ideally a **Code of Judicial Cooperation in Criminal Matters**, including a comprehensive chapter on the transfer of criminal proceedings.

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LEGAL ACTIONS SPECIFIC TO LAND REGISTRY

Elena-Claudia DUMITRACHE[*]

ABSTRACT

Land registry operations, such as the description of real estate, the indication of real rights and other rights, facts, and legal relationships related to real estate, in situations where they cannot be performed through registration by the territorial cadaster office, at the request of the petitioner, accompanied by the necessary supporting documents, may be resolved by final court decisions. Court decisions thus revolve around land registry entries and their effects, thereby ensuring the role of the land registry in relation to real estate publicity.

KEYWORDS: *land registry actions; real estate advertising; court decisions;*

1. Definition of land registry actions

Land registry actions have been defined as „types of legal action, regulated by the normative act governing the system of real estate publicity through the land registry, having as their object entries in the land registry and ensuring the sanctioning of those who are required to tolerate the entry of a legal transaction, if they oppose or refuse to hand over the documents necessary for the entry to be made."

Consequently, land registry actions are specific to the land registry system and should not be confused with real actions directly defending real property rights that may be registered in the land registry, nor with personal actions derived from legal acts on the basis of which entries are made in the land registry, as there are differences between them in terms of legal basis, subject matter, conditions of admissibility, jurisdiction, limitation period, and legal effects.

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2. Classification of land registry actions

Land registry actions have been classified in specialized legal literature as follows: action for tabular performance; action for tabular justification; action for rectification; action for establishing the rank of registration according to the principle of priority (Art. 890(3) and (5) of the Civil Code, Art. 902(1)(II) of the Civil Code); action for deletion or, where applicable, for granting preferential rank according to the principle of priority (Art. 892 of the Civil Code)."[1]

These classifications of land registry actions were made according to certain criteria such as: the object and nature of the subjective right whose legal protection is sought in court, the correlation with other actions or their relationship with the statute of limitations.[2]

With regard to the classification of land registry actions according to their subject matter, a distinction was made between actions for tabular performance, actions for tabular justification, and actions for tabular rectification as the most representative actions.[3]

With regard to the classification of land registry actions according to the nature of the subjective right whose enforcement is sought through the action, the following have been identified:

- personal actions represented by: the action for tabular performance, action for tabular justification or action for land registry rectification in cases where it is ancillary or, in cases where it is formulated as the main action, in cases where it concerns entries relating to personal rights, deeds, facts, or legal relationships in connection with the properties included in the land registry;
- real actions: action for rectification of the land register in cases where it is brought as a principal claim and seeks to rectify entries relating to real property rights, governed by Article 24 of Decree-Law No. 115/1938, which has been described as „only formally a

[1] Gabriel Boroi, Carla Alexandra Anghelescu, Ioana Nicolae*, Civil law files. 1. General section. Persons. Family. Main property rights*, 8th edition, revised and expanded, Hamangiu Publishing House, Bucharest, p. 897.

[2] Marian Nicolae*, Treatise on real estate advertising*. Vol. II. The new land registers, Universul Juridic Publishing House, Bucharest, 2006, p. 607.

[3] Adrian Rusu*, Land registry actions. Study of doctrine and jurisprudence*, Hamangiu Publishing House, Bucharest, 2008, p. 47-48.

personal action" and that it is in fact „a real action, a particular application of the action for recovery or, as the case may be, of the action for denial in the land registry system."[4]

Depending on the correlation between land registry actions and other legal actions, whether or not they are brought as main actions, the following have been identified:

- main actions: action for tabular performance, action for tabular justification, and action for rectification when brought as a main action;
- accessory actions: actions for rectification in all cases where they accompany a substantive action constituting the legal basis for the rectification of the land registry, such as: actions for annulment, actions for rescission, actions for termination, actions for revocation, etc.

With regard to the relationship between actions and the incidence of the statute of limitations, land registry actions may be:

- actions subject to limitation: action for tabular performance, action for tabular justification, and action for rectification against third-party acquirers in good faith pursuant to Art. 909 para. (2) and (3) of the Civil Code;
- non-prescriptible actions: action for rectification against the immediate acquirer and third-party sub-acquirers in bad faith, according to art. 909 para. (1) of the Civil Code."[5]

Legal doctrine has also referred to the action for justification of provisional registration, also known as the action for tabular justification concerning the provisional registration of rights affected by a suspensive condition, as provided for in Article 899 of the Civil Code, and to the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code, the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code, the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code,

[4] Traian Ionașcu, Salvator Brădeanu, *Principal Property Rights in the Socialist Republic of Romania*, Academy Publishing House, Bucharest, 1978, p. 213.

[5] *Gina Orga-Dumitriu*, *Real estate advertising in the new Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 254-256.

the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code, the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code, the action for cancellation or granting of preferential rank, to which is added, in the light of the provisions of the new Civil Code, the action for cancellation or granting of preferential rank 899 of the Civil Code, and the action for cancellation or granting of preferential rank, to which is added, in light of the provisions of the new Civil Code, the action for establishing the definitive rank, according to Article 890 of the Civil Code.[6]

3. Action for tabular performance

The action for registration was defined as „the action by which the acquirer of a real property right requests the court to order the defendant to submit the necessary document or to perform the necessary obligations for registration in the land register, and, failing that, to order the registration in the land register."[7], the basis for this is Article 896 (1) of the Civil Code and Article 1483(2) of the Civil Code, concerning the obligation to transfer ownership, from which it follows that this obligation also includes the obligation to hand over the documents necessary for registration. Given that the provisions of the Civil Code currently require authentic form for the transfer of ownership, the transfer of ownership cannot be completed without the consent of the notary public.

Given that the provisions of the Civil Code currently require *ad validitatem* for the transfer, establishment, modification of real property rights, respectively the obligation of the acquirer of the extra-tabular real property right to register the property in order to be able to dispose of it, and Cadastre Law No. 7/1996 requires the request for an authentication extract in order to conclude an authentic contract (which implies that the person who transfers, establishes, or modifies the right must be registered in the land registry), the usefulness of this action remains doubtful or irrelevant.

[6] Andreea Annamaria Chiș, *Real estate advertising in the new Civil Code*, Hamangiu Publishing House, 2012, p. 240-241.

[7] Gina Orga-Dumitriu*, Real estate advertising in the new Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 256.

The action for positive performance cannot be used to compel the surrender of the documents necessary for making an entry in the land register, in accordance with Article 902(1) sentence II of the Civil Code, according to which an action for tabular performance may also be used in relation to registrations, but only in the event of a conflict of rights arising from a common author, i.e. only in the case of an action for tabular performance against a third party.

With regard to negative performance actions, the provisions of Article 885 of the Civil Code require, for the cancellation of a right lost or extinguished other than by the expiry of a term, death, or the cessation of the existence of a legal person, the consent of the right holder, given by means of a notarized document.

According to Article 896 of the Civil Code, this agreement is no longer replaced by a final judgment in an action for negative performance, but by an action for rectification of the registration, based on the provisions of Article 908(1)(3) of the Civil Code. (1) point 3 of the Civil Code, as the conditions for the existence of the registered right are no longer met, since the rectification of the registration or provisional registration is mainly done amicably, according to paragraph (3) of the same article, the holder of the right to be rectified being obliged to hand over to the entitled person, together with the consent given in authentic notarial form and the documents necessary for the rectification, and, otherwise, the interested person may request the court to issue a decision replacing the consent to registration and the obligation to hand over the documents.

With regard to the action for specific performance against a third party, Article 897 of the Civil Code regulates the effects of the action for specific performance against a third party purchaser acting in bad faith, analyzing the existence of two conditions for exercising the action, namely: the anteriority of the claimant's title and the bad faith of the third party.

Regarding the condition of the claimant's prior title, regardless of the third party's good or bad faith, we note that the current Civil Code has opted for equal protection of the third-party acquirer with a free title and that of the third-party acquirer with a title for consideration.

As regards the condition of bad faith, this is defined by Article 901 of the Civil Code and is analysed in relation to the time of conclusion of the contract by the third party.

With regard to its legal nature, we note that the action for tabular performance is a principal action (in principle), an action for enforcement, a personal action, and subject to the statute of limitations under the law.

As a rule, an action for specific performance is formulated as a main action, through a summons, and is therefore autonomous in nature.

With regard to the prescriptive nature of the action for specific performance, we note that the provisions of Article 896(1) of the Civil Code stipulate that the right to bring an action for specific performance is subject to the statute of limitations under the conditions laid down by law, which also determines the personal nature of the action.

Since this is an action for the performance of an obligation to do something arising from a contract, the limitation period is the general one of three years, provided for in Article 2517 of the Civil Code, which begins to run from the date of conclusion of the contract, even if the rights are affected by a suspensive term or condition, since the obligation to hand over the documents necessary for notarization or provisional registration becomes enforceable from the moment the contract is concluded.

4. Action for tabular justification

The action for tabular justification is governed by Article 899(2) of the Civil Code, the final sentence of which refers to the provisions of Articles 896 and 897 of the Civil Code concerning the action for tabular performance, provisions which shall apply mutatis mutandis to the action for tabular justification.

Therefore, the legislator intended to provide the interested party with a specific procedural means for situations where, as a result of the legal fact on which the justification depends, the person against whom the provisional registration was made refuses to give their consent to the conversion of the provisional registration into registration.

While the action for tabular justification presupposes the existence of a single provisional registration (the conversion of which into registration is sought by the claimant), the action for establishing the definitive rank of the registration presupposes the existence of two or more provisional registrations, as a result of the submission of two or more applications for

registration under the conditions provided for in Article 890(1) and (5) of the Civil Code.[8]

The action for tabular justification was classified into two actions, namely: the ordinary action for tabular justification and the special action for tabular justification.

With regard to ordinary tabular justification actions, one definition of this action was that it represents the action by which the person in whose favor a provisional tabular real right has been registered requests the court to order the person against whom the provisional registration was made to consent to its conversion (transformation) into a registration, and if not, to order the registration of the tabular right in the name of the claimant with retroactive effect from the date of registration of the application for provisional registration.[9]

We show that in order for such an action to be admissible, the suspensive or resolutory condition affecting the provisionally registered real right or having as its object a future construction must be fulfilled, in accordance with Article 898(1) of the Civil Code.

For the other cases of provisional registrations provided for in Article 898(2)-(5) of the Civil Code, it is not necessary to bring an action for tabular justification, because in the case provided for in point 2, the justification is made at the request of the person in whose favor the provisional registration was made. Para (2)-(5) of the art. 898 Civil Code, it is not necessary to bring an action for tabular justification, because in the case provided for in point 2, the justification is made at the request of the person in whose favor the provisional registration was made, who shall attach to their request addressed to the territorial office a certified copy of the final court decision.

With regard to the special action for tabular justification, we note that the reference in Art. 899 para. (2) of the Civil Code refers not only to the provisions of Article 896 of the Civil Code, but also to those of Article 897 of the Civil Code, it means that the legislator also considered the possibility of bringing an action for special tabular justification.

Therefore, when the conditions for exercising the ordinary tabular justification action are met – fulfillment of the suspensive or resolutory

[8] Andreea Annamaria Chiș*, Real estate advertising in the new Civil Code*, Hamangiu Publishing House, 2012, p. 240-245.

[9] Marian Nicolae*, Treatise on Real Estate Advertising*, Universul Juridic Publishing House, Bucharest, 2006, vol. II, p. 312-331.

condition affecting the provisionally registered real right, or having as its object a future construction – the deadline for exercising the ordinary tabular justification action – it will be possible to formulate the special tabular justification action as an accessory, if the following conditions are also met: the third party provisionally registered their real right in the land registry prior to the provisional registration of the claimant; the third party was acting in bad faith at the time of the provisional registration; the time limit for bringing an action for special tabular justification has been complied with;

In the event that the third party has provisionally registered its real right in the land register prior to the provisional registration of the claimant's real right, the beneficiary of the first provisional registration has every interest in bringing an action for special tabular justification against the tabular predecessor, against the person who transferred the conditional right to it, in order to obtain justification for their registration, it being optional to sue the third party provisionally registered subsequently, subject to justification of the first registration.

In the event that the third party acted in bad faith at the time of provisional registration, given that good faith is presumed until proven otherwise pursuant to Article 14(2) of the Civil Code, the claimant has the obligation to prove that the third party acted in bad faith at the time of provisional registration. The court may not consider the third party's good faith as a defense against the claimant, as the third party's good faith is presumed until proven otherwise, and the claimant has the obligation to prove that the third party acted in bad faith at the time of provisional registration.[10]

With regard to the time limit, the special tabular justification action shall be brought within three years from the date of registration of the third party's application for provisional registration, unless the claimant's right of action against the tabular predecessor (the defendant in the tabular justification action) has become time-barred.

Concerning the subject matter of the special justification action, we note that it consists in obliging the provisionally registered third party to tolerate the registration of the claimant's real property right in the land register,

[10] Mihaela Mîneran*, Land Registry. Commented case law and regulations from the new Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 286.

without affecting the provisional registration of the third party as a result of the exercise of this special tabular justification action.[11]

When the conditions are met, both actions should be exercised simultaneously, in which case we will have both the subject matter of the action in the usual tabular justification: the finding that the suspensive or resolutive condition has been fulfilled or that the construction has been completed, and the obligation of the defendant in line 1 (the tabular predecessor) and the defendant in line 2 (the provisionally registered third party) to tolerate the consolidation of the definitive registration of the real property right in the name of the claimant.

If the conditions for a special tabular justification action were met, the person in whose favor a provisional registration was made, and subsequently another person was provisionally registered with regard to the same real property right, would resort to a rectification action.

With regard to the transitional provisions, we note that, in view of the provisions of Article 76 of Law No. 71/2011, it follows that ordinary actions for justification and special actions for justification may only be brought in cases where provisional registrations were made after the date of entry into force of the new Civil Code on October 1, 2011.

5. Action to determine the rank of registration

Article 890 of the Civil Code establishes with utmost precision the order of entries in the land register, the effects of which take effect from the date of registration of the applications at the cadastral office.

The possibility of bringing an action to determine the rank of the entry is also referred to in the provisions of Article 25(2) of Law No. 7/1996, which stipulate that if several applications for registration of real rights have been submitted at the same time to the territorial office, they shall be registered in the order in which they were received. A similar regulation existed in Decree-Law No. 115/1938, Article 31, but without identifying the existence of a judicial practice based on this text.

A similar provision existed in Decree-Law No. 115/1938, Article 31, but no judicial practice based on this legal text could be identified.

[11] Aurelia Rusu, *Real estate advertising. Land registers (2). Judicial practice*, Hamangiu Publishing House, Bucharest, 2009, p. 152-162

A similar text was also included in Article 31(2) of the old land registry law, but it did not contain the criteria that the court had to take into account in determining the rank of each registration. of the old land registry law, but it did not include the criteria that the court had to take into account in order to establish the rank of each entry, the only criterion resulting from the general principles of law being the date of conclusion of the contracts that constituted the title on the basis of which the registration was requested, namely *Qui prior tempore potior iure*.[12]

In the theoretical situation provided for in Article 890(2) and (3) of the Civil Code, there may be situations in which, with regard to the same property, several incompatible rights are requested to be registered, through applications submitted or communicated in different ways. Faced with this situation, the territorial office will distinguish between mortgage rights and other rights: mortgage rights will all be registered with the same rank, and other rights will be provisionally registered with equal rank.

The establishment of the preferential rank of the mortgage and the establishment of the definitive rank of the registration of other rights, and, where applicable, the cancellation of invalid registrations, shall be carried out by the court, upon notification by any interested party.

6. Action for cancellation or, where applicable, for granting preferential status in accordance with the principle of priority

The action for granting preferential rank is not a genuine land registry action, but an action under common law. The regulation of the action is useful, according to Art. 902 para. (1) sentence II of the Civil Code, in the case of competition between holders of claims that do not arise, except as an exception, from agreements that must be concluded in authentic form *ad validitatem* or of real rights and claims.

With regard to the right of action, we note that, according to Article 892(2) of the Civil Code, the right of action is time-barred after three years, starting from the date on which the third party registered the right in its favor.

Likewise, with regard to the conditions for exercise, we note that these derive from the provisions of paragraphs (1) and (2) of Article 892 of the Civil Code. A first condition is that the right of the claimant and that of the

[12] Daniel Marius Cosma*, Land Registry – Working Procedures and Organization of Regional Offices*, Hamangiu Publishing House, Bucharest, 2007, p. 237.

third party who first registered it must derive from a common author, who is the predecessor in title.

If we take, as an example, the waiver by the owner of the servient estate of his right of ownership over it, pursuant to Article 766 of the Civil Code, which, in fact, constitutes a means of acquiring ownership by the owner of the dominant estate, a waiver not recorded in the land register, followed by a transfer of ownership or an encumbrance thereof in favor of a third-party acquirer, we could possibly speak of a unilateral legal act generating a competing right, not recorded in the land register.

However, a unilateral legal act that has not been communicated in accordance with the requirements of Article 1326 of the Civil Code may be revoked until the communication reaches the recipient, as it only takes effect upon communication. Therefore, the act of renunciation not registered in the land register may be revoked by the owner of the servient estate (including tacitly, by concluding an act concerning a competing right) until its registration or communication in another manner to the owner of the servient estate.

Therefore, it is difficult to imagine a situation in which the latter could bring an action for cancellation or the granting of preferential rank, possibly in the unlikely event that the owner of the servient estate, instead of registering the waiver in the land register (so that this communication is made by communicating the conclusion of the land register), chooses to communicate the waiver in another way to the owner of the dominant estate, and, after this communication, before the latter registers his right, transfers or encumbers the right in favor of a third party who registers first.

The solutions that the court may pronounce result from the provisions of Article 892(1) of the Civil Code, these being the cancellation of the competing right or the granting of preferential rank. The cancellation of the competing right will be the solution for situations where the two rights are mutually exclusive, such as, for example, two rights of the same nature (both are ownership or usufruct rights).

The cancellation of the competing right will be the solution in situations where the two rights are mutually exclusive, such as, for example, two rights of the same nature (both are rights of ownership or usufruct or lease or preliminary sale and purchase agreements, etc.). However, it is possible that, although the rights are not of the same nature, they are nevertheless absolutely incompatible. For example, if the person who concluded the first act acquired a right of ownership over the property, and the third party who registered the first right acquired a right of usufruct. In this situation, the

court, giving preference to the owner of the property right, will order the cancellation of the other right.

The court will give preferential treatment when the two rights are only relatively incompatible. Returning to the example of the property right and the usufruct right, if the person who concluded the first deed is the usufructuary, and the third-party acquirer registered first is the owner, the court will grant preferential rank, in the sense that it will rule in favor of the holder of the right of usufruct, while also registering the right of ownership of the third-party acquirer, encumbered, however, by this dismemberment.[13]

7. Conclusions on the prospects for real estate advertising through the land register

At the level of Community institutions, there is concern for the approximation of national legal systems in the field of private law by studying the principles underlying these legislative systems, but especially the differences that may in practice constitute an obstacle to the functioning of the common market.

The task of regulatory harmonization is not easy, given the differences between real estate advertising systems in European countries, but with the help of the judicial practice consistently conferred by the courts and the decisions of the European Court of Justice, it is possible to highlight the common legal criteria necessary for the development of an international legal project that includes common legal principles and terminology.

With regard to the approximation of national legislation on real estate advertising to that at European level, legal principles such as the following should be taken into account granting maximum legal protection to third-party purchasers acting in good faith, in the sense that the enforceability of rights should be full and not limited to anything other than what results from registration carrying out adequate checks on the legality of the title to the property before registration, so that the land register can guarantee the accuracy of the information published, but also minimum costs for real estate advertising, in the sense that states must establish effective and secure advertising mechanisms.

[13] Andreea Annamaria Chiș, *Real estate advertising under the new Civil Code*, Hamangiu Publishing House, 2012, p. 253-260-264.

The concern for adapting domestic legislation to the requirements of a secure and accessible international real estate market is also reflected in the Romanian legislator's attempt to organize real estate advertising in a manner that allows the two main objectives of Law No. 7/1996 to be achieved: ensuring the legal framework for the establishment of a nationwide cadastre and the gradual and progressive extension of the new real estate advertising system, based on the new land registers, throughout the country.

To this end, judicial practice also plays a role in land registry actions in order to sufficiently configure the scope of application of the legislative rules on real estate advertising, by correctly carrying out land registry operations, which are in fact the most effective means of resolving conflicts between the interests of rights holders and those of third-party acquirers acting in good faith.

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BALANCING INVESTMENTS AND BODILY AUTONOMY IN PROFESSIOANAL SPORTS: THE LEGAL DILEMMA OF MEDICAL DECISION-MAKING

Marian-Ioan MIHAIL*

ABSTRACT

This paper analyses the legal and commercial disputes that arise when professional athletes, usually viewed both as individuals and as significant financial investment, incur severe injuries. The goal is to examine the potential conflict between clubs' financial interests in paying transfer fees and other expenses to acquire skilled players and athletes' rights to make autonomous and informed medical decisions and ultimately maintain control over their bodies. The methodology incorporates doctrinal analysis or the current regulatory framework and common practises, examination of contract law, athlete interviews, and a comparative analysis of case law from various jurisdictions. The findings indicate that while many player-club contracts include medical governance and return-to-play clauses, the regulation of the athlete's decision-making authority is insufficient, leading to potential liability for clubs, insurers, and physicians in cases of actually enforcing these clauses against the athletes. In the case of treatment and recovery from an injury, the paper suggests model contract terms that spell out who has the right to make decisions, how to share risks, and how to settle disagreements.

KEYWORDS: *bodily autonomy; contractual independence; human rights; contract law; employment law;*

1. Introduction

In the world of professional team sports, athletes are in a unique and often conflicting legal and business position. They are both individuals with basic human rights and valuable, often speculative, investments in a multibillion industry. When a player gets injured badly, this dual status becomes even more complicated. This creates a difficult balance between the club's interests, medical governance, and the athlete's right to control their own body. Because clubs spend a lot of money on players through transfer fees,

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salaries, and performance bonuses, they often have, or at least want to have, a say in decisions about medical care and when players can return to play. But these choices affect the athlete's most basic legal rights, such as the right to informed consent, the right to keep their body safe, and the right to make their own medical decisions.

This paper examines the legal conflicts that emerge when a club's financial interest in safeguarding its investment conflicts with an athlete's right to make independent medical choices or even patient-doctor confidentiality. Even though most sports contracts have clauses about injury management, medical exams, and recovery from poor performance, there aren't many strong legal systems in place to protect the athlete's right to make decisions. This gap is not just an idea: recent lawsuits and arbitration cases have shown real cases of coercion, players returning to play too soon, and doctors disagreeing on what to do, which has caused athletes to get injured over and over again and have long-term health problems.

These problems affect all athletes, but female athletes are especially vulnerable. Before 2021, FIFA's Regulations on the Status and Transfer of Players (RSTP) and other international rules didn't have any specific protections for female athletes, especially when it came to pregnancy, maternity leave, or menstrual health. The changes that have happened in 2024 will help fix this by giving female players rights like flexible maternity leave, accommodations for returning to work, and protection from being fired because they are pregnant or refuse to take a pregnancy test. However, these improvements are often not put into practice because of inconsistent national implementation, weak enforcement mechanisms, and the lack of detailed medical governance provisions in standard contracts.

2. Athletes' dual legal and business identities

In modern sports, professional athletes have a unique legal status: they are both individuals with rights and economic investments[1]. This duality is especially clear in medical governance, where the individual's right to

[1] The most valuable resource of the athlete are the economical rights tied with their federative rights, which essentially mean the right to perform the specific athletic activity for one club at a time. These rights are generally held entirely by the club and are entirely affected by the athlete's overall health condition, as opposed to the image rights, for example, which not only can be exploited jointly by the club and athlete, but can also be exploited regardless of the athlete's overall fitness at a certain moment in time.

physical autonomy often clashes with the club's financial interest in protecting its investment. This conflict is most evident in injury management and return-to-play decisions, where the athlete's body becomes the actual source of economic risk. The club is usually interested in having the athlete back in a "ready to compete" state as soon as possible, whereas the athlete is concerned by the long term effects of this decision as well – more stable treatments usually require a longer convalescence or recovery period and these mean more money lost by the club.

2.1. Athletes as valuable assets

Clubs are increasingly looking at the athlete recruitment and managing as an investment and not just as a current operational activity. When teams sign professional athletes, they often have to pay a lot of money, like multimillion-euro transfer fees, performance-based bonuses, insurance premiums, and long-term salary commitments. For example, in European football, elite clubs often list players as "intangible fixed assets" on their balance sheets and write them off over the length of their contracts. In this context, the athlete's body is no longer just a vessel for performance; it is now a financial product that needs to be managed strategically.

This treatment creates a management philosophy that puts keeping assets safe and getting a good return on investment first. Consequently, injuries are not exclusively examined through a medical or welfare perspective but rather through risk assessment, cost estimation, and insurance recovery frameworks. People often ask doctors, insurance companies, and lawyers not only for medical advice but also for advice on how to improve a club's finances. Consequently, the athlete's physique is transformed into an entity for risk assessment, governed by performance indicators, contractual stipulations, and actuarial computations.

2.2. Contractual codification of control

Contracts between players and clubs often show and support this trend of treating players as commodities. Some provisions may require players to report their physical conditions, give clubs control over medical teams, give clubs permission to let players return to play, and give clubs a lot of power over how players are treated. It's not common for both sides to agree on these terms. As a solution, they are built into standardised contract templates

created by clubs or leagues, and they are rarely open to renegotiation, especially for young or new players who don't have much power to negotiate.

Even in top-level sports, athletes say they don't have enough information or freedom when it comes to making decisions about injuries. Even though these kinds of actions may go against general rules of contract and tort law (like medical negligence and undue influence), they are often protected from being looked into by confidentiality clauses and internal complaint processes[2].

2.3. Gendered aspects of commercialisation

The commercial treatment of athletes becomes more complicated when it comes to women players. Even though investment levels are still lower than in men's sports, the process of making sports into a business is speeding up. The best women's football, rugby, and basketball clubs are now using similar ways to manage their players' money. Transfer fees, performance bonuses, and international exposure all add to a player's value. But female athletes also face risks that are often left out of contracts, such as pregnancy, menstrual health, recovery after giving birth, and long-term injury risks that are made worse by sex-specific medical conditions.

These aspects were largely missing from player-club agreements until recently. The FIFA Regulatory Framework for the Protection of Female Players and Coaches for 2024 added new mandatory clauses about maternity leave, flexible work, and support for players and coaches who want to return to play after having a baby. Article 18quater(4) of the RSTP gives female athletes the right to keep playing while pregnant or to stop without worrying about losing their job or money. But this change in the rules is still not being applied evenly across the country, and most standard contracts still don't have clear clauses about medical autonomy during pregnancy or recovery.

[2] See Anderson, L. C. (2008), *Contractual obligations and the sharing of confidential health information in sport.* Journal of the Philosophy of Sport, 35(2), 200-215, who explains that in elite sport the athlete's medical autonomy is structurally limited by the contractual duty to disclose health information to clubs and team officials. The article shows how confidentiality in medical matters is frequently overridden by employment obligations, internal reporting protocols, and performance-management systems. As a result, decisions regarding injury treatment and return-to-play are often influenced by institutional pressures rather than purely by informed medical consent.

2.4. Asset logic undermines autonomy

The conversion of athletes into commercial assets has weakened their capacity to exercise medical autonomy. When people make medical decisions because they are afraid of losing money, getting demoted in sports, or breaking a contract, it is hard to get real consent. Clubs may indirectly pressure players to return early by giving them few choices or making them feel like they have to compete. Team doctors are often torn between their loyalty to the team and their duty to the club, which raises ethical issues in both medical and legal terms.

This dynamic creates an imbalance in the structure that violates athletes' rights to health, bodily integrity, and informed consent. The issue is exacerbated by the absence of external oversight; sports federations and arbitration bodies frequently prioritise contractual freedom, even when provisions result in asymmetries that conflict with overarching human rights standards.

3. Regulatory and contractual frameworks

The governance of medical decision-making in professional sports is primarily constructed through a combination of standard-form contracts, federation regulations, and domestic labour laws. While these frameworks are designed to manage performance and injury risk in high-performance environments, they often fail to provide clear and enforceable mechanisms safeguarding the athlete's right to bodily autonomy. This section examines the regulatory architecture that governs player-club medical relationships, focusing on standard contract clauses, institutional regulations (notably FIFA's RSTP), and enforcement gaps that leave medical decision-making ambiguously regulated.

3.1. Standard player contracts and medical governance clauses

Professional athletes are generally bound to their clubs by standard-form employment or service contracts, which are rarely subject to substantive negotiation – particularly for mid-tier or young players. These contracts often include the following clauses relevant to medical governance: Mandatory club examinations and treatments, return-to-play timelines set by club doctors, consent to treatment at specified medical facilities, penalties

for unauthorized absences or external consultations, waivers of liability in the event of injury recurrence.

While these provisions are typically justified as necessary to manage a club's sporting and financial risk, they restrict athletes' freedom to seek independent medical advice, or to delay return to play for health-related or psychological reasons. In some jurisdictions, these clauses may be inconsistent with national medical law or the legal standards for informed consent, but are rarely challenged due to confidentiality requirements, power imbalances, or arbitration obligations that limit judicial review.

The Udubesi Obodo case[3] illustrates this tension well: although the contract obligated the player to undergo treatment with club medical staff, the CAS tribunal found that seeking independent medical care was justified due to ongoing pain and insufficient club responses, affirming the player's right to health over rigid contract enforcement.

3.2. Federation regulations: The FIFA RSTP and medical provisions

The most prominent global framework governing employment in football is the FIFA Regulations on the Status and Transfer of Players (RSTP). Although the RSTP has long covered contract stability and transfer procedures, substantive medical governance provisions were historically absent. This changed following sustained pressure from unions, legal scholars, and athlete welfare advocates.

As of 2024, the RSTP has introduced a progressive regulatory framework for female players, codified in Articles 18quater and 18quinquies. These provisions include: Protection against dismissal due to pregnancy or medical leave, mandatory paid maternity and adoption leave, right to decide whether to continue training and competing during pregnancy, postpartum return-to-play plans and full pay guarantees, menstrual health leave without financial penalty, breastfeeding accommodations, including facilities and reduced hours with full pay.

These are important steps in recognizing sex-specific medical needs, which were previously neglected or addressed only through informal accommodations. However, enforcement at domestic level remains contingent

[3] Arbitration CAS 2015/A/4327 FC Dinamo Minsk v. Christian Udubuesi Obodo, award of 13 May 2016.

on national association implementation[4], and there is no established jurisprudence at CAS confirming the binding nature or justiciability of these rights in arbitration.

3.3. Domestic legal norms and collective bargaining agreements (CBAs)

National labour laws also play a significant role in shaping medical governance. Jurisdictions with strong worker protections – such as Germany, France, and Scandinavian countries – require higher thresholds for informed consent and allow workers (including athletes) to reject treatments or delay return to duty without immediate dismissal or financial loss[5].

However, in many professional sports systems (e.g., Premier League, La Liga, Serie A), club-drafted contracts often override or circumvent these protections unless a valid collective bargaining agreement (CBA) exists. Where CBAs are in place[6] (e.g., in the US Major Leagues and some national women's leagues), athletes enjoy clearer protections concerning: Medical second opinions, independent medical panels, injury grievance procedures, confidentiality in health disclosures.

Unfortunately, many female athletes (particularly outside top leagues) remain excluded from CBAs, resulting in contracts that omit pregnancy, menstrual health, or postpartum recovery considerations entirely. Moreover, non-disclosure agreements, club-centric arbitration rules, and lack of legal representation further compound the regulatory asymmetries.

[4] However, as per Article 1 (3) of the FIFA RSTP, the implementation at national level without modification of Articles 18bis, 18ter, 18quarter is mandatory.

[5] For example, under the Entgeltfortzahlungsgesetz (Continued Remuneration Act), employees who are unable to work due to sickness are entitled to continued pay for up to six weeks, provided that they present a medical certificate and notify the employer. During that time, the employer cannot unilaterally force them back to work.

[6] The NFL Players Association & National Football League Collective Bargaining Agreement for the 2020-2030 cycle contains in Articles 39-45 provisions regulating club medical staff, mandatory second medical opinions, injury grievance procedures and independent medical evaluations.

3.4. Structural deficiencies in the governance of medical decision-making

A further examination of the FIFA Regulations on the Status and Transfer of Players (RSTP), the standard club employment contracts utilised in European professional football, and collective bargaining-based medical governance frameworks in U.S. professional leagues, particularly the NFL CBA, uncovers three enduring and structurally deficiencies. These deficiencies could be considered compromising the effective safeguarding of athletes' bodily autonomy, notwithstanding the presence of formal protections.

(i) Uncertainty in the distribution of ultimate medical decision-making power

All of the frameworks we looked at – the RSTP, national league standard player contracts in Europe, and the NFL Collective Bargaining Agreement – have a clear lack of a rule that states who has the final say over medical treatment and decisions about when to return to play. In reality, European club contracts mostly give club-appointed medical staff de facto control, and their decisions are usually influenced by both sports and business reasons. General principles of medical law and human rights doctrine acknowledge that the patient (the athlete, in this case) must maintain ultimate decision-making authority grounded in informed consent[7]. However, these principles are not explicitly integrated into sport-specific regulatory frameworks in a practical manner and professional sport exists in jurisdictions outside the applicability of these conventions.

The RSTP, for example, doesn't say much about medical self-determination outside of the narrow range of protections for women that are set out in Articles 18quater-18quinquies. The NFL CBA allows for second medical opinions[8], but it doesn't change the fact that club doctors have the final say

[7] The judgment handed down by the European Court of Human Rights in the case of Glass against the United Kingdom, on 9 March 2004, application no. 61827/00, which became final on 9 June 2004.

[8] The NFL CBA, Article 39 entitled Player's Right to a Second Medical Opinion grants players "the opportunity to obtain a second medical opinion." It provides that the club must cover the cost, but only if certain procedural conditions are met (for example, board-certified physician, advance consultation, reporting to club physician). It also states that while the player "shall have the right to follow the reasonable medical advice given to him by his second-opinion physician ... with respect to diagnosis of injury, surgical and

on whether a player is fit to play in the short term. This lack of clear rules lets clubs work in a grey area where contractual control takes the place of personal medical autonomy. Athletes, on the other hand, have to deal with the practical burden of fighting decisions that affect their physical integrity.

(ii) Lack of required independent medical oversight mechanisms

A second systemic flaw is that there aren't any mandatory and independent medical review bodies that can settle disagreements between an athlete's freedom and the club's medical assessments. None of the frameworks analysed (the RSTP regime, European league contract systems, or U.S. CBAs) provide a universal, obligatory third-party medical arbitration mechanism for disputed return-to-play or treatment decisions.

Independent medical evaluations, such as those in the NFL's concussion protocol[9], are rare and only apply to certain injuries. They are not part of the overall structure of medical governance. In European football, on the other hand, there is usually no independent verification at all, which means that all important medical authority is based in the club setting. This institutional design makes the problem of dual loyalty for team doctors worse and creates a regulatory gap where coercive decision-making can happen without any real outside validation.

(iii) Regulatory improvements for each gender and possible failures in enforcement

The FIFA RSTP reforms for female athletes done between 2021 2024 are the only clear attempt in the frameworks we looked at to protect bodily autonomy through binding rules. Nonetheless, their execution exposes profound systemic vulnerabilities. First, the RSTP does not set up a special way to handle disputes about pregnancy, maternity, or menstrual health. Mutandis mutatis, these disputes are to be resolved following the general dispute resolution mechanism for contractual disputes. Second, enforcement relies

treatment decisions, and rehabilitation and treatment protocol", that is subject to prior consultation with the club physician and "due consideration" of the club physician's recommendations.

[9] The NFL Concussion Protocol is a league-mandated medical framework requiring that any player suspected of sustaining a head injury be removed from play and evaluated by an unaffiliated neurotrauma consultant in addition to the club physician.

ultimately on national associations[10], whose adherence is inconsistent, disjointed, and predominantly unverified in arbitration practice. Third, the lack of unified CAS case law that interprets these provisions greatly reduces their normative power.

In contrast, most male-dominated professional sports rules and CBAs, like the NFL framework, do not have any gender-sensitive health protections. For example, reproductive health autonomy and sex-specific medical vulnerabilities are not covered by the rules at all. Consequently, the regulatory framework is inherently gender-neutral in its design yet effectively gender-blind, thereby sustaining structural inequalities in medical governance.

4. The institutional medical dilemma of in-house physicians

A significant ethical and regulatory conflict in professional team sports stems from the institutional status of in-house medical personnel, who are almost without exception directly employed by clubs. This organisational model, while ensuring logistical efficiency and immediate access to athletes, creates a structural conflict of interest between the physician's professional duty to the athlete as a patient and the contractual obligations to the employing club. The problem is not a one-time issue, it is built into the way modern professional sports work, where the athlete is both a patient and a valuable asset. Therefore, similarly, the doctor looks at the athlete as both a patient and an employer's asset that needs protecting.

In theory, doctors who work in sports should follow the same basic ethical rules that all doctors do, especially informed consent and doctor-patient confidentiality. These principles mandate that medical decisions be made exclusively in the patient's best interest, free from external economic or performance pressures. In the professional sports environment, however, this ethical ideal is persistently destabilized by the physician's embeddedness within the club's hierarchical and commercial structure[11].

[10] As stated before, the FIFA regulations are not directly applicable in domestic disputes, but require a formal engulfing in the national associations' own regulation.

[11] "In *Hamed v Mills & Tottenham Hotspur FC* [2015] EWHC 298 (Queen's Bench division), the High Court held that club-appointed doctors owed a duty of care to a 17-year-old academy player whose abnormal cardiac screening results were not properly investigated or explained. The court found a breach of duty for failing to organise further

The essential ethical paradox of in-house sports medicine resides in the amalgamation of two incompatible institutional logics: the logic of patient-focused medical care and the logic of performance-oriented asset management. The doctor is expected to follow medical ethics while working for a company that puts performance, business success and competitive advantage first. This combination will always cause role confusion, a loss of norms, and professional weakness.

As long as medical staff are still part of the club's command structure, ethical compliance will depend more on the individual staff member's moral resistance than on the design of the institution. For this paradox to be truly resolved, the medical staff would need to be structurally separate from the club management, there would need to be a mandatory neutral medical review for decisions that are being challenged, there would need to be enforceable confidentiality boundaries, and the athlete would need to have the legal right to make the final decision about their own body.

Without these changes, the sport (especially in team sports) medical care will continue to depend on a weak balance in which athlete autonomy is officially recognised but only works if institutions are willing to accept it.

5. Summary of ethical implications and possible reforms

The tensions identified throughout this paper – between commercial interest and bodily autonomy, between club control and athlete rights – demand more than surface-level remedies. They require a deeper rethinking of the legal and ethical architecture that underpins medical governance in professional sports. The athlete, whose body forms both the basis of a livelihood and the object of club investment, often inhabits a precarious space where the principle of informed consent risks being reduced to a procedural formality rather than a genuine right.

Reform, therefore, must begin by acknowledging the structural imbalances that shape the athlete-club relationship. When a player is injured, the decisions surrounding treatment and return-to-play are not made in a vacuum. They are influenced by contract durations, upcoming fixtures, team standings, media narratives, and, in many cases, the athlete's own economic insecurity. In this environment, even well-intentioned medical staff may be

tests, communicate the seriousness of the risk, and act on unequivocally abnormal findings, leaving the club vicariously liable for its medical staff."

caught between obligations, as discussed in the previous section, while the athlete faces implicit pressures to conform to a return schedule that prioritizes the team's performance over long-term health.

One of the clearest ways to address this imbalance is through the institutionalization of independent medical oversight. When treatment decisions or fitness assessments are disputed, clubs should not be the final arbiters. Instead, truly independent panels, funded jointly by players' associations and leagues, but operationally autonomous, could provide neutral evaluations. Such bodies would help reassert the principle that medical decisions should prioritize the patient's best interest, even in the high-stakes context of elite sport.

Equally important is the need for transparent communication around medical risks. Too often, return-to-play decisions are based on limited or biased information[12]. Athletes should receive clear, documented explanations of both the short-term and long-term risks associated with playing through injury, undergoing specific treatments, or delaying recovery. These explanations should be confirmed by a second, unaffiliated medical professional – particularly in cases involving concussions, chronic pain, or surgery.

Another critical dimension is the inclusion of gender-specific considerations in all reform efforts. While FIFA's introduction of regulatory protections for pregnant athletes marks a significant advance, its impact will remain limited without robust enforcement mechanisms and adaptation into national contracts. Menstrual health, postpartum care, and reproductive rights must no longer be treated as optional or niche issues – they are essential components of medical governance in women's sports, and their omission is a form of structural discrimination.

Finally, any sustainable reform must involve a cultural shift within clubs and national associations/federations. Medical ethics should not be treated as external to sporting success but as integral to it. Coaches, team managers, and even agents must be educated on the importance of respecting athlete autonomy, not merely for legal compliance but for the integrity of the sport

[12] Mitch Koczerginski, *Who Is at Fault When a Concussed Athlete Returns to Action?*, 47 Val. U.L. Rev. 63 (2012), examines the legal and ethical arguments surrounding "return-to-play" guidelines that permit athletes to resume action before they are symptom-free. The author argues such guidelines may constitute a breach of a duty owed to the athlete.

itself. Only by embedding ethical values into the day-to-day decision-making of sports institutions can real change be achieved.

Conclusions

To sum up, professional sports organisations in both the US and Europe always put money ahead of their moral duties, which puts athletes' freedom at risk. Recent improvements in regulatory frameworks and the negotiation of collective bargaining agreements signify progress; however, they have not tackled the core issue: the widespread perception of the athlete's body solely as a commodity rather than as a vessel for an individual endowed with rights and dignity. To achieve truly ethical sports governance, we need to change the way we do things at the most basic level. This change should not only be based on contractual obligations or changes to procedures, but also on restoring true medical independence while always respecting the athletes' freedom.

In the end, the goal of truly ethical sports governance requires a complete change in how things are done. This change should also include restoring real medical independence and always respecting athletes' freedom. This plan would be a way to put money back into athletes' health and reaffirm the basic human values that should guide professional sports.

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HARMONIZING THE LEGAL REGIME OF CONSTRUCTION SUPERVISION: COMPARATIVE ANALYSIS BETWEEN GOVERNMENT DECISION NO. 1/2018 AND LAW NO. 10/1995, LEGAL REGIME CONFLICT AND PROPOSAL FOR AN INTEGRATED REGULATORY FRAMEWORK

Sorina NEAGU*

ABSTRACT

The legal analysis of the Supervisor institution, as set out in this paper, focuses on the examination of the Supervisor's duties, responsibilities and liability, in relation to the provisions of the National Construction Contract regulated by Government Decision No. 1/2018, as well as on the comparison between the duties, responsibilities and liability of the Supervisor under recent legislative amendments to Law No. 10/1995 and Law No. 204/2020. The analysis highlights the overlap and, at the same time, the structural tension between the role of protecting the public interest assigned to the Supervisor by construction law and the contractual role, derived from the FIDIC architecture adapted to domestic law by Government Decision No. 1/2018. The paper investigates the forms of liability for the Supervisor's activity and the legal consequences of decisions with direct contractual impact between Supervisor and contractor, including the issue of the opposability of the Supervisor's decisions. Finally, the study proposes an integrated legislative framework aimed at unifying competing competencies assigned to the Supervisor, in line with the models established in other legal systems (France, Germany, United Kingdom) and with best practices in public works procurement.

KEYWORDS: *FIDIC Engineer; Supervisor; legal liability; Government Decision No. 1/2018; Law 10/1995; public procurement of construction works;*

1. Introduction

Starting in 2018, the largest public works construction projects in Romania have been carried out under construction works contracts governed by G.D. No. 1/2018. The contract model regulated by G.D. No. 1/2018 is

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inspired by the FIDIC standards developed by the International Federation of Consulting Engineers (FIDIC)[1], an organisation whose contractual standards have been profoundly influenced by Anglo-Saxon law and which place primary emphasis on the practical needs of construction projects[2]. Similarly, the institution of the Supervisor regulated by G.D. No. 1/2018 is an adaptation of the institution of the Engineer within the FIDIC standards.

The FIDIC Engineer has been an established institution since the very first edition of the FIDIC standard, published in 1957[3]. The first edition of the FIDIC standard was an adaptation, for international use, of the ICE Conditions of Contract, developed by the Institution of Civil Engineers in the United Kingdom[4], and was widely used there since the first half of the 20th century. The British ICE model was already deeply rooted in construction practice, promoting the idea of a "*third-party impartial entity"* **managing the execution of the contract and deciding upon technical and financial disputes** arising during construction. The introduction of the Engineer into

[1] The specificity of these contract standards and a brief overview of the history of the FIDIC organisation and of the legal systems that have influenced the FIDIC Contract standards are described in the paper *"Brief considerations on the legal framework applicable to the public works construction procurement contract, in the phase of its execution, from the perspective of the adoption of the National Works Contract regulated by G.D. no. 1/2018"* – Sorina Neagu, Revista Dreptul no. 10/2025, p. 36.

[2] *"FIDIC documents tend to be oriented towards an approach specific to the common law system with respect to contractual matters, although consultants and contractors coming from countries familiar with a civil law – inspired legal environment do not appear to have encountered significant difficulties in using FIDIC forms" Engineering the Future: 110 Years of FIDIC*, a publication edited by the FIDIC Organisation, available at the publisher's site – accessed on 21.07.2025.

[3] *Conditions of Contract (International) for Works of Civil Engineering Construction*, First Edition, 1957 – *Engineering the Future: 110 Years of FIDIC*, a publication edited by the FIDIC Organisation, available at the publisher's site – accessed on 21.07.2025.

[4] *"The first edition of the FIDIC Red Book, published in 1957, was substantially based on the conditions of contract developed by the Institution of Civil Engineers (ICE) in the United Kingdom. The rationale for this approach lies in the fact that, in the years immediately following the Second World War, when several international projects financed by international financial institutions such as the World Bank were implemented, consultants from numerous jurisdictions used the ICE form, departing from it only when the international character of the works required such derogations. Therefore, when FIDIC drafted the first edition of the Red Book, it was natural for the organization to use, as a foundation, the works already existing in the field." Engineering the Future: 110 Years of FIDIC*, a publication edited by the FIDIC Organization, available at the publisher's site – accessed on 21.07.2025.

the FIDIC standards responded to concrete needs – such as managing the technical-legal complexity of construction projects, avoiding contractual deadlock through prompt and balanced decisions during performance, and ensuring a minimum level of impartiality – ***within an inherently asymmetric contractual environment in which the Employer holds a dominant position***[5]. The FIDIC Engineer was therefore conceived as a **technical professional with advanced contractual competencies,** managing the relationship between the Parties and preventing disputes from escalating, while preserving the legal and practical tradition of anglo-saxon construction contracting system[6]. In subsequent editions, the Engineer retained **a dual character**: designated and remunerated by the Employer, yet **contractually obliged to act fairly and reasonably when performing decision-making functions – a quasi-impartial status, close to that of a "*technical arbitrator*"**[7].

Although the FIDIC standards do not require that the role of Engineer be performed by a certified FIDIC professional, the international organisation has developed, since the 2010s, a professional accreditation system intended to verify the technical-legal competencies of those administering contracts governed by the FIDIC Conditions of Contract. It is important to underline that this professional certification, although not mandatory, **contributes to the harmonisation of contractual practices and to increased confidence in the impartiality and competence of the FIDIC Engineer**. The most relevant certification for the Engineer role under the Red Book is that of FIDIC Certified Contract Manager (FCCM), issued by FIDIC Credentialing Ltd (FCL), the specialised competency-evaluation branch of FIDIC, headquartered in Geneva[8]. Eligibility requirements include at least ten years of relevant professional experience in civil engineering or construction management, practical experience with FIDIC contracts, completion of official FIDIC courses (notably Modules 1-3 on the practical use of the Conditions

[5] Christopher Seppälä, *FIDIC – An Overview*, annual conference IBA, Praga, 2005, p. 2-3; Nael G. Bunni, *The FIDIC Forms of Contract*, 3rd ed., Blackwell, 2005, p. 15-16

[6] N.G. Bunni, Nael G. Bunni, The FIDIC Forms of Contract, 3rd ed., Blackwell, 2005. p. 17-18; Brian Eggleston, *The FIDIC Red Book Contract*, Wiley Blackwell, 2006, p. 12-13.

[7] Nael G. Bunni, *The FIDIC Forms of Contract*, 3rd ed., Blackwell, 2005, p. 233-234.

[8] FIDIC Credentialing Ltd, *About Us*, available at: *https://fidiccredentialing.org*

of Contract[9]) and passing written and oral examinations. Certification is valid for a limited period (usually three years), with renewal conditional upon **continuous professional development** and **compliance with the professional code of conduct** (similar to many liberal professions)[10].

We provide these preliminary clarifications concerning the origins of the Supervisor institution because the legal analysis and classification of new legal institutions is a complex doctrinal and scientific undertaking. Understanding and considering the broader context, **the reasons for their appearance in legislation, and the sources of inspiration for such newly-introduced institutions play a central role in such an endeavour[11]**.

At present, there are a number of valuable works which analyse either the FIDIC standards or the contract model regulated by Government Decision No. 1/2018. However, these works do not address all of the legal institutions newly introduced by Government Decision No. 1/2018 and related normative acts applicable to public procurement and construction overall. The lack of doctrinal analysis regarding these institutions leaves a wide range of practical issues unclarified and unresolved – issues which have a significant impact on the proper functioning of public works procurement projects.

2. Analysis of the Supervisor's duties under the National Construction Contract governed by Government Decision No. 1/2018 and under Law No. 10/1995

G.D. no. 1/2018 defines the Supervisor as "*an economic operator or a team within the Employer's organization, appointed by the Employer. The Supervisor has technical, financial and contractual duties as set out in the Contract Conditions. [...] The Supervisor includes in its team authorized site inspectors in accordance with the Law and any other personnel necessary to fulfil its role*." and it also includes this entity among the Employer's

[9] FIDIC Credentialing Ltd, *Certification Schemes – Contract Manager*, available at: *https://fidiccredentialing.org*.

[10] FIDIC, *FIDIC Credentialing Handbook*, Geneva, 2023, p. 7-9.

[11] *"The context in which legislation is adopted and, especially, the explanatory memoranda/notes of substantiation underlying its adoption are important aspects that must be taken into consideration when interpreting the law"* as a leading contemporary doctrinarian and practitioner strongly emphasises – Lidia Barac, *"Guidelines for Interpretation in Law. Guide to Interpretation in Civil Matters"*, 2nd ed., 2023, Universul Juridic Publishing House, Biblioteca Profesioniștilor, p. 161.

Personnel. The term Supervisor is thus used with an equivalent role to that of Engineer in FIDIC contracts. The legal regime established by G.D. no. 1/2018 for the Supervisor creates a profoundly hybrid contractual position, located at the intersection of **technical mandate, contractual administration, employer representation, financial assessment and dispute management**. Complementarily, Law no. 10/1995 designates the Supervisor as a "*involved factors*" (in ensuring the quality and safety of construction works) and regulates not only basic technical and administrative duties but also **a substantial legal liability for its activity within the project** – not only towards the Employer but also **towards other actors involved in execution and even towards third parties**. This plurality of functions and responsibilities – distributed concentrically and regulated by distinct normative acts with different purposes – reveals **the absence of a unified classification of the Supervisor's prerogatives and creates the premises for doctrinal confusion** and, more importantly, an inherent tension between the Supervisor's role as the Employer's agent/representative and its quasi-impartial decision-making role in relation to the Contractor's claims, with significant practical implications.

2.1. Supervisor's duties under the National Construction Contract[12]

The duties set out for the Supervisor under G.D. no. 1/2018 reveal several functional dimensions:

The Technical dimension – between conformity control and the power to issue binding instructions. The Supervisor performs permanent technical monitoring of the execution of the works, verifying compliance with technical design, technical specifications and applicable construction law (arts. 14-15 G.D. no. 1/2018). These duties appear as a delegation of technical verification on behalf of the Employer. The Supervisor's instructions are mandatory for the Contractor, and in some cases even for the Employer. Some of these powers may be exercised **independent of the Employer's prior approval** – giving the Supervisor a level of **delegated technical authority** capable of directly influencing the pace, methodology and compliance of execution. Legally, this prerogative resembles a **technical mandate with executive powers**, yet without the professional

[12] We use this term in order to designate both of the contract modals imposed by G.D. no 1/2018.

standardization seen in traditional FIDIC practice or in jurisdictions such as the UK (RICS)[13] or Germany (HypZert)[14]. Even more importantly, the Supervisor's ability to issue decisions with direct financial impact goes far beyond a purely technical role, positioning the Supervisor as a decisive actor in shaping the Parties' rights.

The contractual administration dimension – de facto authority in managing communications and contractual evidence. The Supervisor operates as the **exclusive intermediary for formal communications between the Employer and the Contractor** (Art. 16, Art. 55, Art. 69 G.D. no. 1/2018), thus gaining control over the information flow and over the legal evidence structure of the contract. Managing registers, validating site documents and issuing procedural certifications transform the Supervisor into **a real administrator of the contractual process**, with impact on how the Parties exercise their rights. In practice, such duties are associated with a **contractual management function with constitutive effects**, since the procedural acts of the Supervisor are mandatory prerequisites for the existence of patrimonial rights (e.g. through payment certificates, decisions regarding claims or acceptance documents). This strengthened position raises the issue of **indirect judicial control**, since the documents issued by the Supervisor cannot be challenged autonomously, but only within disputes filed against the Employer or the Contractor.

The representation dimension – an extended mandate with potential conflict of interest. In the exercise of its role within the project, the Supervisor acts as a direct representative of the Employer (Art. 5, Art. 14, Art. 16 G.D. no. 1/2018), being however entrusted also with the protection of the public interest. This position generates a **structural asymmetry** in relation to the Contractor, since the mandate implies to some extent either a legal loyalty towards the Employer or a tendency to undermine the legitimate

[13] Royal Institution of Chartered Surveyors (RICS) – a British professional body, founded in 1868, which accredits professionals in the fields of construction, property and real estate; a "chartered surveyor" holding the designation MRICS or FRICS is internationally recognized as a standard of excellence and is subject to a strict code of ethics, competency requirements and continuous professional development.

[14] HypZert GmbH – a German certification body for real estate valuers, operating in accordance with international standard ISO/IEC 17024; HypZert certification (e.g. "HypZert M", "HypZert F") requires periodic validation, re-certification every 5 years and continuous professional monitoring of valuers, ensuring a high level of competence, transparency and technical neutrality.

interests of the Contractor (the Contractor's interests being always private in nature and therefore subordinated to the public interest). The conflict of interest thus appears structurally: the Supervisor is simultaneously **an agent of the Employer and decision-maker regarding the claims of the Contractor and of the Employer**, placing him/her in a position that is difficult to reconcile with the principle of decisional impartiality inspired by FIDIC contracts.

The financial dimension – decision-making competence with direct patrimonial effects. The duties concerning the certification of payments, the validation of the work situations, the approval of additional costs and the performance of contractual adjustments (Art. 37, Art. 55 G.D. no. 1/2018) grant the Supervisor **substantial financial power,** exercised through acts with direct effects on the financial flow of the contract. This configuration leads to a paradoxical situation: an economic operator **who is a third party** (the Supervisor is not formally one of the Parties of the National Construction Contract), engaged by the Employer, has the capacity to produce legal effects similar to decision-making acts with impact on the patrimony of the other contracting Party. In doctrinal terms, the prerogative of the Supervisor acquires the nature of a technical-financial act with constitutive effect, although it cannot be qualified as an administrative act, as **it is not issued by a public authority**[15] [16]. This mechanism is problematic for the **security**

[15] A detailed analysis of the legal nature of the Supervisor's decisions is presented in the article: *"On the legal nature of the decision of the engineer issued in connection with the performance of administrative contracts concluded on the basis of the FIDIC model"*, Mihai Baesu, Revista de Drept Public 3/2023. After substantial and valuable doctrinal and case-law research, the author concludes that *"it can be stated with a high degree of certainty that this does not represent a unilateral administrative act"*, a conclusion which we also share in this paper. The same conclusion is emphasized also in the work of O. Puie, L., *"Special contentious matters concerning spatial planning, urban planning, authorization of the execution of construction works and sanctions applicable for failure to comply with construction discipline"*, Universul Juridic 2022, Chapter XXII.

[16] The case-law of Romanian courts is consistent in denying Supervisor's Decisions the status of administrative acts, e.g. Bucharest Tribunal, 6th Civil Division, civil judgment no. 1374/20.05.2021, available on the *www.rejust.ro*: *"[Also, the court cannot uphold the defendant's submissions regarding the legal nature of the document issued by the FIDIC Engineer, since, considering the responsibilities and authority of the latter, as these notions are regulated by sub-clause 3.1 of the Special Conditions of the contract concluded by the Parties, the court finds that the FIDIC Engineer does not act in the regime of public authority, so that it could be considered that the legal act issued by the latter would have the legal nature of an administrative act within the meaning of the*

of the rights and legitimate patrimonial interests of the Contractor, in the absence of institutional or legislative guarantees of impartiality and control in the hands of the Supervisor.

The legal dimension – quasi-jurisdictional function without adequate procedural guarantees. According to G.D. no. 1/2018, the Supervisor is called to receive, analyze and resolve the claims of the Parties, retaining the obligation to issue a motivated and "*equitable"* decision, with direct impact on the rights to extension of time and to additional costs. Even though the Supervisor's decision is not "*final*" in a jurisdictional sense (as it may be challenged by the Parties within actual jurisdictional forums), it still generates legal effects in the real dynamics of the contract: for example, it may condition the issuance of addenda to the contract, it may delay payments, it may establish the amount of certain rights and, in some cases (in the absence of vigilance of the Parties to contest these decisions) it may condition the exercise of the Parties' contractual rights before jurisdictional bodies through the mechanism of forfeiture of rights. This dimension of the Supervisor's activity transforms the Supervisor into a "***technical arbitrator"*** lacking still the guarantees of arbitration, which may lead to power imbalances and extensive disputes. At the same time, this competence exceeds the traditional scope of a technical mandate, acquiring characteristics of a **quasi-jurisdictional function**, although such a role requires the existence of guarantees regarding impartiality, an adversarial procedure, access to evidence and independence of the decision-maker – elements which G.D. no. 1/2018 does not currently regulate, **especially as the contract models regulated by this normative document, have not incorporated the institution of the Dispute Adjudication Board** (a body complementary to the Engineer in the FIDIC system). By removing from the body of the National Construction Contract the institution of the Dispute Adjudication Board (and its specific procedure) provided by FIDIC standards, G.D. no. 1/2018 does not establish a robust procedural regime for the resolution of disputes between the Parties, and the status of the Supervisor – as he is contracted by the Employer – weakens the credibility

provisions of Art. 2 letter c) of Law no. 554/2004. Moreover, the claimant's possibility to request the competent court to amend the method of resolution adopted by the FIDIC Engineer results expressly from the provisions of sub-clause 3.5 of the Special Conditions of the contract concluded by the Parties."].

of its decision in the perception of the Contractor and contributes to destabilizing the relationship between the Parties.

2.2. The Supervisor's duties and liability under Law no. 10/1995

he reform of Law no. 10/1995 on construction quality, through its successive amendments, has introduced a structural change in the architecture of actors responsible for ensuring the quality and safety in construction works, by expressly recognizing the Supervisor as an "*involved factor*" (in ensuring the quality and safety of construction works) within the meaning of Art. 6 of the Law. This recognition represents **a significant doctrinal shift**: the Supervisor is no longer just a contractual creation of the *lex specialis* in public procurement (G.D. no. 1/2018), but he becomes a true **legal subject with its own statutory obligations**, part of the public system for the scope of construction quality and safety. Law no. 10/1995 (as amended by Law no. 204/2020) introduces both the notion of Supervisor itself[17] and also sets of duties, responsibilities and, above all, a**n extended legal liability for the Supervisor** for activities carried out within the project. **Without establishing a legal framework for certification/authorization,** as in the case of the other "*involved factors*" in ensuring the quality of works, the Supervisor is included in this category with the same "rank" applicable to architects, verifiers, site inspectors and contractors, Art. 6 para. 3 of Law no. 10/1995 also providing that "*the Supervisor becomes a factor involved within the meaning of para. (1)* ***for the stages specified in the consultancy or technical assistance contract, and the responsibilities related to those stages shall lie with him/her according to the law, jointly with designers and contractors"***.

Art. 22^1 of Law no. 10/1995 regulates a set of duties and responsibilities for the Supervisor, comparable (but by no means identical) to those imposed by G.D. no. 1/2018, as follows:

The technical dimension. According to Law no. 10/1995, the Supervisor (when designated in the project) exercises the technical quality control throughout the execution of the works and for all specialties and stages for

[17] Art. 6 para. (2) of Law no. 10/1995: *"For the purposes of this Law, the actors involved referred to in para. (1) are: investors, owners, administrators, users, contractors, consultants, supervisors, researchers, designers, certified project verifiers, certified technical experts, certified energy auditors for buildings, authorized technical managers for execution, authorized site inspectors, ...".*

which he/she is contracted by the Employer, through duties such as: control of the quality of materials installed, the means of execution of the works, the technological process and compliance with the fundamental requirements regarding construction quality (Art. 22^2 para. (1) letter a) Law no. 10/1995); participation in verifications related to the determining phases of execution and approval of the transition to subsequent stages (Art. 22^2 para. (1) letter b), letter d) Law no. 10/1995); requesting the immediate cessation of the works and correction of improperly executed works (Art. 22^2 para. (1) letter c), corroborated with Art. 24 para. (1) Law no. 10/1995). At the same time, the Law establishes as a fundamental responsibility of the Supervisor the assignment **of certified/authorized technical personnel** for supervising the works and for verifying and ensuring their quality and conformity with the requirements of the technical design and applicable technical norms. The Supervisor does not thus become himself/herself a certified specialist, but rather represents a "*technical guarantor*" of the Employer, engaging in the role of coordinating the activity of certified specialists hired by the Supervisor for the purpose of the project, and assuming the obligation to identify, report and monitor the quality of works and the remediation of technical nonconformities.

The administrative dimension. These duties are only comparable, but not identical to those included in G.D. no. 1/2018, in the sense that the Law does not require that all communications between the contracting Parties be carried out through the Supervisor. At the same time, the Law focuses primarily on technical matters closely linked to public interests also in the administrative dimension of the Supervisor's activity, through imperative duties such as: keeping records concerning quality control and documenting execution; notifying the competent authorities in the case of serious breaches (the Supervisor has the legal obligation to notify the State Inspectorate for Constructions (ISC) when he/she finds significant deviations from the design or from quality standards even against the will of the Employer) or participating in the acceptance of the works and preparing the documentation required for acceptance (under the Law, the Supervisor becomes a "co-participant" in the legal act of acceptance, an act with constitutive effect on the performance guarantee).

The representation dimension. Unlike G.D. no. 1/2018, the Law does not formally confer to the Supervisor the role of representative of the investor/Employer; on the contrary, Law no. 10/1995 establishes a legal regime much more focused on the technical dimension and on the protection

of the public interest rather than on the management of the construction works contract between Employer and Contractor. Such legal reflexes – representation of the Employer – may only be inferred indirectly from the technical duties of the Supervisor.

The financial dimension. The Law does not explicitly grant the Supervisor direct financial duties in the sense of certifying payments or determining the value of reciprocal claims of the Parties to the construction works contract, as do the provisions of G.D. no. 1/2018. Nevertheless, the Law grants to the Supervisor technical powers with **indirect financial impact**, through duties relating to determining the volume of the works, participating in the acceptance of the works, identifying nonconformities, etc. Such duties include: validating the volume of works executed for acceptance by certifying the reality and conformity of the works (duties which the Supervisor also fulfils through certified site inspectors); analyzing and informing the Employer regarding the remediation of defects in the works and even regarding design faults. Thus, through his/her duties of technical validation, the Supervisor may influence the recognition of the Contractor's receivables in relation to the Employer and even the recognition of additional works, but not as direct prerogatives, but as effects of strictly technical powers.

The legal dimension. Unlike G.D. no. 1/2018 (where the Supervisor, through his contract administration duties, has a central role in addressing disputes between the Parties in the pre-litigation stage), under the Law the Supervisor has only a consultative role in such matters, which is also limited to situations such as the occurrence of nonconformities of the works and does not extend to financial matters or matters related to execution deadlines. On the contrary, the Supervisor has the obligation to provide "**simple" motivated technical opinions** regarding possible disagreements concerning the conformity of the execution of the works, without the Law granting any decision-making power to the Supervisor in such matters. It is true that, beyond the provisions of the Law as such, in disputes between the Parties to the construction works contract, the Supervisor's position may constitute a decisive technical piece of evidence regarding the Contractor's fault or the existence of design deficiencies, just as it may contribute to supporting the Contractor's claims in relation to the Employer (e.g. for payment of additional works, for extensions of time with the consequence of exempting the Contractor from liquidated damages etc.). Nevertheless, under Law no. 10/1995 the documents and opinions issued by the Supervisor shall only

have the status of written evidence in such disputes and judicial technical expert reports will probably be required in most cases, in order to validate the conclusions and opinions of the Supervisor.

2.3. The Supervisor's liability under Law no. 10/1995

If, as regards the duties of the Supervisor, substantial similarities can be identified between the provisions of G.D. no. 1/2018 and those of Law no. 10/1995, **as regards the liability of the Supervisor for his/her activity within the project, Law no. 10/1995 is much more robust.** This is due to the purpose of Law no. 10/1995: it is not "partisan" to either Party, but has as its sole aim a public order objective, namely ensuring the quality and especially the safety of works. At the same time, the differences in approach between the two normative acts, may also be due to the fact that, unlike the National Construction Contract, **to which the Supervisor is not a Party** and which is not enforceable upon him automatically, Law no. 10/1995 gives rise to direct legal relationships, of a legal nature, not only between the Supervisor and the Employer, but also between the Supervisor and the Contractor and other actors involved in the execution of the works.

Tort liability of the Supervisor. By the inclusion of the Supervisor among the category of "*involved factors*" and by the establishment of legal obligations governed by Art. 22^2 of the Law, the liability of the Supervisor is significantly extended compared to his/her previous legal position prior to the amendment of Law no. 10/1995. Prior to Law no. 204/2020, the Supervisor could be held liable only by the Employer and only in the contractual realm, based on the contractual legal relationships between them; at present, the Supervisor is also subject to other forms of legal liability, tort and contraventional liability (but not criminal liability, as analyzed below). As an effect of the obligations established under Art. 22^2 (obligations which, by their content, nature and purpose, exceed the legal relationships between Employer and Supervisor), the Supervisor is now liable in tort towards any legal subject who may justify and prove the infringement of one of the Supervisor's legal obligations, the existence of damage and the causal link between the Supervisor's act and the damage concerned. The tort liability of the Supervisor towards the contractor, architect, other "*involved factors*" or even towards third parties is based on the fact that Law no. 10/1995 grants to the Supervisor a set of autonomous legal obligations, distinct from contractual ones, such as guaranteeing

fundamental quality requirements, reporting nonconformities and exercising technical control through certified specialists, obligations whose infringement may directly cause damage to these actors involved in the construction process or to third parties.

This paper does not offer sufficient space for detailed analysis of the cases that may trigger the Supervisor's tort liability in relation to entities other than the Employer, but we note a few relevant examples of situations in which the Supervisor's liability may be engaged in relation to the Contractor and the Designer. **In relation to the Contractor**, the liability of the Supervisor may be engaged when he issues erroneous technical instructions or instructions not compliant with applicable regulations, fails to identify or report obvious nonconformities in design or even in execution, culpably delays the certification of work situations or imposes unauthorized technical solutions, thus causing direct damage to the Contractor in the form of additional costs, delays or remedial works which are not attributable to the Contractor or which, even if attributable to the Contractor, could have been remedied at lower cost if signaled in accordance with the requirements of the Law. **In relation to the architect**, the Supervisor may be liable in tort when, in breach of his legal obligations, he formulates unfounded technical imputations/accusations against the designer in his mandatory reports, or requests changes to the design without technical basis, fails to communicate essential information regarding execution to the architect or misinterprets technical documentation in a way that leads to re-design of works, causing the architect professional or patrimonial damage.

The regulatory (contraventional) liability of the Supervisor. The regulatory liability of the Supervisor is primarily shaped by Art. 36 letter k) of Law no. 10/1995. The contraventional rule sanctions the non-compliance with essential obligations arising from the provisions of Art. 22^2 letters a)-d) and Art. 31, thus outlining a sanctioning regime adequate to the role fulfilled by the Supervisor in guaranteeing fundamental requirements of quality, given that these obligations are of legal nature, not contractual, which justifies the application of a distinct contraventional regime aimed at ensuring the compliance of the Supervisor's conduct with the requirements of technical public order. Falling under Art. 36 letter k) are the non-compliance with obligations provided under Art. 22^2 letters a)-d), which include reporting nonconformities, participation in determining phases, drawing up mandatory technical documentation and implementing a personal quality management system. The rationale of the Law is correct

since infringement of these obligations may compromise the technical integrity of the construction and may endanger the safety of users, and for this reason Art. 36 letter k) operates as a mechanism of prevention and discipline. Finally, Art. 31 establishes the obligation of the Supervisor to conclude a professional civil liability insurance policy, and failure to comply with this requirement also triggers contraventional liability. This obligation protects the Employer and third parties against professional risks inherent to supervision activity, and its non-compliance directly affects the legal safety of the entire investment process.

Criminal liability of the Supervisor (or rather lack thereof). If in the tort and regulatory responsibility realm, we have no reservations in supporting the Supervisor's liability, in the criminal sphere – especially given the specificities of criminal liability, to be interpreted and applied in the "*most restrictive"* manner – we have serious reservations in outlining a regime of criminal liability for the Supervisor under Art. 35 and Art. 37 para. (3) of the Law.

As regards the criminal offences regulated under Art. 35, which concern "*designing, verifying, expertising, carrying out a construction or performing modifications to it without complying with technical regulations concerning structural stability and resistance"*, in our opinion the material elements of the offence (which consist of concrete acts that are not performed by the Supervisor) exceed the duties of the Supervisor, even if he has a decisive role in the implementation of the project and explicit responsibilities of verification and technical validation in relation to all "*involved factors"*. As regards the criminal offences governed by Art. 37 para. 3 of the Law, our reservations concern the terminology of the incriminating rule, according to which the active subjects of the offences in this case are "**certified/authorised specialists"**. Thus, although the incriminating rule aims to punish criminally the contraventional acts regulated by Art. 36 when they have extremely serious consequences, it subjects to criminal liability only persons and entities that hold a formal certification or authorization, while the Supervisor, as shown above, although regulated by the Law with a substantial set of duties and obligations, is not subject to an authorization regime. In our opinion the current form of Art. 37 para. (3) of the Law does not reflect in any way the intention of the legislator and is not in line with the purpose of the Law which ultimately pursues a clear outcome: "*the quality and safety of construction works"*. In light of the purpose of the Law, there should not be any distinction between the active subjects of the offence

on the basis of the certification/authorization criterion, as long as the causal link between the breach of an imperative rule of public order among those sanctioned administratively and the outcome regulated by Art. 37 para. (3) can be proven. Nevertheless, until a future amendment of the Law to include Supervisors among the active subjects of these offences or until the regulation of Supervisors as "*certified/authorized specialists"*, the Supervisor cannot be criminally sanctioned, but may be liable (possibly jointly with the active subjects of such offences) towards the "*victims*" of their acts only under tort liability.

Therefore, the Supervisor's liability regime under Law no. 10/1995 is a complex one[18], and is no longer today a purely contractual derivative, but a legal liability integrated into the public regime of construction quality, expressed in civil (tort and, possibly, contractual towards the Employer), administrative and, possibly in the future, criminal spheres.

2.4. Brief comparative analysis between G.D. no. 1/2018 and Law no. 10/1995 on the role, responsibilities and liability of the Supervisor. The issue of the enforceability of the Supervisor's Decisions

At present, the regulations applicable to the Supervisor in the field of public construction works reveal a structured dissonance between two distinct legal regimes: the regime of technical public order, established by Law no. 10/1995 on construction quality, and the contractual regime, inspired by FIDIC contracts, configured by G.D. no. 1/2018. In contrast with the normative rigor of Law no. 10/1995 (where the Supervisor has more limited duties, but a much more substantial legal liability), G.D. no. 1/2018 assigns to the Supervisor a much broader range of prerogatives (technical, financial, administrative and dispute management), but without establishing an equivalent legal liability. The Supervisor thus becomes, under this regulation, an actor with a quasi-jurisdictional role in the pre-litigation stage, but without the establishment of minimum guarantees of

[18] Including the obligation to use exclusively certified specialists and to comply with their authorisation framework, joint liability with the authorised site inspector and with the other actors involved, the obligation to conclude professional civil liability insurance – Art. 31 of Law no. 10/1995: *"Designers, the consultant or the supervisor, where the latter is an economic operator, have the obligation to conclude professional civil liability insurance with insurance companies authorised by the Financial Supervisory Authority for the duration of the implementation of the consultancy/supervision contract ..."*.

impartiality and without a specific sanctioning framework. This duality generates uncertainty as to the priority of the Supervisor's obligations, especially in case of conflict between the interests of the Employer and those of the Contractor or in case of conflict between their interests and the imperative technical requirements.

By analyzing this institution comparatively, we have identified several "*legislative conflicts*" between the legal paradigms proposed by the provisions of G.D. no. 1/2018 and of Law no. 10/1995 with regard to the regulation of the Supervisor:

A functional conflict: technical independence vs. contractual subordination. Law no. 10/1995 imposes on the Supervisor the legal obligation of professional independence, including the obligation to notify authorities when the Employer or Contractor violates technical rules. In contrast, G.D. no. 1/2018 presumes contractual subordination towards the Employer, which may limit the Supervisor's freedom of assessment.

A deep conflict regarding liability mechanisms. By way of G.D. no. 1/2018, the Supervisor is liable to the Employer strictly on contractual grounds and not by reference to the responsibilities established by G.D. no. 1/2018, but in relation to the provisions of the supervision contract concluded between the Employer and the Supervisor (a contract which, in practice, in most cases does not even establish duties and responsibilities comparable to those regulated by G.D. no. 1/2018). According to Law no. 10/1995, on the other hand, the Supervisor may be contraventionaly or tortiously liable, **even if his action would be in accordance with the contractual mandate received from the Employer.** At the same time, under the Law, the liability of the Supervisor is one of qualified diligence, since, although the Supervisor does not exercise a certified technical profession, he has the legal obligation to involve in the project (under his/her responsibility) certified technical personnel in accordance with the technical requirements of the project. Thus, a standard superior to that of the ordinary person is imposed, with emphasis on a sort of specialized competence, professional vigilance and preventive action throughout all stages of execution. From this difference in approach between the two normative acts, a disproportion results between imperative technical obligations and liability mechanisms, which may lead the Supervisor to favor the avoidance of administrative risks, even if this generates conflicts with the contracting Parties.

An epistemic conflict. The two normative acts propose two different professional paradigms: a "*contractual supervision*" (G.D. no. 1/2018) is built on the British (FIDIC) paradigm, where the Supervisor is a person with specialised training, whereas a "*technical supervision*" (Law no. 10/1995) is built on a continental, technical-centred paradigm, based on strict administrative certification (ISC). The two professional paradigms are not harmonised, which leads to: confused overlap of roles, lack of uniformity in professional selection, significant variation in the quality of supervision itself.

The issue of enforceability of the Supervisor's decisions towards the Contractor. Finally, in this section we also wish to draw attention to an extremely complex problem with significant practical effects, namely, the issue of the enforceability of the Supervisor's decisions towards the Contractor **in the absence of a direct legal relationship with the Contractor**.[19] [20] The issue of enforceability of the Supervisor's decisions towards the Contractor, in the absence of a direct legal relationship between them, constitutes one of the most nuanced issues of public works procurement law at this moment. The difficulty arises from the overlap of two profoundly different legal regimes: on the one hand, the contractual regime configured by G.D. no. 1/2018, which assigns the Supervisor a decision-making role with direct effects on the Contractor's legal situation in relation to the Employer, and on the other hand, the technical public-order regime established by Law no. 10/1995, in which the Supervisor exercises statutory duties with effects primarily towards the Employer and the public construction-quality system, without generating direct obligations upon the Contractor.

[19] We are not analysing here the claims procedure regulated by G.D. no. 1/2018 (a procedure under which the Supervisor's Decisions are only "temporarily" enforceable upon the Parties, as they may be challenged before a jurisdictional body), but we merely wish to emphasise the legal issues raised by the regulation of the Supervisor's extended duties only in G.D. no. 1/2018, issues which today do not benefit from a solid doctrinal response.

[20] For a concise description of the claims procedure under G.D. no. 1/2018, see Alina Mioara Cobuz Bagnaru, *The resolution of claims and disputes in accordance with G.D. no. 1/2018 and with the Arbitration Rules of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania*, Universul Juridic Premium 6/2019; or *"Determination of the Engineer / Decision of the Supervisor / Rejection Notice issued in accordance with road infrastructure contracts based on the contract conditions imposed by G.D. no. 1.405/2010 and G.D. no. 1/2018. Legal nature and procedural implications"* by Mona Maria Soltan, Alexandra Dan, Mihai Băeșu, available on *www.juridice.ro.*

From a contractual liability perspective, the Supervisor is not a party to the construction contract, and no contractual legal relationship is created between the Supervisor and the Contractor. Formally, the legal configuration of the legal relationships between Supervisor and Contractor is fragmented into two autonomous and parallel relationships: the distinct contractual relationship between the Employer and the Supervisor (supervision services contract), and the contractual relationship between the Employer and the Contractor (based on the National Construction Contract). The legal paradox arises in the normative context created by G.D. no. 1/2018. Although the Supervisor does not have a direct contractual relationship with the Contractor, his technical or financial instructions (Art. 15-16, Art. 37, Art. 69 G.D. no. 1/2018), payment certificates, determinations regarding work situations and even decisions regarding the Contractor's claims produce legally binding effects upon the Contractor. Moreover, the Supervisor becomes an indispensable actor for the conduct of the acceptance procedures, for the approval of contractual modifications, for cost adjustments or for certifying the fulfilment of contractual obligations.

This enforceability with direct effect upon the Contractor is specific exclusively to the contractual regime established by G.D. no. 1/2018 and is not found in Law no. 10/1995, where the effects of the acts of the Supervisor are oriented towards the Employer and the public system of construction quality, without generating direct obligations upon the Contractor.

The legal basis for the enforceability of the Supervisor's decisions under G.D. no. 1/2018 lies in the reflex effects of the Employer's mandate and the legal explanation lies in the special nature of the mandate granted by the Employer to the Supervisor. Although a mandate produces, as a rule, effects exclusively between the principal and the agent, in public works contracts it is configured as a "*mandate with external effects*", which allows the extension of the Supervisor's prerogatives upon the Contractor because, in the tender stage, the Contractor adheres to the provisions of the National Construction Contract and implicitly to the prerogatives which the Supervisor shall exercise in the implementation of the project according to the provisions of the National Construction Contract. In short, by signing the National Construction Contract, the Contractor accepts the applicability of the Supervisor's instructions and determinations, which produces indirect enforceability, but this mechanism is extremely fragile.

This legal architecture, although somewhat functional and not challenged in practice, raises serious theoretical/doctrinal issues, since it allows a non-

contractual actor: to limit patrimonial rights of the Contractor, to exercise prerogatives with quasi-jurisdictional character (determination of claims), to influence the execution and completion of the contract, to be in a potential structural conflict of interest, given its contractual dependence on the Employer.

Under the regime of Law no. 10/1995, the issue is simpler. Under the Law, the Supervisor does not issue decisions with binding effect upon the Contractor, but his/her technical acts are enforceable towards both the Contractor and the Employer as an effect of the statutory obligations of the Supervisor as an "actor" of the public system of control of quality and safety of works, and the possible repercussions upon the Contractor arise from the legal regulation of the quality of works, not from individual acts of the Supervisor.

3. Conclusions and recommendations

The legal regime of the Supervisor in Romania is characterized by a dysfunctional overlap between two normative frameworks: on the one hand, Law no. 10/1995, which establishes severe and multi-layered liability, and on the other hand, G.D. no. 1/2018, which grants the Supervisor an essential contractual role, but without establishing an explicit or autonomous regime of patrimonial liability. This duality produces significant legal consequences, particularly in the relationship between Supervisor and Contractor, entities between which there is no direct contractual relationship, yet the Supervisor's decisions significantly influence the rights and obligations of the Contractor. The analysis of the legal nature of the Supervisor's prerogatives reveals a **multi-faceted structure, but insufficiently delimited and especially regulated in a non-unitary manner**, giving rise to major **risks to contractual balance,** such as: the risk of confusion between technical mandate and decision-making authority; the risk of impairment of the Supervisor's impartiality; the risk of financial imbalance and even of general contractual insecurity. In the absence of a regulated profession and of a certification system (similar to RICS or HypZert), the quality of the Supervisor's decisions depends exclusively on the person and the "*private*" competence of the Supervisor, not on his/her professional status, which is in no way consistent with the spirit of the National Construction Contract nor with the purpose and spirit of Law no. 10/1995. Given not only the technical dimension of supervision activity (which is fully covered by both G.D.

no. 1/2018 and Law no. 5/1995), but also the financial and even jurisdictional implications (at least indirectly) of supervision activity, with impact not only on the Contractor but also on the Employer, there is undoubtedly a current and even urgent need to reconfigure this institution. Such a reform should take into account not only the technical dimension of supervision activity but also aspects such as the source of inspiration for this institution and models offered by other States (models which have functioned and have endured the test of time and complexity of projects involving supervision services) and could target the following main directions:

The establishment of a unified professional status of the Supervisor. Given the complexity of duties and the systemic impact of supervision activity on quality, safety and technical discipline in construction works, it is necessary to configure **a legal and unified professional status of the Supervisor, integrated into the body of Law no. 10/1995**. Such a reform implies, first of all, the introduction of conditions for access to the profession, through the establishment of a system of technical-professional certification specific to supervision, distinct from the regime of site inspectors and design verifiers, accompanied by the **obligation of continuous professional development** (typical of most liberal professions) and by the establishment of minimum standards of competence and ethical conduct, similar to those applicable to specialized technical professions in comparative law[21]. Complementarily, we consider necessary the establishment of a National Register of Supervisors in Construction Works, organized by a competent central authority (such as the State Inspectorate for Constructions) or by an autonomous professional institution, following the model of *Ingénieurs qualifiés* in France or Chartered Surveyors[22] in the United Kingdom[23]. Finally, a genuine professionalization of the function should be strengthened by the establishment of **a specific disciplinary regime,** adapted to the particularities of supervision activity, distinct from the administrative sanction regime established by Law no. 10/1995 and independent from that applicable to other categories of specialists involved in the construction process. These elements are fully compatible with the tradi-

[21] S. Keating, *Keating on Construction Contracts*, Sweet & Maxwell, 2021, p. 112-118.

[22] P. Malinvaud, *Droit de la construction*, Dalloz, 2020, p. 65-79.

[23] Royal Institution of Chartered Surveyors (RICS), *Global Professional and Ethical Standards*, 2016.

tions of advanced systems such as the United Kingdom, where Contract Administrators and Engineers are subject to a strict professional corpus, elaborated by RICS, ICE and ACE.

Unification of technical and contractual duties in a coherent normative framework. The current fragmentation of the Supervisor's duties between the provisions of Law no. 10/1995 and those of G.D. no. 1/2018 generates interpretative difficulties, functional overlaps and legal uncertainty. Consequently, the establishment of a single (or at least unified) normative framework is necessary, where technical and contractual duties are logically integrated into a coherent legal architecture. An adequate legislative solution could be the inclusion of the duties laid down by G.D. no. 1/2018 in a technical annex of Law no. 10/1995, together with the express definition of the four functional pillars of supervision: (i) technical duties regarding control of execution quality, (ii) contractual duties concerning the administration of the legal relationship Employer-Contractor, (iii) financial duties regarding verification and certification of work situations and (iv) pre-litigation duties in the field of claims analysis. Such clarification would eliminate the ambiguities generated by the overlap of legal regimes and would ensure more uniform application of the rules in public procurement practice.

Formal regulation of the obligation of impartiality of the Supervisor in claim resolution procedures. While the FIDIC model enshrines the obligation of the Engineer to resolve the Parties' claims "*fairly*" and "*neutrally*", Romanian law contains no express provision imposing on the Supervisor a standard of impartiality in exercising his/her decision-making prerogatives. Since in contracts governed by G.D. no. 1/2018 the Supervisor has quasi-jurisdictional duties, including in determining claims, we consider it necessary to introduce in legislation a statutory obligation of impartiality, accompanied by the definition of conflict-of-interest situations and corresponding sanctions. At the same time, for high-complexity projects, the mandatory use of alternative dispute resolution mechanisms, such as Dispute Boards, should be regulated, following the model of international FIDIC projects, thus contributing to reducing pressure on the Supervisor and increasing the predictability of decision-making and even relieving administrative courts from disputes concerning the performance of public works procurement contracts, in accordance with the objective stated in the Explanatory Memorandum to Law no. 212/2018.

Introduction of a unitary liability regime for the Supervisor. Given the current duality between public-order statutory responsibilities established by Law no. 10/1995 and the extended prerogatives conferred to the Supervisor by G.D. no. 1/2018, it is necessary to establish a unitary liability regime compatible with the complex and multidimensional role of this actor. Firstly, the statutory joint liability established by Law no. 10/1995 should be correlated with the decision-making prerogatives of the Supervisor under the National Construction Contract, in order to avoid situations in which he/she exercises technical and contractual authority without a liability corresponding to the powers granted under this contract. Secondly, it is necessary to configure a direct contractual liability towards the Contractor, limited to acts issued with excess of power or in breach of impartiality duties, in order to ensure the structural balance of the contract. Thirdly, we consider it appropriate to establish a separate professional sanction regime, inspired by models established in comparative law – the RICS Code of Ethics (United Kingdom), the disciplinary mechanisms applicable to *Ingénieurs des Travaux Publics* (France) or the sanctioning regime of Bauüberwacher in Germany – all these systems having in common the requirement of **a high level of professional liability correlated with the exercised competencies and duties**.

Clarification of the legal framework regarding the enforceability of the Supervisor's decisions in relation to the Contractor. As shown above, Romanian legislation does not currently define sufficiently the legal regime of enforceability of the Supervisor's decisions towards the Contractor, which generates significant practical difficulties. For this reason, we consider that legal rules with universal applicability (such as Law no. 10/1995) should explicitly establish, in perfect correlation with the provisions of G.D. no. 1/2018: (i) the nature and extent of the legal effects of the Supervisor's decisions, (ii) a procedural regime for challenging such decisions, with clear deadlines and conditions, and (iii) situations in which the Supervisor may be civilly liable to the Contractor for acts issued in breach of his/her powers or with excess of authority. Such clarification is essential for restoring contractual balance, protecting the rights of the Contractor and for the professionalization of the Supervisor's role in public works procurement.

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THE PENALTY CLAUSE IN THE DIGITAL ERA

Florentina PETRE*

ABSTRACT

Civil contracts represent an essential component of daily life, particularly in the digital era, given the rapid evolution of electronic commerce. An increasing number of contracts are concluded through electronic means – such as email, websites, online platforms, or digital applications, and sometimes even through artificial intelligence – due to the accessibility offered by these mechanisms. In the current context of expanding digitalization and automation, as well as the rise of artificial intelligence technologies, the penalty clause, as an instrument for ensuring the performance of contractual obligations, acquires new dimensions adapted to the digital environment, beyond its traditional structure regulated by the Civil Code. This article analyzes modern methods of forming digital contracts, the validity of penalty clauses included in such contracts, the mechanisms of electronic evidence for non-performance, the effective application of penalties in this context, and the role of new technologies in shaping contractual relationships. Furthermore, it also addresses smart contracts, in which the enforcement of penalty clauses occurs automatically, and analyzes the functioning of automated penalty clauses, as well as the triggering of penalties based on digital data from technical systems. The article highlights the need to adapt traditional principles to the new technological reality. Digitalization does not remove or invalidate the mechanism of the penalty clause but rather imposes new standards of interpretation to ensure the compatibility and efficiency of this legal institution. The conclusions emphasize the need to adapt the regulatory framework and the practices of digital operators to the principles of good faith, transparency, and consumer protection.

KEYWORDS: *penalty clause; digitalization of legal institutions; electronically concluded civil contracts; artificial intelligence;*

1. Introductory aspects

Technological developments over the past two decades have led to a radical change in the way parties conclude civil contracts. From traditional written documents, parties have shifted toward digital platforms, mobile

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applications, automated systems, and intelligent contracting models. Electronically concluded contracts are no longer an exception but have become the norm in most commercial fields.

The penalty clause remains a fundamental legal instrument, intended to ensure the performance of obligations, discourage improper conduct, and provide the creditor with an anticipated assessment of damages.[1] However, complex questions arise regarding the manner in which consent is expressed in a click-wrap contract, the validity and method of establishing a penalty clause inserted into an electronic document, the evidence required to prove non-performance, and the role of artificial intelligence in administering and enforcing penalty clauses.

In 1996, the United Nations Commission on International Trade Law adopted the Model Law on Electronic Commerce with the aim of facilitating commerce through electronic means. In particular, the law guarantees equal legal treatment between paper-based documents and those in electronic format.[2]

In Romania, electronic contracts are regulated by the Civil Code[3], as well as by Law no. 365/2002 on electronic commerce[4] and Law no. 455/2001 on the electronic signature[5]. Accordingly, contracts concluded via email, platforms, applications, websites, and similar means do not require a physical, handwritten form, as consent is freely expressed through a simple click or by using an electronic signature.

According to Article 7(1) of Law no. 365/2002 on electronic commerce, "contracts concluded by electronic means produce all the effects recognized by the law for contracts, when the legal conditions required for their validity are met."

[1] L. POP, "Regulation of the Penalty Clause in the Provisions of the New Civil Code", in *Dreptul* no. 8/2011, p. 11 et seq.

[2] M. Tudorache, *The Contract Concluded by Electronic Means under the Regulation of the New Civil Code*, C.H. Beck Publishing, Bucharest, 2013, p. 7.

[3] See Article 1245 of the Civil Code.

[4] See Law No. 365/2002 on Electronic Commerce, republished in the Official Gazette No. 959 of 29.11.2006.

[5] See Law No. 455/2001 on the Electronic Signature, republished in the Official Gazette No. 316 of 30.04.2014.

2. Validity of the penalty clause – electronic consent

If, in the traditional environment, the parties negotiated directly and signed a written document, in the digital environment consent is expressed through electronic actions such as clicking, ticking a box, registering, sending data, or using an electronic signature.

In practice, consent is usually expressed through mechanisms such as clickwrap, which requires the explicit acceptance of terms by pressing an "Accept" or "I Agree" button; browse wrap, where the use of the platform implies acceptance of the terms by simply accessing a hyperlink; sign-in-wrap, a combination of the two, where acceptance occurs upon creating an account.[6]

In contracts concluded through applications or platforms, the user accepts preconfigured clauses without the possibility of negotiation, which raises concerns regarding contractual freedom and the balance of contractual terms. In the digital environment, contractual freedom is limited by preconfigured platforms, applications, and smart contracts – the parties no longer effectively and individually negotiate the clause but accept it in its standard, pre-formulated form.

According to Article 4 of Law no. 193/2000, a contractual clause that has not been directly negotiated with the consumer will be considered abusive if, by itself or together with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties. At the same time, a contractual clause will be considered as not having been directly negotiated with the consumer if it was established without giving the consumer the opportunity to influence its nature, such as standard-form contracts or general terms and conditions commonly used by traders in the market for the relevant product or service.

Although the digital environment changes he form in which parties express their consent, the validity of the penalty clause is, in principle, not affected as long as the rules of common law are respected, and consent is given seriously, freely, and with full knowledge of the facts.[7] Therefore,

[6]Article available at: *"What Is a Clickwrap Agreement?"* - DocuSign Blog, *https://www.docusign.com/blog/what-is-a-clickwrap-agreement.*

[7] C. Spasici, *Contractual Consent: Civil and Consumer Law*, Universitară Publishing, Bucharest, 2023, p. 53 et seq.

inserting a penalty clause into an electronic contract does not require a conceptual adaptation but merely a technical one.

The qualified electronic signature, legally equivalent to a handwritten signature, serves to prove the consent given and allows the verification of the user's acceptance of the penalty clause. According to Article 5 of Law no. 455/2001, an electronic document is assimilated, in terms of its conditions and effects, to a private written document if it is incorporated with an advanced electronic signature.

Including a penalty clause in an electronic contract, accepted with a single click, generally does not raise legal difficulties, being sufficient to produce legal effects. However, in the digital environment, there is a significant risk that the debtor of the obligation does not read the contract in its entirety.

Thus, a rigorous approach regarding transparency and the genuine informing of contracting parties is required. Ideally, platforms and applications should display the penalty clause as visibly as possible, highlight separately those provisions that have a significant impact on the user, and request express confirmation via a dedicated checkbox. Such practices do not merely aim at obtaining formal acceptance of terms but enable the user to make an informed decision and contribute to the real protection of consumers in the digital environment, avoiding the mere mechanical ticking of the "I accept the terms and conditions" box.[8]

3. The method of establishing the penalty clause in digital contracts

The penalty clause may be preconfigured, electronically negotiated, or included in smart contracts.

A. Preconfigured Clause

The preconfigured penalty clause is one unilaterally introduced by the professional (platform, application, online merchant) in the general terms and conditions, which the user does not negotiate but simply accepts as a whole. It is characteristic of standardized "business to consumer" (B2C) and "business to business" (B2B) contracts, being encountered especially in

[8] A. Bleoanca, *The Contract in Electronic Form*, Hamangiu Publishing, 2010, p. 15 et seq.

electronic commerce, digital services, subscriptions, and mobile applications. The user does not negotiate the clause but accepts it through a click or by ticking a box. This practice raises issues related to contractual freedom and balance, making it necessary that the clause be clearly and visibly presented and expressly accepted in order to be enforceable. The doctrine has often emphasized that merely inserting the clause in an extensive and difficult-to-access document (for example, a lengthy hyperlink) is not sufficient for its validity. Likewise, it has been noted that, in the digital environment, the requirement of adequate information becomes essential for enforceability. If the professional does not highlight the penalty clause, it may be deemed abusive with respect to the consumer.[9]

Although it does not concern the penalty clause directly, the High Court of Cassation and Justice of Romania (ICCJ) established in Decision no. 23/2019 that electronic acceptance of contractual terms can produce legal effects, but only if the platform proves that the user had a real opportunity to become aware of their content.

Moreover, the Court of Justice of the European Union (CJEU), in Case C-49/11[10], established that informing the consumer through a simple link is not sufficient to consider the terms accepted, which implicitly applies to penalty clauses in contracts as well.

B. Electronically Negotiated Clause

The electronically negotiated penalty clause is specific to contractual relations between professionals, where the parties discuss and adjust the terms of the contract using email, dedicated negotiation platforms, or contract management applications. Electronic negotiation is equivalent to traditional negotiation, and communication via e-mail can fully prove the parties' agreement. In this case, the value of the clause and the conditions of its application result from the parties' genuine consent.

[9] *Ibidem*.

[10] See the CJEU Judgment in Case C-49/11, Content Services Ltd v Bundesar beitskammer, 05.07.2012, available at: *https://curia.europa.eu/juris/document/document.jsf?docid=124744&doclang=RO#Footnote*

C. Smart Contracts

A smart contract is a computer program that automatically executes contractual provisions when certain predetermined conditions ("if-then") are met. As self-executing software programs, smart contracts operate on block-chain technology and, unlike traditional legal contracts, once the agreement is concluded and the contract is deployed, neither party can modify it. It executes automatically, without interruptions, alterations, or the possibility of being breached.[11]

The penalty clause inserted in this type of contract is automated – the program applies the penalty as soon as non-performance of the obligation is detected. The program code determines the execution conditions and penalties automatically, without human intervention.[12] This ensures immediate enforcement of the clause and transparency in calculating damages. However, legal issues arise if the algorithm makes mistakes or fails to fully reflect the parties' agreement.

A relevant example of the application of smart contracts in electronic commerce is the purchase of a good with payment in installments, where a penalty clause for late payments is included. Suppose a client purchases a laptop through an online platform and chooses to pay in three monthly installments. The platform uses a smart contract that encodes all obligations of the parties: the total price, the number and amount of the installments, due dates, and the penalty clause providing that, in case of delay, 5% of the outstanding installment is automatically charged. Moreover, ownership of the laptop will be transferred to the client only after full payment of all installments.

Once the client confirms the purchase and pays the first installment, the monitoring of due dates for the following installments begins automatically. If payments are made on time, the contract executes without any intervention, and the amounts are transferred to the trader without penalties. However, if an installment payment is delayed, the smart contract automatically applies the stipulated penalty, with the corresponding percentage deducted from the outstanding sum and transferred to the client or the trader,

[11] R. Onufreiciuc, L-E. Stănescu, "Regulation of the Smart Contract in (Romanian) Civil Law", European Journal of Law and Public Administration, 2021, Vol. 8, Issue 2, pp. 95-111, available at: https://doi.org/10.18662/eljpa/8.2/164.

[12] *Ibidem*.

as agreed. After full payment of all installments – including any penalties – the contract automatically confirms the transfer of ownership of the laptop to the client, without any external intervention or possibility of altering the process.

Thus, the example illustrates how smart contracts enable automatic execution of contractual clauses, rapid application of penalties, and protection of both parties through a transparent and irreversible process, reducing the risk of disputes and costs in electronic commerce.

Smart contracts provide an innovative solution for automating the legal institution of the penalty clause, with corresponding advantages and risks. Consumer protection, transparency, and good faith remain essential principles in applying the penalty clause in the digital environment.

4. Non-performance of contractual obligations

The non-performance of an obligation in electronically concluded contracts is proven primarily through digital means that allow an exact reconstruction of the parties' conduct. Electronic platforms and services automatically generate activity reports recorded by the software, which attest to the moment the contract was accepted, the due date of the obligation, and any actions or omissions of the debtor.[13] These records constitute technical evidence with legal value, as they faithfully reflect the user's interaction with the system.

In addition, electronic correspondence – emails, automatic notifications, messages sent through the platform/application – may demonstrate both the communication of the obligation and any attempts by the creditor to obtain performance of the obligation. In the case of payment obligations, bank records or online transaction histories may prove the absence of a transfer, while for obligations to deliver a good or service, tracking systems using AWB numbers and platform-generated reports may be used.[14]

Electronic archiving systems also play an important role, as they preserve successive versions of the contract and can demonstrate the exact content of the obligation at the time it was accepted. In situations where the contract

[13] *Ibidem*.

[14] A. Bleoanca, *op.cit.*, p. 120 et seq.

was signed with an extended electronic signature, the identity of the signatories and the integrity of the document can be confirmed.[15]

5. Conclusions

The penalty clause in electronic contracts represents an effective instrument for ensuring the performance of assumed obligations, adapted to the new realities of digital commerce. Due to the automated nature of platforms and applications, the penalty clause can be provided and applied in a transparent and immutable manner. It allows the parties to clearly establish the consequences of non-performance, reducing the risk of disputes and the costs of mediation or arbitration.

In the digital environment, the validity of the penalty clause depends on how it is communicated and accepted by the parties. Recommended practices – such as clearly displaying the clause, highlighting it visibly, and requesting express confirmation – ensure that acceptance is not mechanical but genuinely informed. Moreover, digitalization enables the collection and preservation of evidence regarding the non-performance of contractual obligations.

The application of the penalty clause in the digital environment presupposes the existence of the principal obligation, the ascertainment of its non-performance, the notification of the party, and compliance with the proportionality of the penalty. In contracts concluded through applications and platforms, the penalty clause is often standardized and accepted without negotiation, which may limit contractual freedom and generate difficulties and disputes in court.

Each form of penalty clause – preconfigured, electronically negotiated, or automated through smart contracts – raises specific issues of validity, information, enforceability, and evidence. Digital contracts bring efficiency but also require increased responsibility in consumer protection and maintaining contractual balance. Current case law tends to validate digital penalty clauses but conditions their enforceability on transparency, visibility, and genuine consent.

In conclusion, the penalty clause in electronically concluded contracts not only protects the creditor's interests but also contributes to the stability of contractual relationships in the digital environment, promoting

[15] *Ibidem*.

predictability and legal certainty. The integration of the contractual clause into applications and platforms ensures an efficient mechanism for enforcing obligations, adapted to the speed and complexity of transactions in the digital age.

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MANIPULATION THROUGH SILENCE IN THE MEDIA: BETWEEN FREEDOM OF EXPRESSION AND TORT LIABILITY

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ABSTRACT

This article aims to analyze the phenomenon of manipulation through silence in mass media, seeking to highlight the fragile balance between freedom of expression and tort liability. It considers the nature of omission and its impact on public perception, as well as the legal framework applicable within the context of freedom of expression and liability for damages caused through silence or strategic inaction. Silence in the media context underscores the associated legal limits and responsibilities. In this framework, silence or the omission to inform can have significant effects on public perception and may constitute a form of implicit manipulation.

KEYWORDS: *manipulation; silence; mass media; tort liability; public perception; omission;*

1. Introduction

The fundamental purpose of mass media is to guarantee the right to information and, subsidiarily, to shape public opinion. However, there is a risk of violating ethical and legal principles through subtle manipulation, particularly through silence or omission. Manipulation through silence, as a form of deliberate inaction, raises fundamental questions regarding the limits of freedom of expression and the liability for harm caused to society or individuals. From a legal perspective, freedom of expression is constitutionally guaranteed, but it is not absolute. It may be subject to legal limitations, especially when expression, or in this case, omission or silence, violates the rights and interests of others, such as the right to a fair trial, to accurate information, or to protection against disinformation. In Romanian law, for example, tort liability may arise if the existence of an unlawful act, damage, fault, and a causal link between them is demonstrated.

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2. Brief considerations on tort liability

One of the leading authors in the field of tort liability is Ioan Adam, who analyzes in detail the conditions of this form of liability. He emphasizes that: **"(...) the primary role of civil liability is not to punish a person guilty of causing damage, but to repair the damage itself (...)"**.[1]

The same author examines the phenomenology of tort liability, identifying its conditions of applicability: *the existence of an illicit act*, **"(...) when it is contrary to the law and results in the violation or infringement of subjective rights or at least the legitimate interests of persons, interests which, of course, are not contrary to the law and morality, thus causing damage"**[2]**;** *the existence of damage*, through **"harm to a person's health, destruction or deterioration of goods, the death of a person's legal provider, etc."**[3]**;** *the causal link*, considered **"a general requirement of civil liability, whether contractual or tort. Moreover, it is a requirement of liability, whether civil or criminal"**[4]**;** and *fault*, **"(...) as the form of imputability of its author""**[5]

In our view, the essence of civil liability in tort consists primarily in compensating the moral or material damage suffered by the injured party as a result of an unlawful or illegal act. Tort liability aims to ensure the reparation of the damage, including the sanctioning of illegal acts or actions, thereby safeguarding social and human values as well as citizens' fundamental rights.

We also consider that tort liability lies outside contractual relationships, therefore, it is essential to determine whether any fault can be attributed to the author of the act in generating actions that resulted in damage. Thus, we believe that this form of civil liability has an ambivalent character regarding its scope of application.

[1] Adam, I., *Tratat de drept civil. Obligațiile. Vol. II. Responsabilitatea civilă extracontractuală. Faptul juridic*, Bucharest: C.H. Beck, 2021, p. 199.
[2] *Ibidem*, p. 369.
[3] *Ibidem*, p. 281.
[4] *Ibidem*, p. 403.
[5] *Ibidem*, p. 417.

3. The paradigm of silence reflected in mass media and its use as a means of manipulation

The concept of *manipulation through silence* is a form of deliberate silence by the media regarding matters of public interest, which may constitute a form of manipulation. In the absence of information, it can lead to the creation of a false image of reality.

With regard to mass media, we consider that *the paradigm of silence* describes a subtle mechanism of manipulation through omission, manifested when the press chooses what not to say. From a legal perspective, silence may constitute an unlawful act when it is exercised with manipulative intent, causes damage, and lacks professional justification. Thus, we believe that silence, as a form of expression in mass media, reflects several defining aspects, namely: silence is not only individual but can also be institutional, and its immediate result is manipulation through the absence of information, which distorts public perception.

The abusive use of media communication tools "can cause significant harm to individual rights and freedoms, as well as to the democratic functioning of public life."[6] At times, *silence* may take on an ambivalent form, in the sense that it can be used both in the communicative sphere and in the ethical-legal sphere. It is often employed to avoid direct confrontation and maintain control over a situation. It can be used to evade direct answers to difficult questions, thereby creating a favorable environment for manipulating perceptions of a situation.

In contemporary mass media, situations are frequently encountered in which information obtained leads to distortion through techniques of manipulating public opinion, using disinformation through concealment of the truth or through silence, such that "(...) the true intentions of the one transmitting the message remain imperceptible to its receiver."[7]

As an impact, silence can influence the perception of a situation in subtle yet profound ways. Without clear information, individuals tend to fill the gaps with their own assumptions, which may lead to erroneous interpretations of reality. Silence, as a form of manipulation, represents a complex

[6] Drăganu, T., *Drept constitutional și instituții politice. Tratat elementar*, Vol. 1, Bucharest: Lumina Lex, 2009, p. 175.

[7] Buzărnescu, Ș., *Sociologia opiniei publice*, Bucharest: Didactic and Pedagogical Publishing House, 1997, p. 58.

form of influence that can have deep effects on the perception of reality. By understanding how silence can be used to manipulate, strategies can be developed to counteract these effects.

In the specialized literature, experts in communication or social psychology argue that a distinction must be made between manipulation and influence, although such an approach is quite difficult, always depending on context, on each individual case, and on any other situational factors.[8]

4. Can manipulation and propaganda through silence be assimilated as omission?

If we start from the term "**omission,"** we can associate this notion with "**action through inaction,"** in the sense that it involves a direct intention to "forget" or "omit something" with the obvious purpose of avoiding the communication of information. Well-disguised silence in journalism can represent a technique of manipulating public opinion, characterized by that omission, sometimes a lack of reaction or deliberate disregard by the journalist or the media institution to which they belong. The use of this technique, of intentional omission, leads to the distortion of reality and the creation of an erroneous perception of facts, transforming silence into an instrument of subtle propaganda. In this context, a natural question arises: *Can a journalist be sanctioned for "silence"?* In our opinion, the answer can only be *affirmative*, insofar as silence is equivalent to a form of manipulation or a deliberate omission that causes damage through disinformation or intentional concealment of the truth. However, the Journalist's Code of Ethics explicitly provides in Article 8 the following: "**In exercising the profession and in relations maintained with public authorities or with various commercial companies, the journalist is prohibited from entering into agreements that could affect his impartiality or independence. (...)"**[9] Thus, this text refers directly to the pressures to which the journalist is subjected in the exercise of his profession, focusing on his professional and moral independence. Deliberate silence amounts to a violation of the ethical principles of the profession.

[8] Chalvin, D., *Du bon usage de la manipulation*, Iissy-les-Moulineaux: ESF éditeur, 2001, pp. 18-19.

[9] Clubul Român de Presă, *Codul Deontologic al Ziaristului*, 1999, available at *https://www.juristnet.ro/documentatie/ziarist/codul-deontologic-al-ziaristului-adoptat-de-clubul-roman-de-presa/,* accessed on 27.10.2025.

Moreover, the journalist must, in practice, be free from any influence that could endanger their activity or distort the way they inform the public. This means that they must not accept to write articles "on command," promote the interests of political parties, companies, or individuals in exchange for benefits, or, conversely, refuse to cover a certain event. Through their silence, the journalist contributes to the manipulation of public opinion. In our view, when the journalist remains silent, professional independence ceases. And when professional independence ceases, freedom of expression and the public's right to accurate information also cease.

Manipulation can be defined as "a certain situation created deliberately to influence the reactions and behavior of those manipulated in the direction desired by the manipulator"[10], in other words, a means through which one may obtain a desired outcome from others in order to satisfy the manipulator's intentions.

In the context of contemporary society, the issue of manipulating the journalist concerns the process through which an external or internal factor controls, directs, or distorts the journalist's activity, so that the message transmitted to the public serves a particular interest rather than the public interest. Thus, manipulation may sometimes take the form of self-censorship, an action through which the journalist yields to internal pressures from within the editorial office not to report on certain events, political actions etc.

Propaganda through silence, however, can manifest concretely through specific actions. First, *selective omission of information* must be noted – an action through which media institutions may avoid broadcasting certain news, investigations, or critical opinions in order to protect economic, political, or institutional interests. Thus, we can highlight as a form of propaganda *the minimization of the importance of an event*, namely the intentional reduction of a subject's visibility by placing it on secondary pages of the editorial layout, omitting relevant headlines, or broadcasting it at times of low audience. Additionally, propaganda through silence may manifest through *the exclusion of critical voices*, an action that may occur by denying airtime to independent experts, NGOs, or opposition representatives, allowing the press to sometimes create the illusion of a false public consensus. A third way in which propaganda through silence may manifest is through *self-censorship*, which can arise from two perspectives:

[10] Ficeac, B., *Tehnici de manipulare*, Bucharest: C.H. Beck, 1998, p. 30.

the journalist's own self-censorship or the editorial office's fear of political or economic repercussions.

These two actions – manipulation and propaganda through silence – represent some of the most insidious and dangerous forms of media control. The high degree of danger comes precisely from the consequences these two actions have on the general public, namely: deep effects on collective consciousness, expressed through *persuasion*. Robert Cialdini, an expert in social influence and persuasion, identifies six basic categories, each "governed by a fundamental psychological principle that dictates human behavior"[11]: reciprocity, consistency, social proof, liking, authority, and scarcity. He describes *reciprocity* as a fundamental social rule according to which people feel obliged to respond positively when they receive something, even symbolically.[12] He notes that in media communication, the principle of reciprocity is exploited in multiple ways: journalists or politicians offer "exclusive information" to earn public loyalty; advertising offers symbolic "gifts" to encourage a favorable attitude; and election campaigns rely on the idea that if we have received something from someone, we must give back our support. Thus, reciprocity transforms information into an emotional exchange, and public opinion is shaped through the feeling of moral obligation. Manipulation of opinion can be carried out through subtle psychological mechanisms rather than coercion. The same author identifies *manipulation* with deception or coercion, while persuasion is based on "trust." This theory is grounded in behavioral science, in understanding the psychological mechanisms underlying individual decision-making.[13] In our view, *persuasion* as a form of societal manipulation is based on the following relationship: journalist – media / politics – manipulation – public. Thus, this form of influence aims to manipulate people into adopting the ideas or actions of those who employ this method of manipulation.

Alongside manipulation, *propaganda through silence* represents another form of control over the public and society. It is considered one of the manipulation techniques used by mass media, manifested through a so-called "omission to say something". Its main characteristic is the masking of

[11] Cialdini, R.B., *Psihologia manipulării*, Bucharest: EuroPress Group, 2015, p. 11.

[12] *Ibidem*, pp. 38-82.

[13] Reshape Studio, *Puterea Persuasiunii Etice: Lecții de la Cialdini*, August 2021, available at *https://reshapestudio.ro/cialdini-training/,* accessed on 27.10.2025.

media falsehood through control of the public agenda (agenda-setting), namely the decision regarding what is said and, especially, what is left unsaid, thus constituting a concealed form of informational control. Thus, according to specialists, "there is oscillation between extremes such as **everything is propaganda in contemporary society** and the opposite extreme, which pushes propaganda into a secondary place compared to other categories of symbolic social interaction"[14]. Propaganda through silence, as a subtle means of manipulation, represents a "weapon" frequently used by political power in collaboration with subordinate media institutions. We used the term "**weapon"** because it highlights the strategic and effective nature of this form of manipulation. Unlike aggressive or obvious methods, propaganda through silence operates invisibly, shaping public opinion through the absence of information. In social psychology, this method is effective because people tend to assume that what is not communicated either does not exist or is not relevant. Media silence can also consist of deliberately omitting critical or uncomfortable information so that certain facts or social issues do not reach public attention. In this way, public opinion is shaped indirectly: citizens perceive reality only through the topics that are publicized, unaware of what is silenced or hidden. The media thus becomes not only a channel of information but also a strategic instrument of social and political control, influencing collective perception and decisions without direct intervention. Silence is therefore part of communication through the deliberate omission of relevant information, being "a way of impressing the public and creating a psychological state necessary for communication, while silence at the end of a discourse may signify a request for the audience's adherence to what was expressed or an invitation to discussion and questions"[15].

In the context of our analysis, we consider that manipulation and propaganda through silence may fall under the category of "omission," for the following reasons:

– *Omission* involves the intentional absence of information or viewpoints relevant for fully understanding reality. In the journalistic and media sphere, this form of manipulation deliberately excludes facts or opinions.

[14] Stănciugelu, Ș., *Logica manipulării*, Bucharest: C.H. Beck, 2010, p. 91.

[15] Burcă, I., *Tăcerea – o formă de comunicare*, January 2028, available at *https:// cafe-psychologique.md/tacerea-o-forma-de-comunicare/,* accessed on 27.10.2025.

– *Manipulation through silence* is based on omission as a mechanism of control over the public, which receives incomplete information and therefore forms only a partial representation of reality. It can be considered a subtle form of influence, as its effects occur without explicit falsehood, resulting in the orientation of public perception and collective decisions.
– *Propaganda through silence* relies on the same logic as manipulation through silence. It involves selecting subjects to be made visible and excluding those that would contradict the interests of institutions or political actors. Omission thus becomes a strategic communication tool capable of shaping the public agenda and creating a preferential image of reality.

Therefore, from our perspective, all these concepts intersect through their common element – *deliberate omission* – but the major difference lies in the intention and purpose pursued. Summarizing, we can say that in manipulation, omission serves a strategic goal: shaping public perception through an incomplete representation of reality. Propaganda through silence, however, takes this strategy further, becoming a systematic and coordinated practice by political power and media institutions to control the public agenda and influence citizens' opinions. The difference between accidental omission and deliberate propaganda lies in the intention to influence and control.

In our opinion, a correctly informed person is a powerful individual, whereas a misinformed person is merely a pawn that can be used at any moment on the "chessboard of manipulation." Likewise, **propaganda through silence** is a subtle yet extremely effective form of manipulating public perception, operating through the strategic selection of information, namely through omission. It refers exclusively to influencing public perception not through what is said, but through what is not said. It is an extremely effective technique used in the media precisely because it is invisible, in the sense that we do not notice what is not present.

5. The ways in which the deliberate silence of the media may endanger freedom of expression and trigger tort liability

Deliberate silence in the media represents the intentional omission of information of public interest. This is not merely an editorial decision but may constitute a subtle tool of influence over public opinion. Its effects are

not only ethical but also legal, as it can affect the public's right to be informed and may trigger tort liability of media institutions. This is a subtle form of manipulation that may violate the public's freedom of expression and may incur civil liability.[16]

In our view, deliberate silence is a subtle form of influencing and controlling information, producing direct effects on the health of the public sphere. It can distort public reality just as effectively as false information by excluding relevant subjects or perspectives.

Editorial freedom does not justify in any way the omission of information of major interest, and the media has both a moral and legal responsibility to ensure a complete and accurate flow of information. Pluralism, transparency, and adherence to ethical norms are essential to preventing abuses through silence. This silence may reduce public willingness to discuss certain topics, distort democratic dialogue, and create a space in which those in power evade accountability through the absence of information.

Freedom of expression is often presented as one of the essential conditions of democracy: within it, individuals have the right to express opinions, disclose dissatisfaction, or question authority. Nevertheless, this freedom is not absolute, it operates within a framework of rules designed to protect equal rights, human dignity, and civilized coexistence. Thus, ECtHR caselaw establishes that "the truth of value judgments cannot be proven. With reference to the Law on Freedom of Expression, the trial courts emphasized that a value judgment constitutes an opinion, commentary, theory, or idea that expresses an attitude toward a fact, whose truthfulness cannot be demonstrated."[17] In modern democracies, open discourse must coexist with a legal framework that prevents abuse, defamation, or incitement to violence while maintaining space for divergent ideas and contestation.

[16] Dimitriu, R., *Dreptul comunicării. Libertatea de exprimare și limitele sale juridice*, Bucharest: Universul Juridic, 2018, pp. 92-101.

[17] Nasu, A., Mereuță, V., *Libertatea de exprimare a mass-media în fața justiției. Cum combatem procesele judiciare menite să reducă la tăcere jurnaliștii*, July 2024, p. 17, available at *https://crjm.org/wp-content/uploads/2024/08/Libertatea-de-exprimare-a-mass-media-in-fata-justitiei.pdf,* accessed on 27.10.2025.

Among the ways in which deliberate silence by the media may infringe on freedom of expression, we may list:

- Erosion of the public sphere of debate – through silence, the media fails to create spaces for discussing its materials, depriving the public of this right;
- Selective omission may eliminate critical subjects from the outset, affecting citizens' right to be informed and to form opinions;
- Self-censorship and commercial/political pressure – the journalist may face external censorship (e.g., political or economic pressures) as well as internal censorship from within the media institution itself;
- Editorial censorship and owner control are reflected in the directives issued by media management, in both print and audiovisual press;
- Framing and information selection are methods by which journalists and media organizations select and interpret events and issues when creating news or reports;[18]
- Omission aimed at protecting reputations or interests – sometimes viewed positively in light of the protection of private life, a principle included in regulations governing journalistic activity.

Regarding tort liability for deliberate omission (general elements), it may arise under certain circumstances, namely:

- When there exists a professional or contractual duty, or a causal relationship between journalistic practice and the protection of the public's right to information;
- When clear professional standards exist (codes of ethics, editorial norms), compliance is required regarding the verification of information and investigative practices, grounded in a duty to inform or a reasonable expectation on the part of the public;
- When a concrete injury is created (e.g., affecting the moral or material interests of an individual or the public, or distorting the informational marketplace), with demonstrable harm and a causal connection between the omission and the damage.

The exact applicability of these principles varies across jurisdictions and countries. In many states, liability for omission may be difficult to prove and

[18] Redacție a1.ro, *Conceptul de „framing" în jurnalism: Cum sunt prezentate știrile și noutățile*, June 2024, available at *https://a1.ro/news/social/conceptul-de-framing-in-jurnalism-cum-sunt-prezentate-stirile-si-noutatile-id1117984.html*, accessed on 27.10.2025.

depends on local professional standards and legal regulations. Legislation concerning freedom of expression and media responsibility (e.g., the right to information, protection of reputation, right to private life) may provide explicit frameworks in which omission may or may not generate liability.

Deliberate silence by the media may seriously affect freedom of expression by limiting public access to information of public interest, distorting debates, and delegitimizing the media's role as a watchdog of power. In tort liability, omission can be demonstrated as a breach of a professional standard, causing damage, and the causal link and fault must be proven in the specific context of each jurisdiction.

Thus, tort liability for omissions in the media may arise when a legal or assumed obligation to inform exists, when culpable conduct is identified through intentional withholding or gross negligence, when concrete damage is proven, and when a causal connection between the omission and the harm is established.

To avoid such risks, it is essential for newsrooms to maintain clear ethical standards and transparency in editorial processes, provide mechanisms for correction when omissions stem from error or external pressures, and offer readers sufficient information to develop an informed opinion.

In our assessment, the requirements mentioned reflect the structural tension between protecting freedom of expression and the need to sanction media conduct that harms the individual rights of citizens. Consequently, although the media currently enjoys a broad margin of discretion in selecting and disseminating information, this discretion is not absolute: where deliberate silence harms the legitimate interests of citizens, legal remedies – from the right of reply and correction to actions for damages – become fully justified.

6. Conclusions

From the points presented above, we consider that the phenomenology of manipulation, including in mass media, represents a complex topic situated at the intersection of freedom, morality, and social responsibility. Analyses conducted by specialists from various fields reveal that freedom of expression is not absolute but must be exercised responsibly, within the limits of respect for the rights and freedoms of others.

Undoubtedly, manipulation through silence, namely persuasion, silence, and omission as media techniques, necessarily involves public participation

and is deliberately used as a weapon of manipulation. The central issue of the topic examined lies in the transmission of false information and in the intentional omission of essential facts, perspectives, or data that could directly alter the public's perception of reality.

From a legal perspective, freedom of expression, guaranteed by the Constitution and by the European Convention on Human Rights, cannot be interpreted as an absolute right. It also implies the obligation to exercise this freedom in good faith, with respect for the rights and freedoms of others. In this sense, tort liability may arise only when media silence is deliberate and produces real, concrete harm.

Analyzing the ways in which deliberate silence in the media may affect freedom of expression allows us to highlight the complex and ambivalent nature of the mechanisms through which media reality is constructed. Although editorial freedom currently constitutes an essential dimension of press autonomy in a democratic system, the strategic use of informational omission can generate significant distortions in public perception, influence the social agenda, and limit access to pluralism of opinions and information. In the absence of adequate disclosure of relevant data, the public is deprived of the opportunity to form an informed opinion, transforming silence into a discourse-control tool with subversive potential for democratic values.

In conclusion, journalistic responsibility becomes an essential condition for the functioning of an authentic democracy. Combating *manipulation through silence* requires not only appropriate legal sanctions but also the development of a solid professional ethic grounded in full respect for human rights. Only through such a balance between freedom and responsibility can the media preserve its fundamental role as a guarantor of accurate information and as a pillar of the rule of law.

Therefore, we consider that, regarding civil liability in tort, the journalist's freedom of expression must be assessed through the lens of balancing public interest with the protection of individual rights. When journalistic activity is carried out in good faith, respecting ethical and deontological norms, freedom of expression is protected. Conversely, when this right is exercised abusively, through manipulation, intentional omission, or distortion of information, only then may tort liability be engaged.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING GOVERNMENT ACCOUNTABILITY

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ABSTRACT

The engagement of the Government's political responsibility represents a procedure by which, in order to deal with special circumstances that require the establishment of urgent measures, which are within the competence of Parliament, the Government seeks the adoption of a program, a general policy statement or a draft law, with the support of the parliamentary majority on which it is based and under conditions of maximum celerity. Holding the Government accountable is a complex parliamentary procedure that involves mixed relationships, as its content is an act of the Government that can trigger parliamentary control over it, and its effect either produces a legislative act or leads to the dismissal of the Government. By assuming its responsibility, the Government exposes itself to the risk of a motion of censure being formulated and adopted. A few clarifications are necessary regarding the meaning of the constitutional text:a) the Government, as a collegial and solidary body, assumes liability, which requires a decision to this effect on its part; b) the possibility of assuming liability is not subject to any conditions, the opportunity of its initiative and the content of this initiative remaining at the exclusive discretion of the Government; c) the Government is not obliged to assume liability.

KEYWORDS: *holding the Government accountable; bill, motion of censure; constitutional text;*

1.1. Commitment of Government responsibility for a program or general policy statement

The program or general policy statement, supplementing or, as the case may be, amending the Government Program accepted by Parliament at the inauguration, once approved, become binding on the Government. Their submission for approval was necessary due to the fact that they supplement or amend the government program and, precisely for that reason, have the same status. As for the distinction between the program and the general policy statement, this is fragile, difficult to achieve. However, the **"pro-**

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gram", without being specific to a specific field, sector of activity or for solving a specific problem, defines in general terms the policy that the Government intends to put into practice. The **"Declaration"** after a certain period of operation of the Government would be the pretext for reconsolidating parliamentary support and increasing the credibility of the executive. The declaration is vaguer; the program is more concrete. Both are integrated into the same procedure, which results in the transfer of the technique of silent and global voting to the field of parliamentary control.

The doctrine also claims that the semantics of the term program primarily signifies concrete measures of the nature of those routinely undertaken by any Government, it being essential that the areas to which it refers fall within the scope of competence of the Government, while the term general policy statement signifies the expression of intentions, main directions of action or government conduct in a field as precisely determined as possible.[1] However, in both cases, the possibility of engaging in liability – which has the effect of either granting confidence to the Government or dismissing it – is framed within **"firm"** rules that guarantee the use of the institution for the purpose for which it was created; closer cooperation, in conditions of mutual trust, between the legislature and the executive and the achievement of better results in governance.[2]

Moreover, as appreciated in recent doctrine, Parliament has the power to evaluate not only the legality of assuming responsibility for a program or a general policy statement, but also its appropriateness. In the commentary on the revised Constitution, the question was raised whether, by analogy with the law, it would be possible to admit the formulation of amendments (permitted as a result of the revision, in the case of assuming responsibility for a draft law) to the government program or to the general policy statement, when the Government assumes responsibility in one of these two cases?[3] It was considered that since these are **exclusively political acts**, and the interest of the Government, to the extent that it intends to strengthen the trust it enjoys in Parliament, would require a certain cooperation with it, nothing prevents it from accepting certain amendments and modifying,

[1] Tudor Drăganu, *Constitutional Law and Political Institutions, Elementary Treatise*, vol. II, Lumina Lex Publishing House, Bucharest, 1998, page 175.

[2] Genoveva Vrabie, Marius Bălan, *The Political-Statistical Organization of Romania*, European Institute Publishing House, Iași, 2004, page 157.

[3] Ioan Muraru, Simina Tănăsescu, *The Constitution of Romania, commentary on articles,* 3 ed., C.H. Beck Publishing House, Bucharest, 2022, page 961.

consequently, the content of the program or, as the case may be, of the general policy statement, if a motion of censure was not submitted and amendments were formulated or if, although a motion of censure was submitted, it was not adopted, and amendments resulted during its debate.

1.2. Engaging the Government in responsibility for a draft law

It represents an indirect legislative way of adopting a law, that is, not by debating the law within the ordinary legislative procedure, but by debating a quintessentially political issue, related to the government's stay or dismissal. This is why this parliamentary procedure, known in doctrine as a provoked motion of censure, is carried out in the reunited Chambers by whose vote the Government was invested and can also be disinvested. Practically, when the Government is to assume responsibility for a draft law, under the terms of art. 114 of the Constitution, this fact will be brought to the attention of the permanent bureaus of the two Chambers. They will establish the agenda and program of the next joint meeting in which the Government will assume responsibility for the respective draft law.

The Presidents of the two Chambers shall convene the Senators and Deputies in a joint session, the date and place of the session being communicated to the Government by the President of the Chamber of Deputies, 24 hours before it takes place. In the joint session, the Prime Minister expressly declares that he assumes responsibility for a draft law, followed by the presentation of the new regulation. The presentation is not followed by debates.

From this moment, the 3-day deadline for submitting **a motion of censure** begins to run. The doctrine also suggested the name "forced motion" as being more appropriate because the opposition, being faced with the government's decision to assume responsibility, if it does not want to give in without a political fight or if it does not want to react through an organized abstention from the vote, will be forced to submit a motion of censure.

This way of adopting a law is a simplified one, by its nature, being a legislative method that is resorted to as **a last resort**, only when adapting the draft law in the usual procedure or in the emergency procedure is no longer possible. In other words, such a procedure is especially indicated in the situation of a Government confident of a parliamentary majority, when

it wants to promote extremely quickly a law that it considers vital for its governing program.[4]

In other cases, the Government's only chance to promote a bill is either to adopt an emergency ordinance or to assume responsibility for the bill. Choosing the emergency ordinance option carries some risks, related to the fact that, subsequently, Parliament, in the context of its control over delegated legislation, may modify its provisions or even reject it. Even assuming the Government's responsibility is not without risks, which derive from the possibility of introducing a motion of censure, which will result in the dismissal of the Government.[5] The doctrine also highlighted, with pertinent arguments, the risks that may arise for the normal functioning of parliamentary democracy in Romania from the application of this constitutional text. On the one hand, whenever the Government would have a secure majority in Parliament, the constitutional provisions would put it in a position to make the entire legislative procedure stipulated by the Constitution inapplicable.

Based on a loyal majority in Parliament, the Government would be able to nullify the constitutional provisions regarding legislation, except for those regarding the promulgation and entry into force of laws.

From a deliberative assembly, in which standing committees, deputies, and senators play an active role in drafting laws, especially through their right to submit amendments, Parliament would transform into a forum for simply addressing government draft laws. On the other hand, if the parliamentary majority on which the Government relies were fragile and threatened with disintegration, the Government could use this procedure to exert moral pressure on parliamentarians, hardly compatible with the independent character ensured to their mandate.

Faced with the alternative of voting against a government proposal or losing their seats in Parliament, as a result of its possible dissolution, determined by the adoption of a motion of censure, some parliamentarians could, against their personal convictions, oppose it, through their vote. Hence, the conclusion that a constitutional text enshrines a procedure

[4] Dan Apostol Tofan, *The Government's Commitment to Responsibility, in the Public* Law Journal no. 1/2003, page 8.

[5] Ioan Vida, *Formal legal studies, introduction to legislative technique and procedure, 5th Edition*, revised and supplemented, Universe Juridic Publishing House, Bucharest, 2012, page 188.

that aims to save the stability of the Government, but with the possible sacrifice of the freedom of opinion of parliamentarians.

Regarding the possibility of intervening in the actual content of the draft law, although it was initially claimed that the Government could accept possible amendments to it, and the debates taking place could concern both the content of this draft and of a program or a general policy statement, as the case may be, in state practice, outlined in the application of art. 114 of the Constitution, the text of the law has always remained the one promoted by the Government.

In fact, this is the only case in the current Romanian constitutional regime in which a bill is adopted without being effectively debated. In other words, this is precisely the peculiarity of the institution: the Government obtains a law without Parliament, strictly speaking, having legislated. The created practice has highlighted the need for political negotiation on one solution or another in the draft law that is the subject of the Government's liability, in other words, the possibility of formulating amendments. A paradoxical situation has arisen. The Prime Minister declares in Parliament that he recognizes the merits of some amendments, but can no longer make changes as a result of the text of the Constitution.

It was also argued that the expression **"a draft law"** should be interpreted in a narrow sense, the Government's liability not being engaged with respect to two draft laws or a package of such drafts, a situation that would practically nullify the role of Parliament as the sole legislative authority of the Country. From this perspective, in 2004, in the first commentary of the revised Constitution, the issue of complex laws was discussed, taking into account both the situation of the possibility of engaging the Government's responsibility not only for simple projects, from one field or another of activity, but also for complex projects, as well as the situation in which the Government proposes in this way the modification or completion of already existing laws.

It was appreciated that, since the constituent legislator did not understand to make a distinction, it remains up to the Government to outline the dimensions and content of the draft law, the discussion oscillating from the sphere of legislative technique to the sphere of political disputes.

On the contrary, it was considered that the phrase **"bill"** formulated in the singular should inoculate the idea, contrary to government practice, that it cannot be a **"package of laws",** even if it bears a unique name. However, the Constitutional Court **"tolerated"** the engagement of political respon-

sibility by the Government, systematically over a **"package of laws"**. The Constitutional Court Decision no. 298/2006[6] states that the provisions of Art. 114 of the Constitution do not provide for the requirements that a draft law must meet in terms of its structure and the scope of the regulatory field. The Court also specifies, invoking its own jurisprudence, that a draft law may have a **"complex"** character. However, as stated in the doctrine, the **"complex"** character has one meaning, and the **"plurality of laws"** another.

2. Evolution of state practice in the matter of engaging the Government's liability

Despite doctrinal clarifications, in the absence of an adequate legislative framework, in State practice the Government's liability was engaged in the most varied situations: for a draft law approving an emergency ordinance (which already produced legal effects); for a draft law containing 6 regulatory objects or for a draft law that had already entered the parliamentary debate, being adopted with amendments by the Chamber of Deputies and being in the Senate, etc. This last mentioned situation is proposed in recent doctrine to no longer be allowed in view of a future constitutional revision.[7] Also in the perspective of revising art. 114 of the Constitution, the recent doctrine contains the proposal to limit the areas in which the Government could assume responsibility for a legislative text. The presentation of concrete situations in which the provisions of art. 114 of the Constitution have been put into practice could be edifying.

The Government invested following the parliamentary elections of 1996 undertook its responsibility before Parliament, in February 1998, for the draft Law approving the Emergency Ordinance no. 88/1997 regarding the privatization of commercial companies, becoming Law no. 44/1998, an ordinance that had been submitted to the approval of the legislative body, and being published in the Official Gazette, it already produced its legal effects. Having been notified by a number of 42 senators, the Constitutional Court ruled by Decision no. 34/1998[8] to the effect that the constitutional

[6] Published in the Official Gazette of Romania no. 372 of April 28, 2006.

[7] Bogdan Dima, *The Conflict between the Palaces – The Power Relations between Parliament, Government and President in Post-Communist Romania*, Hamangiu Publishing House, Bucharest, 2014, page 115.

[8] Published in the Official Gazette of Romania no. 88 of February 25, 1998.

provision does not distinguish with regard to the nature of the respective draft law, which may be of the nature of organic laws or ordinary laws, with the exclusion of the constitutional law revising the Constitution for which there is a special procedure, and motivated the solution based on the premise that the engagement of liability is a mixed procedure, of parliamentary control and legislation.

The reasoning of the decision further states that "adding another restriction, regarding the approval of an emergency ordinance, can only have the meaning of amending the constitutional text of art. 113 (art. 114 after the revision of the Constitution in 2003), which – in principle – is inadmissible. When the law does not distinguish, neither can the interpreter distinguish, and a constitutional norm cannot be amended by interpretation. The qualification of this procedure as "a mixed procedure, of parliamentary control and legislation" by the Constitutional Court is criticized in recent doctrine, it being viewed rather as a special legislation procedure, initiated and led by the Government, which allows, in the absence of a motion of censure, the tacit adoption of a draft law by eliminating parliamentary debates in the legislative process.

In turn, the Government inaugurated in April 1998 resorted to the same procedure to pass through Parliament Law no. 99/1999 on some measures to accelerate economic reform, which contained no less than six regulatory objects and began, paradoxically, even with the amendment of O.U.G. no. 88/1997 on the privatization of commercial companies. In November 1999, the same Government once again assumed responsibility for the draft law on the Statute of Civil Servants, which became Law no. 188/1999, a draft that had been debated in the Chamber of Deputies and was being debated in the Senate, following the normal legislative procedure. The then-incumbent government withdrew the draft law from the parliamentary debate, taking responsibility for the initial version, which was also the form in which the Civil Servants' Statute was promulgated and published in the Official Gazette of Romania, Part I. And in this case, 51 deputies notified the Constitutional Court. Although the decision by which the Constitutional Court rules on the constitutionality of a law before promulgation, in the event of a finding of constitutionality, is usually published in the same Official Gazette as the Law, this time it was published later. The justification for this unprecedented situation can be found in the very content of the decision of the Constitutional Court which, questioning the deadline within which the law approved through the emergency procedure, related to the act

of assuming the Government's liability, could be challenged at the Constitutional Court, found that it had been exceeded, hence the conclusion of the inadmissibility of the notification to be examined on the merits, the notification occurring after the promulgation of the law (Decision of the Constitutional Court of Romania no. 233/1999).[9]

In turn, the Government inaugurated in December 2000 assumed responsibility in June 2001 for the draft law on the promotion of direct investments with a significant impact on the economy, which became Law no. 332/2001, and, less than a year later, in March 2002, for the draft law on some measures to accelerate privatization, which became Law no. 137/2002.

The Government's liability was invoked again in December 2002 for a normative act with profound implications for the life of Romanian society, the Labor Code, which became Law no. 53/2003, being the first time that this procedure was used to adopt a Code. This time too, the Constitutional Court, by Decision no. 24/2003, found the constitutionality of the provisions with which it had been notified.

In March 2003, the then-acting Government once again assumed responsibility for a draft law containing no less than 15 regulatory objects, which became law following the promulgation and publication of Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, and the prevention and sanctioning of corruption.

Once again, the opposition, after introducing a motion of censure, which however failed in the vote, resorted to the procedure of notifying the Constitutional Court, criticizing first of all, "the procedure of holding the Government accountable for no less than 15 laws, some of which have nothing to do with anti-corruption measures." In addition, it was argued that this procedure for adopting the law also violated the provisions of art. 3 and art. 12 of Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, since the law that is the subject of the notification "brings together a number of 15 distinct laws, assembled into an eclectic project". The Constitutional Court Decision no. 147/2003[10] states that such an objection cannot be accepted because "the legislator can regulate through a law a complex group of social relations, in order to obtain a desirable result at the level of the entire society". From this point of view,

[9] Published in the Official Gazette of Romania no. 638 of December 28, 1999.
[10] Published in the Official Gazette of Romania no. 279 of April 21, 2003.

it is further argued: "The law in question primarily regulates, amends and supplements existing normative acts to achieve decision-making transparency, in order to prevent and combat corruption."

In turn, the Government inaugurated in December 2004 assumed responsibility for the package of laws aimed at reform in the fields of property and Justice, becoming Law no. 247/2005 on reform in the fields of property and Justice, as well as some adjacent measures. Following the notification of the Constitutional Court, through DCC no. 375/2005[11], the unconstitutionality of some provisions of the Law was found, subsequently agreed with its proposals, by applying the provisions of art. 147 paragraph 1 of the Constitution. In this regard, the Constitutional Court Decision No. 419/2005[12] was adopted, whereby, at the request of the President of Romania, it was found that the provisions of Law No. 247/2005 on the reform in the fields of property and Justice, as well as some adjacent measures, were brought into line with the Constitutional Court Decision through the texts adopted by Parliament in joint session.

Subsequently, the procedure of engaging the Government's responsibility was used again for the adoption of Law No. 95/2006 on the healthcare reform, the Constitutional Court's Decision No. 298/2006[13] resolving the control prior to promulgation having already been critically evoked in the specialized doctrine.

Finally, the procedure for holding the Government accountable was also set in motion in November 2007 for the so-called single-member vote bill, but the finding of the unconstitutionality of some provisions in the text of the bill, upon notification to the Constitutional Court by the President of Romania, through Constitutional Court Decision no. 1177/2007[14], determined the return of the bill to Parliament followed by its abandonment and the launch of a new parliamentary initiative, which materialized through the adoption of Law no. 35/2008 for the election of the Chamber of Deputies and the Senate and for the amendment and completion of Law no. 67/2004 for the election of local public administration authorities, of the Local Public Administration Law no. 215/2001 and of Law no. 393/2004 on the Statute of Local Elected Officials.

[11] Published in the Official Gazette of Romania no. 591 of July 8, 2005.
[12] Published in the Official Gazette of Romania no. 653 of July 22, 2005.
[13] Published in the Official Gazette of Romania no. 372 of April 28, 2006.
[14] Published in the Official Gazette of Romania no. 871 of December 20, 2007.

It is worth noting that during the period 2009-2012 the current Government resorted to the procedure of engaging the Government's responsibility more times than all previous Governments combined. Thus, in the summer of 2009, even Law no. 287/2009 on the Civil Code (entered into force on October 1, 2011) and Law no. 286/2009 on the Criminal Code (entered into force on February 1, 2014) were promoted in this way. Again, in the fall of 2009, Law no. 329/2009 on the reorganization of some public authorities and institutions, supporting the business environment and respecting the framework agreements with the European Commission and the International Monetary Fund, as well as Law no. 330/2009 on the unitary remuneration of personnel paid from public funds were promoted through the procedure established by art. 114 of the Constitution. In mid-2010, the austerity measures promoted by the former President of Romania and fully adopted by the then-incumbent Cabinet resulted in the adoption of Law No. 118/2010 on some measures necessary to restore the budget balance and Law No. 119/2010 on establishing some measures in the field of pensions, through the same procedure of engaging the Government's responsibility.

Following the intervention of the Constitutional Court, which issued four Decisions on the two normative acts, the laws were sent back to Parliament and adopted taking into account the objections raised. The National Education Law was also promoted through the same procedure of engaging the Government's responsibility. Thus, although at a first attempt in 2009, through Decision no. 1557/2009[15], the Constitutional Court considered that a different procedure could not be admitted in a matter as important as **national education**, the Constitutional Court subsequently changed its position through Decision no. 2/2011[16], adopting a diametrically opposite point of view that allowed the promotion of National Education Law no. 1/2011 by applying art. 114 of the Constitution. In the fall of 2010, the same Cabinet resorted to the same procedure to promote Law no. 284/2010 on the unitary remuneration of personnel paid from public funds and, respectively, Law no. 285/2010 on the remuneration in 2011 of personnel paid from public funds. Law no. 40/2011 amending and supplementing Law no. 53/2003 – the Labor Code, which, in turn, had been promoted in the same way, as well as the Social Dialogue Law no. 62/2011, together with Law no. 63/2011 on the employment and remuneration in 2011 of teaching

[15] Published in the Official Gazette of Romania no. 40 of January 19, 2010.
[16] Published in the Official Gazette of Romania no. 365 of May 25, 2011.

and auxiliary teaching staff in education were promoted during 2011 through the same procedure, by the same Cabinet.

Law no. 300/2011 amending and supplementing Law no. 303/2004 on the status of judges and prosecutors, as well as amending art. 29 paragraph 1 letter b of Law no. 304/2004 on judicial organization was the last normative act promoted under art. 114 of the Constitution by the Government that abused to the greatest extent this exceptional Constitutional procedure.

The last attempt to resort to the same procedure, to hold the Government accountable to the same Cabinet, for the purpose of merging the parliamentary elections with the general local elections, in 2012, was **"ANIHILATED"** by finding the unconstitutionality of the draft law promoted for this purpose, by Decision no. 51/2012 of the Constitutional Court.[17] The last law promoted through the procedure of engaging the Government's responsibility by the then-incumbent Cabinet was Law No. 165/2013 on measures to finalize the process of restitution, in kind or through equivalent, of real estate abusively taken over during the communist regime in Romania.

Another failed attempt, in the fall of 2013, consisted in promoting the draft law on establishing measures to decentralize certain powers exercised by some ministries and specialized bodies of the central public administration, as well as some reform measures regarding public administration – briefly called the draft law on decentralization – whose unconstitutionality, in its entirety, was found by the Constitutional Court's Decision no. 1/2014.[18]

Subsequently, the adoption of this normative act was abandoned, making it practically impossible to adapt the existing legal text to the numerous exceptions of unconstitutionality formulated in the extensive Decision. Since then, until the Government assumed responsibility this year (2025), only one other draft law had been promoted through the Government engagement procedure in relation to the state budget law for 2020, when the Orban Government was removed from confidence by introducing a motion of censure.[19]

In July 2025, the Government led by Ilie Bolojan assumed responsibility before Parliament for the first set of fiscal measures. Subsequently, in early

[17] Published in the Official Gazette of Romania no. 90 of February 3, 2012.

[18] Published in the Official Gazette of Romania no. 123 of February 19, 2014.

[19] Constitutional Court Decision no. 85 of February 24, 2020, published in the Official Gazette of Romania no. 195 of March 11, 2020.

September 2025, the Bolojan Government presented itself to Parliament, committing itself to responsibility for five draft laws, including fiscal measures, which aimed to increase public spending and reduce revenues. These measures included increasing the general VAT rate from 19% to 21% and generated censure motions from the opposition that were rejected.

3. Conclusions regarding the Government's liability

From the list of cases presented above, it is obvious that problems arise in practice, in connection with the engagement of the Government's responsibility for a draft law, and as a rule, the application of this procedure in State practice has proven atypical, hence the conclusion that a Government, whatever it may be, wishes to expand its power to legislate, ultimately to the detriment of the legislative forum – Parliament. Never, to date, has a Government been dismissed as a result of assuming its responsibility, although many times a motion of censure has been submitted, but it has "failed" in the vote. Instead, most of the time, the Constitutional Court has been notified. Regarding the concrete ways in which the Government's liability is put into practice for a draft law, the answer must be sought, from my point of view, in the relationships that the constituent legislator establishes between Parliament and the Government, more precisely, in the weight given to the Government in the lawmaking activity. From the express Constitutional consecration of the role of Parliament as the Supreme representative body and sole legislative authority of the Country, I believe that the Government should only be allowed, as an exception, to enter the sphere of primary regulation of social relations, to enter the field of action of the legislative forum. However, two constitutional procedures, namely the engagement of the Government's responsibility and legislative delegation, have allowed over time, especially due to the overly general nature of the drafting of constitutional texts, to transform the exception into the rule. From this perspective, the addition brought by the revision law, in the sense of admitting the possibility of modifying or supplementing the draft law promoted by the Government, provided that the amendments brought in Parliament are accepted by it, I do not consider that it contributed to the classification of the special procedure of adopting a draft law by engaging the Government's liability. Moreover, the commentary to the Revision Law specified that political negotiations are possible even in this procedure, which, in principle, is the essence of parliamentarism.

On the contrary, compared to the current drafting method, I believe that the dilemmas have been amplified. The first question that naturally arises concerns the Government's refusal to amend the draft law. What will happen in such a situation? It is assumed that the draft law will be sent for promulgation in its original form, but then we wonder what point would there be in proposing amendments by parliamentarians. In an analysis of the revision project, this addition was viewed as an **"ingenious artifice"** that partially reconsidered the usual, common or **"traditional"** elements of the mechanism of political accountability. The draft law had to be examined, because otherwise, it could not be modified or supplemented by amendment.

It has been rightly argued that the acceptance of amendments remains at the discretion of the Government, but this is the privilege derived from the risk assumed by engaging in political responsibility. In addition, procedural issues may arise in connection with the application of the current constitutional provisions. If the deadline for introducing the motion of censure is so short, just three days from the presentation of the draft law, we wonder, is this the period of time available to parliamentarians to formulate amendments? And, if it is about an entire legislative package, as has happened on several occasions, we wonder what period would be necessary for parliamentarians to promote substantive amendments? Without anticipating the consequences too much, the Romanian Constitution of 1991 provided for two institutions (the engagement of the Government's responsibility and legislative delegation) through which it allowed the Government to enter the sphere of competence of Parliament, within certain limits and with certain conditions, unfortunately insufficiently circumscribed.

The overly general nature of the constitutional provisions, in the absence of details that would have been required to be brought by law, has allowed successive Cabinets over time to often resort to excessive power in the practice of legislation, instead of legislative authority, with consequences that are difficult to anticipate for the entire Romanian legislative system.

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LEGAL NATURE OF THE RELATIONSHIP BETWEEN ADMINISTRATOR AND DIRECTOR WITH THE COMPANY. MANDATE AGREEMENT VS INDIVIDUAL EMPLOYMENT CONTRACT

Adina Daniela TODORAN *

ABSTRACT

May an administrator or a director of a company conclude an individual employment contract, or is it mandatory to enter into a mandate agreement? While the answer to this question seems relatively clear under the legislation applicable to joint-stock companies, the legal framework remains less explicit in the case of limited liability companies. The study aims to provide an answer to these questions and to present the prevailing doctrinal views developed over time to outline a coherent direction for corporate governance.

KEYWORDS: *individual employment contract; mandate agreement; Law on companies; Labor Code; joint-stock company; limited liability company;*

1. Brief considerations regarding the mandate agreement and the individual employment contract. Defining elements

For many years, both scholars and courts through their jurisprudence have sought to clarify the distinction between the mandate agreement and the employment contract, particularly to determine the legal nature of the relationship between administrators and directors, on the one hand, and the company, on the other.

The mandate agreement is expressly regulated by the Civil Code, being defined in art. 2009 as "a contract under which one party, called the agent, undertakes to conclude one or more legal acts on behalf of the other party, called the principal". It is considered that the definition provided by the Civil Code departs from the classical view according to which the notion of mandate is associated with that of representation, the legal act being concluded by the agent on behalf of, but not necessarily in the name of, the

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principal. The distinction between the two forms of mandate, with and without representation, is expressly provided by art. 2011 of the Civil Code[1]. Moreover, the law presumes that a mandate agreement is one with representation, and only when the contract clearly and unequivocally authorises the agent to act in his or her own name can it be qualified as a mandate without representation[2]. Furthermore, it is stated at art. 2010 of the Civil Code that a mandate may be either gratuitous or onerous, stipulating that "a mandate between two natural persons is presumed to be gratuitous; however, a mandate granted for the performance of professional activities is presumed to be onerous". Considering the specific nature of the mandate given to an administrator or director, whereby the agent performs a professional activity on behalf of the company, it follows that such an agreement is onerous. The onerous nature of this specific mandate has been recognized since 1900, when the Court of Cassation, by Decision No. 17/1900, held that a mandate entrusted to a person who carries it out as a professional activity is presumed to be onerous, even in the absence of an express contractual clause regarding remuneration [3].

Unlike the onerous mandate contract which concerns exclusively the conclusion of legal acts, the individual employment contract refers to material acts (operations) carried out, in principle, without any relationship of representation towards to those who employ[4]. Of course, for certain categories of activities, a mandate of representation may also arise, for example, when participating in negotiations as a representative of the company, even though the legal relationship with the company remains governed by the labour law.

Just like the mandate contract, the individual employment contract is a nominate contract, having specific elements that clearly emerge from the definition provided by art. 10 of the Law No. 53/2003 regarding Labour Code, which states that this type of contract is "an agreement under which a

[1] Dumitru Marcel Gavriș and others, *Noul Cod civil. Comentarii, doctrină și jurisprudență*, vol. III. Art. 1650-2664, Hamangiu Publishing House, Bucharest, 2012, p. 363.

[2] Stanciu D. Cărpenaru, *Tratat de drept comercial român*, 6th updated edition, Universul Juridic Publishing House, Bucharest, 2019, p. 526.

[3] Court of Cassation, Decision No. 17/1990 published in Bulletin of Cassation 1900, p. 36 and following in Dumitru Marcel Gavriș and others, *op. cit.*, p. 366.

[4] Titus Prescure, Andreea Ciurea, *Contracte civile*, Hamangiu, București Publishing House, 2007, p. 431.

natural personal, referred to as the employee, undertakes to perform work for and under the authority of an employer, a natural or legal person, in exchange for remuneration called salary". The definition highlights the object of the individual employment contract, namely the obligation of the employee to perform, under the law, work for and under the subordination of a legal or natural person, on one hand and the employer's obligation to pay a sum of money, namely the salary, on the other hand[5].

Starting from the considerations set above and analysing the definition from the perspective of the relationship between the parties, it is observed that the defining elements of the individual employment contract is subordination, namely the performance of work for and under the authority of the employer. The subordination expressed by the phrase "under the authority of an employer" entails serious and cumulative limitations regarding on the employee's freedom to organize his or her activity and to make independent decisions, highlighting the binding character of the employer's instructions, under the sanction of disciplinary liability specific to labour law[6]. In an employment contract relationship, the parties are not in an equal position, the individual employment contract being "characterised by a democratic deficit which can be mitigated only by a legislative intervention, restoring, at least partially, the balance between the contracting parties".[7] In clarifying the specific object of the individual employment contract, judicial practice has held that any agreement which does not have as an object the performance of work for and under the authority of the employer, and which does not contain obligations to perform work and to pay remuneration, cannot be regarded as an employment contract[8].

[5] Marius Cătălin Preduț, *Codul Muncii comentat. Protecția datelor personale, telemunca, munca virtuală și alte forme de muncă*, 2nd revised edition, Universul Juridic Publishing House, Bucharest, 2019, p. 91.

[6] Costel Gîlcă, *Codul Muncii. Comentat și adnotat*, Rosetti International Publishing House, Bucharest, 2013, p. 57.

[7] Raluca Dimitriu, *Recalificarea unui contract civil ca având natura juridică a unui contract de muncă*, in *Dreptul* No. 8/2018, Uniunea Juriștilor din România, Bucharest, p. 63.

[8] Hight Court of Cassation and Justice, Second Civil Chamber, Decision No. 2900/2013. In this context, it should be noted that judicial practice has also held that "the fact that the payment of financial entitlements is contractually made conditional upon the achievement of a performance target does not affect their classification as salary within an employment relationship, since contractual clauses must be interpreted systematically." – Constanța Court of Appeal, Civil Decision No. 412/CA 31 May 2016,

The elements outlined in the introductory section are the starting point for clarifying the legal nature of the relationship between the administrator and the director with the company on which behalf they act, with emphasis on joint-stock companies and limited liability companies.

2. The nature of the legal relationship between a joint-stock company (SA) and its administrators, respectively directors

Relevant to this analysis are the provisions of art. 72 of the Law No. 31/1990, republished, on companies, according to which "the obligations and liability of administrators are governed by the provisions relating to mandate and by those specifically provided by law". Considering the legal provisions, it is assumed that the legal relationship between the administrator and the company is a contractual mandate, since the administrator is appointed by the articles of incorporation or by the resolution of the general meeting of the shareholders, and by accepting the appointment, enters into a legal a mandate relationship with the company. Furthermore, through the amendments to Law No. 31/1990 made in 2006 and 2007, an explicit prohibition was introduced against holding simultaneously the status of employee and that of administrator or director of the company. The specialized legal doctrine has pointed out that "it is illogical for an employment contract to be concluded by a manager (the head of the company, the employer of the other employees) with the very company he manages, since the relationship of subordination between employer and employee, as well as the disciplinary liability specific to labour law, are entirely absent from such an 'employment contract.'" . As stated, if the prohibition established by art. 137[1] paragraph (3) of the Law 31/1990,

in Vasile Nemeș, Gabriela Fierbințeanu, *Dreptul contractelor civile și comerciale. Teorie, jurisprudență, modele*, Hamangiu Publishing House, Bucharest, 2020, pp. 323, 324. Relevant is also the Decision No. 29, 14 July 2016 of Târgu-Mureș Court of Appeal according to which "the mandate agreement is subject to the special legislation", namely Law No. 31/1990, only regarding the obligations and liability of administrators (art. 72). However, the subject matter of the present case (payment of remuneration) is not governed by these special provisions. Considering the source and nature of the obligations and the assimilation of such categories of income to salary income, the court of judicial review held that the provisions of the Labour Code, as general rule, are applicable to the dispute, the conflict between the parties having the nature and characteristics of an employment dispute, in Sebastian Bodu, *Legea societăților comerciale*, Rosetti, Bucharest Publishing House, 2019, p. 391.

namely, the prohibition to conclude individual employment contracts during the term of mandate as administrator/director, is breached, the sanction will consist in the termination by law effect of such contracts pursuant to art. V of Government Emergency Ordinance No. 82/2007.

Also, legal doctrine is unanimous in stating that the prohibition on concluding individual employment contracts with administrators, directors, members of the supervisory board, and members of the management board applies not only to joint-stock companies but also to partnerships limited by shares[9].

At the same time, the current regulation also clarifies the situation in which, during an employment relationship, a change occurs whereby an employee acquires the status of administrator, Article 137[1] paragraph (3) of Law No. 31/1990 on companies providing that "during the performance of the mandate, administrators cannot conclude an employment contract with the company. If administrators have been appointed from among the company's employees, the individual employment contract shall be suspended for the duration of the mandate." Regardless of the employee's position within the company, upon appointment as administrator, the individual employment contract is suspended by law effects. Although the Labor Code does not contain an explicit provision referring to this specific case of suspension, the situation falls under the scope of art. 50 letter (i) of the Labor Code, which stipulates that "the individual employment contract is suspended by operation of law (...) in other cases expressly provided by law", provisions which will be used in conjunction with those of the Law on Companies.

The legal doctrine states that[10] such a legally imposed approached according to which the individual employment contract is suspended may create challenges for the company in organizing and carrying out its activities, as it is left with an unoccupied position that cannot be advertised for recruitment, being reserved for the administrator for the moment his or her mandate expires. It should be emphasised that labour legislation provides the necessary tools to address such difficulties. In this regard,

[9] See, also, Tiberiu Țiclea, *Considerații privind conceptul și contractul de salariat – acționar în contextul tendinței actuale de liberalizare a dreptului muncii*, în *Revista Română de Dreptul Muncii* No. 9/2014, Wolters Kluwer Publishing House, Bucharest, p. 17.

[10] Stanciu D. Cărpenaru, Gheorghe Piperea, Sorin David, *op. cit.*, p. 491.

art. 83(a) of the Labour Code allows the conclusion of a fixed-term individual employment contract "for the replacement of an employee whose contract has been suspended, except when that employee is participating in a strike". We cannot agree with the opinion[11] that the law should have provided the termination of the employment contract upon appointment as administrator, or that it should have expressly allowed the position reserved for the administrator to be filled under a fixed-term employment contract. Considering the legal framework governing employment relationships, nothing prevents the employer from replacing the employee who has become an administrator with another employee hired for a fixed term, until the holder returns to their position, without the need for such a provision to be expressly included in the special law. Moreover, the legislative solution namely, the suspension of the employment contract protects the interests of the employee appointed as administrator, since it allows the person to return to the previous position once the mandate ends. Also, during the suspension period, the contract cannot be amended, except for termination by law effect, thereby eliminating the risk of dismissal for reasons unrelated to the employee's person. It is well known that there is no interdiction for the employer to decide, during the suspension period, to cancel the position held by the employee who has become an administrator, but it is important to highlight that the dismissal decision can be implemented only after the employee's return, being necessary to observe certain procedural requirements and time limits imposed by labour law. It should be noted that in contrast to other cases of suspension, in the situation of an administrator returning to the previous position under an employment contract, the special law does not grant additional protection requiring retention in the position for a certain period; thus, dismissal proceedings may commence upon resumption of work.

Given the regime applicable to the management of commercial companies, namely the single-tier management system regulated under Chapter IV, Subsection I of Law No. 31/1990, a case of incompatibility also arises between the position of director and that of employee. Persons vested by the board of directors with executive prerogatives, exercising such prerogatives under a mandate granted by the company, cannot simultaneously hold employee status within the same company. Their relationship with the company is governed by a specific mandate contract and within the limits

[11] *Ibidem.*

of the mandate received, not by an employment contract and the provisions of labour law[12]. Furthermore, following the amendments to Law No. 31/1990 by Government Emergency Ordinance No. 82/2007, it is expressly provided that the rule set out in Article 137¹ (3) (concerning the prohibition of concluding an individual employment contract in the case of administrators) also applies to directors. We consider that this prohibition should not be applied to all types of director positions within a company, but only to those who, under the mandate granted by the board of directors, are entrusted with executive management powers and determine the company's strategic decision. This interpretation is expressly confirmed by Article 143(5) of Law No. 31/1990, which specifies that "for the purposes of this law, a director of a joint-stock company is only the person to whom management powers have been delegated in accordance with paragraph (1). Any other person, regardless of the technical title of the position held, is excluded from the application of the provisions concerning company directors." On the other hand, it has been argued that deputy general directors are subject to labour law[13]. In light of the considerations set out in the first section of this paper and taking into account the defining elements of the employment contract, we cannot share this view as long as the deputy general directors, together with the general director, form the executive management. Although a formal subordination may exist between them, this does not affect the deputy's executive prerogatives over the company's activity, as both are equally accountable to the board of directors pursuant to their appointment and the delegation of powers received.

Specialised legal literature notes that although the law uses the phrase "administrators may not conclude with the company," which might lead to the conclusion that a cumulative holding of positions could be possible with different employers, an analysis of Article 138²(2)(b)[14] of Law No. 31/1990 shows that an independent administrator as a member of the board of

[12] Alexandru Athanasiu, Magda Volonciu, Luminița Dima, Oana Ileana Cazan, *Codul Muncii. Comentariu pe articole*, Vol. II. Art. 108-298, C.H. Beck, Bucharest Publishing House, 2011, p. 284.

[13] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 2nd revised, edition, Universul Juridic Publishing House, Bucharest, 2012, p. 231.

[14] When appointing an independent administrator, the general meeting of shareholders shall take into account the following criteria: "... (b) the individual must not have been an employment of the company or of a company controlled by it, and must not have held such a position within the past five years".

directors may not combine this capacity with that of an employee, even with different employers[15].

With respect to the position of director, there is no statutory provision establishing a prohibition on simultaneously holding employee status in another company where the person does not act as a director. Nevertheless, such a restriction may (and indeed should) be regulated by the parties through the mandate agreement, to safeguard the interests of the company that is a party to the agreement and to prevent any potential conflict of interest. Thus, the parties may expressly provide in the mandate agreement that the director is prohibited from engaging, without the prior authorisation of the board of directors, in any activities for other enterprises that constitute, or are expected to become, competitors of the company in which they hold the position of director.

3. The legal nature of the relationship between a limited liability company (SRL) and its administrators and directors

In the case of joint-stock companies, the legal nature of the relationship between administrators and directors with the company is clarified by explicit statutory provisions. However, in the case of limited liability companies, certain distinctions and clarifications are necessary.

According to art. 72 of Law No. 31/1990 on Companies, included in the general section applicable to all forms of companies, namely Title III – Functioning of Companies, Chapter I – Common Provisions, the legal nature of the relationship between a limited liability company and its administrators is based on a mandate agreement, as defined by the Civil Code. The administrator acts as an organ of the company, operating in the name and on behalf of the company under the conferred mandate, thus establishing a civil relationship of representation rather than one of subordination. The same conclusion is supported by commercial law doctrine, which observes that even though the statutory prohibition on holding multiple positions expressly applies only to joint-stock companies, it should be interpreted as covering all administrators, regardless of the

[15] Maria Fodor, Irina Rădulescu, *Aspecte privind cumulul de funcții în cazul administratorilor societăților comerciale*, în *Revista Română de Dreptul Muncii* No. 6/2007, Wolters Kluwer Publishing House, Bucharest, p. 32.

company's legal form[16], which leads to the conclusion that the administrator may have a legal relationship with the company solely under a mandate contract. On the contrary[17], other doctrinal opinions maintain that, in the absence of an explicit prohibition, the relationship between a company and its administrator may also be established by means of an employment contract, since there is no justification for extending the scope of Article 137¹(3) – which regulates only the administration of joint-stock companies – to the administration of limited liability companies.

With respect to the legal nature of the relationship with directors, doctrinal opinions are divided. Some authors argue that nothing prevents the extension of the rules applicable to joint-stock companies to other forms of commercial companies, such as limited liability companies. However, it is emphasised that, in such a situation, it should not be the law itself that imposes an incompatibility, but rather the express will of the board of directors that has delegated its powers namely to the directors within limited liability companies who choose to perform their activity on the basis of a mandate agreement rather than an individual employment contract[18].

At the same time, it may be argued that[19], as shown below, that the provisions of art. 137¹ of Law No. 31/1990 constitute a special law in relation to the Labour Code, which serves as the general framework governing employment relations. Accordingly, these provisions apply by way of derogation from the general law, but only as an exception, namely in the cases expressly and exhaustively regulated by the statute. Moreover, art. 197(3) of Law No. 31/1990 expressly provides that "the provisions regarding the management of joint-stock companies are not applicable to limited liability companies, regardless of whether or not they are subject to

[16] See Stanciu D. Cărpenaru, *Drept comercial român*, 3rd edition, All Beck Publishing House, Bucharest, 2000, pp. 215, 216. The same idea is supported in earlier works, see, in this regard, Sorin David, Flavius Baias, *Răspunderea civilă a administratorului societății comerciale*, în *Dreptul* No. 8/1992, Uniunea Juriștilor din România, Bucharest, p. 14.

[17] M. Novac, *Calitatea de salariat și administrator al societății cu răspundere limitată*, available at *https://www.juridice.ro/202417/calitatea-de-salariat-si-administrator-al-societatii-cu-raspundere-limitata.html.*

[18] Alexandru Athanasiu, Magda Volonciu, Luminița Dima, Oana Ileana Cazan, *op. cit.*, p. 285.

[19] Excerpt from the opinion issued in 2009 by the Professional Civil Law Partnership Magda Volonciu și Asociații," by attorney Marius Eftimie, as part of an internal analysis conducted within a commercial company.

audit obligations." However, this situation does not apply to limited liability companies, since such a single-tier management system is not regulated by law for this type of entity. Consequently, this interpretation excludes the possibility of applying by analogy the provisions governing joint-stock companies and supports the conclusion that the legal nature of the relationship between a limited liability company and its directors falls under labour law rather than mandate law.

On the other hand, the decision of the Court of Justice of the European Union in *Bosworth & Hurley*[20] is particularly relevant. The Court held that "a contract concluded between a company and a natural person performing the functions of a director does not create a relationship of subordination

[20] European Union Court of Justice, C-603/17 *Peter Bosworth, Colin Hurley against Arcadia Petroleum Limited and others*, decision of 11 April 2019. The request for a preliminary ruling concerns the interpretation the provisions of Section 5 of Title II (Articles 18 to 21) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1; '*the Lugano II Convention'*). The request has been made in proceedings between Mr Peter Bosworth and Mr Colin Hurley, on the one hand, and Arcadia Petroleum Limited and other companies, on the other, concerning a claim for damages for the loss those companies claim to have suffered as a result of alleged fraud by Mr Bosworth and Mr Hurley. (see para. 2 of the Decision available at *https://curia.europa.eu/juris/document/document.jsf;jsessionid=74F2746CB2FB42EA2E6B9D5111D45A98?text=&docid=212908&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=268777).* Mr Bosworth and Mr Hurley are British nationals who are domiciled in Switzerland and who, at the material time, were chief executive officer (CEO) and chief financial officer (CFO), respectively, of the Arcadia Group. They were also directors of Arcadia London, Arcadia Singapore and Arcadia Switzerland and were each party to a contract of employment with one of those companies drafted by themselves or at their direction (see para. 7 of the Decision). By the application lodged to the High Court of Justice (England & Wales), Arcadia London, Arcadia Singapore, Arcadia Switzerland and Farahead Holdings, commence proceedings to sought compensation for the damage as a result of fraudulent transactions involving the companies in the group (see para. 8 of the Decision). Mr Bosworth and Mr Hurley challenged the jurisdiction of the United Kingdom courts to hear and determine Arcadia's damages claims against them on the ground that those claims fell within the provisions of Section 5 of Title II of the Lugano II Convention concerning the rules on jurisdiction over individual contracts of employment, and that, under those rules, the claims should be brought before the courts of the State in which Mr Bosworth and Mr Hurley are domiciled, that is to say, the Swiss courts (see para. 10 of the Decision). Precisely, the legal issue brought before de court, refers to the question if the two directors and employees according to UE law or they performed an independent activity?

between them and, therefore, cannot be classified as an 'individual employment contract' where, even though the shareholders of that company have the power to terminate the contract, that person is able to determine or effectively determines the terms of that contract and exercises an autonomous power of control over the day-to-day management of the company's business and over the performance of their own duties." This decision establishes an essential principle for our analysis, namely, that decision-making autonomy excludes the existence of an employment relationship. Detailing further, it was explained[21] that no subordination existed, since the claimants, acting as directors, exercised significant influence over de the company: (1) they concluded with the company where they are managers, an individual employment contract drafted by them and in accordance with their instructions, acting in the name and on behalf of the company and (2) exercised control over the person who employed them, as well as over the place and conditions where they have been employed. Also, it is noted that[22] the fact that the shareholders retained the power to appoint and dismiss them was deemed irrelevant, as the shareholders' legal control mechanisms do not, in themselves, establish subordination; thus, the mere fact that the shareholders have the power to revoke a directorship is not sufficient to demonstrate a relationship of subordination. Although the Court did not analyse the situation from the standpoint of a Romanian limited liability company, but rather a UK company functioning more as a joint-stock company with limited shareholder liability, the decision nonetheless has relevance and persuasive value in clarifying the legal nature of the relationship between a director and a company, as well as in distinguishing between the concepts of "employment" and "mandate" based on the principle of subordination.

We consider that, based on the principle developed by the European Union Court of Justice, in the case of limited liability companies with a more complex management structure, directors with power of representation delegated by the administrator or the board of directors may conclude a mandate contract, provided that they act autonomously in the name of the

[21] See also the Decision of the European Union Court of Justice, *cit. supra*. and Opinion of Advocate General Henrik Saugmandsgaard øe, delivered on 24 January 2019, in the same case, available at *https://curia.europa.eu/juris/document/document.jsf?text=&docid=210190&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=283733*

[22] *Ibidem.*

company, even though there is no explicit legal provision clarifying the applicable legal relationship. Of course, the risk cannot be ignored that, in such circumstances, a court of law might reclassify the mandate agreement as an employment contract. Such a judicial decision would also entail certain consequences. For example[23], one may refer to the implications concerning salary rights, in which case the collective labour agreement would become applicable, thereby granting the director the right to claim retroactively the benefits not received during the previous three years. Furthermore, where a director has caused damage or loss to the company and the company seeks to recover it, the determination of the true legal nature of the relationship between the parties becomes decisive for establishing the manager's liability under the relevant provisions of the labour law. In this respect, it should be noted that the pecuniary liability of employees under labour law is significantly more limited than that of a mandatary, whose liability is governed by the rules of commercial law.

4. Conclusions and *de lege ferenda* proposals

In the absence of explicit statutory regulation, limited liability companies have, in practice, widely adopted the use of mandate agreements for general directors and deputy general directors, being primarily driven by the need to ensure that top management possesses sufficient strategic and operational autonomy to pursue the company's profitability objectives while maintaining flexibility in the exercise of their functions within the limits of the mandate conferred. From a corporate governance perspective, the mandate agreement offers significant advantages, being characterised by greater legal and managerial flexibility, the possibility of revocation without the procedural constraints imposed by labour law. Also, clear representation, strategic freedom, and enhanced managerial accountability which is not restricted by the protective mechanism of the Labour Code, are important elements.

All the above lead us to conclude that *de lege ferenda* the legislator should consider explicitly extending the prohibition on concluding individual employment contracts to directors of limited liability companies, given the role they perform within the corporate structure, namely, that of direction and control, in the absence of any element of subordination. At the same time, an alternative option would be to leave it to the discretion of the

[23] Excerpt from the opinion expressed by attorney Marius Eftimie, see footnote 26.

administrators to determine the legal framework governing their relationship with the company, whether by means of an individual employment contract or a mandate agreement, depending on the direction established by the parties in the contract.

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THE PRINCIPLE OF EVIDENTIARY LOYALTY IN CRIMINAL PROCEEDINGS: HUMAN DIGNITY AND FAIR TRIAL GUARANTEES

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ABSTRACT

This paper examines the principle of evidentiary loyalty as a structural safeguard of the right to a fair trial within criminal proceedings. Starting from the premise that the criminal process cannot tolerate the use of evidence obtained through violence, coercion, deceit, or other forms of procedural illegitimacy, the study analyzes the correlation between domestic law – particularly Articles 101-102 of the Romanian Code of Criminal Procedure – and the standards developed in the jurisprudence of the European Court of Human Rights. Human dignity, as the core value protected by Article 3 of the European Convention on Human Rights, imposes absolute limits on the methods through which evidence may be gathered, while Article 6 requires courts to exclude any evidence that affects the fairness of the proceedings. By interpreting both doctrinal sources and relevant case law, the article argues that evidentiary loyalty functions not merely as a technical rule, but as an essential guarantee of procedural integrity and judicial legitimacy.

KEYWORDS: *evidentiary loyalty; unlawfully obtained evidence; human dignity; exclusionary rule; procedural fairness; ECHR;*

1. Introduction

The principle of evidentiary loyalty constitutes a fundamental component of the right to a fair trial, ensuring the protection of the fundamental rights and freedoms of the person under investigation. In a state governed by the rule of law, the pursuit of truth cannot justify the use of methods that infringe upon human dignity or the freedom of will. Article 101 of the Romanian Code of Criminal Procedure expressly provides that "*the use of violence, threats or any other means of coercion, as well as promises or inducements, for the purpose of obtaining evidence, is prohibited*[1].

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In this context, evidentiary loyalty functions as a substantive limitation on the methods through which investigative bodies may collect information. Violence, coercion, manipulation, inducement, or any practice capable of undermining the voluntariness of a person's statements are incompatible with the rule of law and with the values protected under Articles 3 and 6 of the Convention.[2] As such, the exclusion of unlawfully or unfairly obtained evidence is not merely a procedural sanction, but a structural guarantee intended to preserve the legitimacy of the judicial act.

Recent doctrinal analyses underline that evidentiary loyalty is not merely a procedural formality, but a genuine safeguard of human dignity and of the legitimacy of the criminal process. Consequently, any evidence obtained through coercion risks being declared inadmissible.[3]

This study aims to analyse the content, scope, and implications of the principle of evidentiary loyalty within Romanian criminal procedure, in light of the constitutional framework and the standards developed by the European Court of Human Rights. By examining relevant case law, doctrinal perspectives, and statutory provisions, the paper argues that evidentiary loyalty represents not only a requirement of legality, but also an ethical imperative that shapes the boundaries of legitimate state intervention in the criminal process.

2. Regulation of the principle of evidentiary loyalty in Romanian Criminal Procedure Law

The principle of evidentiary loyalty is expressly enshrined in Romanian criminal procedure law through Articles 101 and 102 of the Criminal Procedure Code. These provisions state that "it is prohibited to induce a person to make statements by means of violence, threats or other forms of coercion," thereby establishing a constitutional and conventional obligation for judicial authorities to respect human dignity and the freedom of will of the person under investigation. *Evidence obtained in such a manner must be*

[1] Romanian Code of Criminal Procedure, republished, as subsequently amended, Article 101(1).

[2] Article 3 of the European Convention on Human Rights prohibits torture, as well as inhuman or degrading treatment or punishment.

[3] Oana Bran, "Loyalty and Legality in the Administration of Evidence in Criminal Proceedings" (in Romanian), 2023, available at*: https://avocat-oanabran.ro.*

excluded, as evidence obtained through torture, as well as any derivative evidence, cannot be used in criminal proceedings.[4]

The origins of this principle can be traced to the continental legal tradition, where it is closely linked to the broader notion of procedural good faith. Legal scholarship emphasizes that criminal procedure is not merely a technical instrument for discovering the truth, but a system of guarantees designed to protect individual liberty and human dignity.[5]. Consequently, the state has not only the right, but also the obligation to obtain evidence in a loyal manner, without the use of methods that could compromise the decisional autonomy of the person being questioned.

The content of the principle is further reinforced by Article 102(2) of the Code of Criminal Procedure, which establishes the sanction of excluding unlawfully obtained evidence and provides that "*evidence obtained through torture, as well as any evidence derived therefrom, is affected by absolute nullity*." This provision transposes into domestic law the absolute standard imposed by Article 3 of the European Convention on Human Rights, according to which the prohibition of torture admits no derogation, even in exceptional circumstances.[6].

Romanian legal doctrine highlights that evidentiary loyalty extends to all stages of criminal proceedings, from the investigation phase to trial, and reflects the principles of equality of arms and the right to defence.[7] Judicial authorities are required not only to refrain from abusive methods themselves, but also to ensure that no other state body (such as the police or intelligence services) engages in disloyal practices aimed at obtaining evidence.

The Constitutional Court of Romania has consistently confirmed the imperative nature of these rules. In Decision no. 383/2015, the Court held that the *legality and loyalty of evidence-gathering constitute essential conditions for the validity of criminal proceedings, and that any evidence*

[4] Romanian Code of Criminal Procedure, republished, as subsequently amended, Article 102(1).

[5] For this doctrinal approach, see Grigore Gr. Theodoru, *Treatise on Criminal Procedure* (in Romanian), 3rd ed., Hamangiu Publishing House, Bucharest, 2013; Ion Neagu, *Treatise on Criminal Procedure. General Part* (in Romanian), 3rd ed., Universul Juridic, Bucharest, 2020.

[6] European Convention on Human Rights, Article 3.

[7] Mihail Udroiu, *Criminal Procedure. General Part* (in Romanian), C.H. Beck, Bucharest, 2023, p. 214.

obtained in breach of these principles results in the absolute nullity of the procedural act.[8]

Recent doctrinal analyses likewise reaffirm that evidentiary loyalty is not limited to avoiding torture, but also encompasses the prohibition of promises, rewards, or inducements aimed at obtaining incriminating statements or actions. One specialized study observes that "*evidentiary loyalty represents a balance between the need to discover the truth and the obligation to respect human dignity," and that its violation "undermines confidence in the act of justice*."[9].

Although the Romanian legal framework enshrines a high standard of procedural loyalty, its practical application remains deficient. Despite the alignment of the Code of Criminal Procedure with European standards, judicial practice still reveals instances in which evidence is obtained through coercion or psychological pressure – situations confirmed by numerous ECtHR judgments finding Romania in violation of Article 3 of the Convention.

3. Coercition and threats in obtaining evidence

The European Court of Human Rights (ECtHR) has consistently held that no circumstance, neither the seriousness of the offence nor public interest considerations, can justify the use of violence, threats, or coercion for the purpose of obtaining evidence.

In *Gäfgen v. Germany*,[10] the Court found that even the mere threat of torture addressed to a suspect in order to obtain information regarding the whereabouts of a victim amounted to a violation of Article 3, regardless of whether the violence was ultimately carried out.

In *Jalloh v. Germany*, the forced administration of an emetic with the purpose of retrieving material evidence was qualified as inhuman and degrading treatment, and the subsequent use of the evidence in the trial was

[8] Constitutional Court of Romania, Decision No. 383/2015, published in the Official Gazette No. 534/17 July 2015.

[9] Oana Bran, "Loyalty and Legality in the Administration of Evidence in Criminal Proceedings" (in Romanian), 2023, available at: *https://avocat-oanabran.ro.*

[10] ECtHR, *Gäfgen v. Germany*, no. 22978/05, Judgment of 1 June 2010, §§108-119, available at: *https://hudoc.echr.coe.int/eng?i=001-99015.*

deemed incompatible with the principle of evidentiary loyalty.[11]. The Court further held that admitting evidence obtained through such coercive measures violated Article 6, as it undermined the very essence of the privilege against self-incrimination.

These standards have direct relevance in the Romanian context. Romania has been repeatedly found in breach of Article 3 in cases where the authorities used violence or intimidation during criminal investigations.

Thus, in *Barbu Anghelescu v. Romania* (2004), the applicant claimed that he had been beaten by police officers in order to confess. The Court found a violation of Article 3, emphasising that the authorities failed to provide a plausible explanation for the injuries sustained and that they had not conducted an effective investigation. [12]. This judgment became a reference point in subsequent case law, illustrating that evidence obtained through violence compromises the integrity of the entire criminal process.

In *Constantin and Stoian v. Romania* (2009),[13] the ECtHR held that the police had initiated and actively directed the criminal activity, and therefore the evidence obtained could not serve as the basis for a conviction. The judgment concerned the issue of police entrapment, with the Court finding that the authorities had exceeded the limits of passive investigation and that domestic courts had failed to adequately examine the applicants' allegations. This confirms that evidentiary loyalty is both a moral and legal criterion for the validity of a criminal trial, and that any departure from neutrality compromises the fairness of the proceedings.

In *Bălteanu v. Romania* (2013), the Court found that the applicant had been subjected to degrading treatment while in custody, and that the authorities had failed to offer a plausible explanation for his injuries. The Court stressed that an Article 3 violation has a dual nature when the state fails to conduct a prompt, independent, and effective investigation, thereby transforming an assault on human dignity into both a substantive and procedural violation.

Although the case did not concern evidence-gathering directly, the principle affirmed by the Court – that any form of coercion, fear, or

[11] ECtHR, *Jalloh v. Germany*, no. 54810/00, Judgment of 11 July 2006, §§68-105, available at: *https://hudoc.echr.coe.int/eng?i=001-76307.*

[12] CEDO, cauza *Barbu Anghelescu c. României*, cererea nr. 46430/99, hotărârea din 5 octombrie 2004, §67-74.

[13] CEDO, *Constantin și Stoian împotriva României* (nr. 23782/06 și 46629/06, pct. 33 și 34, 29 septembrie 2009, available at: *https://hudoc.echr.coe.int*.

humiliation is incompatible with the dignity owed to persons deprived of liberty – is a significant benchmark for evaluating evidentiary loyalty in domestic criminal proceedings. In its consistent jurisprudence, the Court has held that statements obtained through methods that compromise a person's freedom of will cannot be regarded as the product of a voluntary act, an idea that lies at the heart of the principle of evidentiary loyalty[14].

At the domestic level, Article 101(2) of the Romanian Code of Criminal Procedure expressly provides that "*evidence obtained through torture cannot be used in criminal proceedings*," thus establishing the rule of automatic exclusion. However, the practical application of this rule is often deficient, particularly in cases where coercion is psychological and difficult to prove. As noted in the literature, psychological pressure exerted by investigative authorities, when it affects the freedom of will, produces the same legal consequences as physical coercion[15].

Through Decision No. 383/2015, the Constitutional Court of Romania confirmed the constitutionality of Article 102(2) of the Code of Criminal Procedure, emphasising that unlawfully obtained evidence cannot be used in criminal proceedings. Although the Court did not explicitly refer to the principle of evidentiary loyalty, the exclusion of evidence obtained in violation of fundamental rights is evidently consistent with the guarantees of the right to silence and the prohibition of coercion, as developed in ECtHR jurisprudence.

Consequently, statements obtained through violence, threats, psychological pressure, or improper inducements cannot be considered the product of free will and must be excluded regardless of their probative value, in order to preserve the fairness of the proceedings.[16] Any violation of the prohibition of coercion – even in subtle forms – constitutes a serious breach of the principle of evidentiary loyalty and a direct infringement of the values protected by Article 3 of the Convention. Legal truth cannot be founded on a person's suffering or fear; the use of such methods irreparably compromises the legitimacy of the judicial act.

[14] CEDO, cauza *Bălteanu c. României*, cererea nr. 142/09, hotărârea din 16 iulie 2013, §53-60, available at: *https://hudoc.echr.coe.int.*

[15] M. Udroiu, *Procedură penală. Partea generală*, Ed. C.H. Beck, București, 2023, p. 217.

[16] Constitutional Court of Romania, Decision No. 383/2015, published in the Official Gazette No. 534/17 July 2015.

4. Consequences of violating the principle of evidentiary loyalty

Violating the principle of evidentiary loyalty has direct effects on the validity of the entire criminal process, undermining not only the individual rights of the person under investigation, but also the public's confidence in the justice system. The Romanian Code of Criminal Procedure expressly provides a sanction for evidence obtained unlawfully or disloyally: according to Article 102(2), evidence obtained through torture, as well as any derivative evidence, is affected by absolute nullity.

The applicable sanction for obtaining evidence through an illicit means is absolute nullity. This rule reflects, in domestic law, a conception similar to the "fruit of the poisonous tree" doctrine, in the sense that the initial illegality contaminates any derivative evidence, affecting its admissibility. [17]

Legal doctrine consistently affirms that excluding evidence obtained in violation of the law or of fundamental rights is not a procedural nicety, but an essential safeguard of the rule of law and of the guarantees protected under Articles 3 and 6 of the European Convention on Human Rights.[18]

Doctrine also stresses that Romanian courts must adopt an active stance in identifying situations of disloyal evidence-gathering and must order the exclusion of such evidence even ex officio when the case file contains sufficient indications of illegality or violation of fundamental rights. This obligation derives from the principle of the active role of the judge, enshrined in Article 349(2) of the Code of Criminal Procedure, which requires the court to verify the legality and loyalty of evidence on its own initiative as an intrinsic guarantee of a fair trial.

The Constitutional Court of Romania has repeatedly confirmed the imperative nature of these norms. In Decision No. 383/2015[19], the Court upheld the constitutionality of Article 102(2) of the Code of Criminal

[17] For the theoretical foundations of the exclusion of unlawfully obtained evidence, see Ion Neagu, *Treatise on Criminal Procedure. General Part* (in Romanian), 3rd ed., Universul Juridic, Bucharest, 2020; Anastasiu Crișu, *Criminal Procedural Law. General Part* (in Romanian), 6th ed., Hamangiu Publishing House, 2022.

[18] For ECtHR standards concerning the effects of Articles 3 and 6 on the admissibility of evidence, see: ECtHR, *Gäfgen v. Germany*, no. 22978/05, Judgment of 1 June 2010; ECtHR, *Jalloh v. Germany*, no. 54810/00, Judgment of 11 July 2006; D. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, 2018.

[19] Constitutional Court of Romania, Decision No. 383/2015, published in the Official Gazette No. 534/17 July 2015.

Procedure, holding that unlawfully obtained evidence cannot be used in criminal proceedings. Although the Court does not explicitly refer to the "loyalty of evidence-gathering," the rule of excluding illegal evidence constitutes the normative expression of this requirement, in line with the ECtHR's case law concerning the integrity of criminal proceedings.

The fundamental consequence of violating the principle of evidentiary loyalty is not limited to the nullity of the investigative act but concerns the very legitimacy of the judicial process. A criminal proceeding cannot be built upon evidence obtained through violence, coercion, deception, or any other prohibited practice, because "truth" obtained through illicit means is not legal truth, but a distortion of it. Contemporary doctrine emphasises that evidence cannot be obtained at any cost, for human dignity represents the supreme value of criminal procedure and absolutely limits the investigative methods that may be used.

At the European level, the Strasbourg Court has reiterated in several Romanian cases that the mere use of evidence obtained through torture constitutes an autonomous violation of Article 3 of the Convention, even where such evidence was not decisive for the conviction.

In *Anghelescu v. Romania* (2004), he Court found that the applicant had been subjected to physical violence while in detention and that the authorities had failed to provide a plausible explanation for the injuries recorded. Furthermore, the state failed to fulfil its procedural obligation to conduct a prompt and effective investigation into the allegations of ill-treatment. Although the judgment did not directly concern the admissibility of evidence, it illustrates the fundamental principle that any form of violence or coercion exerted on a person deprived of liberty is incompatible with human dignity – an essential premise for evaluating evidentiary loyalty in domestic law.[20] The Court reiterated that signing statements under pressure amounts to a form of coercion, and the use of such evidence irreparably compromises the fairness of the proceedings. The case demonstrates that violence is not only a violation of Article 3, but also a breach of evidentiary loyalty under Article 101 of the Code of Criminal Procedure.

Similarly, in *Stoianova and Nedelcu v. Romania* (2005e Court found a violation of Article 3 both in its substantive aspect, due to the degrading treatment applied to the applicants, and in its procedural aspect, since the

[20] ECtHR, *Anghelescu v. Romania (no. 2)*, no. 41904/02, Judgment of 9 April 2009, §§54-62, available at: *https://hudoc.echr.coe.int.*

authorities failed to conduct a genuine and effective investigation. The relevance of the case lies in the principle that the state's obligation to protect the integrity of the person extends to all procedural stages, including those outside formal judicial settings, and that compliance with this obligation implicitly influences the assessment of the legality and loyalty of any evidence that might arise from such situations.[21] The Court highlighted the absence of an effective investigation into the allegations of ill-treatment during detention, confirming the state's duty to safeguard human dignity even in extrajudicial phases. Evidentiary loyalty thus requires not only that evidence be obtained lawfully, but also that all circumstances suggesting the use of impermissible methods be thoroughly investigated.

Therefore, the exclusion of unlawfully obtained evidence is an indispensable guarantee of the fairness of criminal proceedings, as well as a form of moral redress for persons whose rights have been violated. Exclusion serves not only a punitive function, but also a preventive one, by discouraging investigative authorities from resorting to abusive practices.

The academic approach emphasizes that Romanian courts must actively identify situations of disloyal evidence-gathering and exclude evidence obtained through impermissible methods even ex officio whenever the case materials provide sufficient indications. This judicial duty derives from Article 349(2) of the Code of Criminal Procedure and forms an integral part of fair-trial guarantees.

Ultimately, the consequence of violating the principle of evidentiary loyalty concerns not only the nullity of investigative acts, but the overall legitimacy of the criminal process itself. Justice cannot rest upon illegitimate means, and legal truth obtained through violence, coercion, or entrapment is a distortion of the values and purposes of criminal procedure.[22] As contemporary doctrine consistently notes, evidence cannot be obtained at any cost, for human dignity is the essential value that absolutely limits permissible investigative methods.

[21] ECtHR, *Stoianova and Nedelcu v. Romania*, no. 77517/01, Judgment of 4 August 2005, §§74-81, available at: *https://hudoc.echr.coe.int.*

[22] For this doctrinal approach, see Ion Neagu, *Treatise on Criminal Procedure. General Part* (in Romanian), 3rd ed., Universul Juridic, Bucharest, 2020; Mihail Udroiu, *Criminal Procedure. General Part* (in Romanian), C.H. Beck, Bucharest, 2023.

Conclusions

The analysis of domestic regulations and ECtHR case law demonstrates that the principle of evidentiary loyalty is not merely a technical rule of procedure, but a structural pillar of the rule of law. Article 101 of the Romanian Code of Criminal Procedure explicitly prohibits the obtaining of evidence through coercion, while Article 102 provides for the automatic exclusion of evidence obtained unlawfully. In practice, however, numerous cases brought against Romania show that the application of these principles is often superficial.

Through the cases examined, the European Court of Human Rights has made clear that evidentiary loyalty is not a formal concept but an effective safeguard against abuses of power. Although Romania benefits from a comprehensive legal framework, problems persist at the level of practical implementation, which makes it necessary to strengthen judicial oversight of the manner in which evidence is obtained and administered.

The natural legal consequence is the exclusion of unlawfully obtained evidence and the disciplinary or criminal sanctioning of those responsible. Beyond its legal effects, however, evidentiary loyalty has a profound ethical dimension: it ensures that judicial truth is not constructed through violence or manipulation, but through respect for human dignity.

To reinforce the application of this principle, continuous legal education for judges and investigative authorities is essential, together with genuine judicial control over undercover operations and interrogation methods. Only through such measures can a proper balance be achieved between the effectiveness of criminal investigations and the protection of fundamental rights, ensuring that justice is not only efficient, but also fair.

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CONSIDERATIONS REGARDING THE CRIME OF DECEPTION AND THE CRIME OF COMPUTER FRAUD

Dragoș VÎRLAN∗

ABSTRACT

The current regulations on the crimes of fraud (Article 244 of the Romanian Criminal Code) and computer fraud (Article 249 of the Criminal Code) meet society's needs to punish two of the most common crimes in the contemporary criminal environment. Fraud is distinguished, among other things, by the diversity of methods that can correspond to the objective manner of commission, being encountered in the most diverse forms in everyday reality. On the other hand, computer fraud is characterized by fraudulent practices in the field of information technology that cause harm to the injured party in a manner similar to that which characterizes fraud. Even though fraud and deception may share many common elements, they are different crimes, which ultimately result in criminal liability for the perpetrator's actions. In most cases, a complex analysis of the facts brought before the court is required in order to establish the legal classification and other related aspects in a fair manner.

KEYWORDS: *deception, fraud, cybercrime, judicial practice, decision;*

1. Introductory aspects

With the development of the virtual environment, criminals have adapted their methods to the new realities, managing to create various programs through which they commit crimes whose victims are online users.

Thus, the fraud methods used by perpetrators are constantly evolving, as they manage to keep pace with the antivirus programs used by ordinary users, and more. In such a context, judicial authorities encounter numerous difficulties in establishing the identity of those guilty of committing such crimes, mainly because the online environment is much more complex than it seems at first glance.

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It should be noted that the virtual environment offers data protection to people who use computer systems in various forms, but it also presents difficulties in identifying those who access such information without authorization. Thus, in most cases, online crimes have obvious advantages over those committed in the usual way, as it is very difficult for the judicial authorities to track down the real perpetrators, who sometimes escape punishment.

There are situations in judicial practice where legal classifications can be confused, mainly because of the context in which they are committed and their characteristic elements. Thus, upon careful analysis of the constituent elements of the crimes of fraud and computer fraud, we observe that they have many elements in common which, if not analyzed thoroughly, can be confused.

Even though the provisions of Articles 244 and 249 of the Criminal Code are explicit, recent judicial practice has raised a number of issues that can sometimes be treated differently and may be the source of inconsistent judicial practice. The intervention of the legislator or the supreme court was requested prior to the entry into force of the current Criminal Code, some of these contradictory issues having been previously raised but not resolved.

Prior to the actual analysis, I believe that a number of issues relating to the understanding of these terms should be clarified, as without establishing conceptual limits, the two offences may be confused. Thus, fraud is considered to be the act of deceiving or misleading with the aim of harming a person, as an illegal activity for the satisfaction of financial interests[1]. Fraud is considered a generic term given to an act by which a person seeks to make a material profit from breaking the law, for example, through deception or disregard for the rights of another person, such as contract fraud[2].

Fraud is a crime whereby the perpetrator attempts to obtain material gain by misleading the victim, presenting a falsehood as truth.

We note from the above definitions that the two crimes have similar elements which, in the absence of a thorough analysis, can lead to confusion between them. The legislator has fulfilled its task of providing as precise a definition as possible for these crimes, leaving it to judicial practice and doctrine to establish the differences between them.

[1] Mihail Udroiu, *Explanatory and Practical Dictionary of Criminal Law and Criminal Procedure Law*, C.H. Beck Publishing House, Bucharest, 2009, p. 182.

[2] George Antoniu, Costică Bulai, *Dictionary of Criminal Law and Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2011, p. 398.

In the same vein, legal literature shows that the elements considered specific to fraud are also found in the crime of deception, which means that the relationship between the crime of deception and that of fraud is one of part to whole. Given that the concept of fraud is used in legislation, doctrine, and sometimes in judicial practice, sometimes without clearly and specifically defining its content, it is necessary for the legislator to intervene to establish a broad concept of fraud that can be used subsequently for a specific area, either to delimit the concept of fraud from deception[3].

2. The difference between deception and computer fraud

The legislator has failed to find an optimal solution for those practical situations in which we may have a concurrence of incriminating texts, an aspect that can be a source of incorrect legal classification, because the texts of the law allow for distinct classifications in the case of similar acts depending on the perception of the issue brought before the court[4].

Of course, such a perception of a practical situation can also be found in the case of other crimes, but as can be seen from the opinion mentioned above, in the case of crimes of this type, there is a risk of creating very frequent and difficult to resolve confusion in the absence of a thorough analysis.

In this regard, it should be noted that in interpersonal relationships, situations may arise in which an individual is the victim of fraud perpetrated by another individual, as stated in Article 244 of the Criminal Code. However, the legislator did not consider it necessary to create a criminal framework for the act of fraud in all its forms, so that not all actions specific to it fall under criminal law, namely those that result in damage to the injured party[5].

We believe that the same reasoning should also be taken into account in the case of computer fraud, as the financial element is essential for the legal classification of the act in that category of crimes, with the difference that

[3] Mirela Carmen Dobrilă, *The crime of fraud in the old and new Penal Code*, Hamangiu Publishing House, Bucharest, 2014, p. 14.

[4] Anamaria Trancă; Dumitru Cristian, *Computer crimes in the new Criminal Code*, Universul Juridic Publishing House, Bucharest, 2014, p. 10.

[5] Avram Filipaș, *Romanian Criminal Law. Special Section*, Universul Juridic Publishing House, Bucharest, 2008, p. 368.

the specific method of committing the crime does not necessarily involve direct interaction between the perpetrator and the injured party.

With regard to this comparative analysis, it should be noted that both the crime of fraud and the crime of computer fraud are included in Title II of the Criminal Code, entitled "Crimes against property", but in different chapters, with the crime of fraud being in Chapter III, "Crimes against property through breach of trust," and computer fraud in Chapter IV, "Fraud committed through computer systems and electronic means of payment."

From the above, we can see an element that allows us to distinguish between the two crimes, showing that fraud can have a broader scope, while computer fraud is limited to activities that can be committed through computer systems and electronic means of payment.

The legislator has failed to find an optimal solution for those practical situations in which we may have a concurrence of incriminating texts, an aspect that can be a source of incorrect legal classification, because the texts of the law allow for distinct classifications in the case of similar acts depending on the perception of the issue brought before the court.

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We believe that the same reasoning should also be taken into account in the case of computer fraud, as the financial element is essential for the legal classification of the act in that category of crimes, with the difference that the specific method of committing the crime does not necessarily involve direct interaction between the perpetrator and the victim.

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From the above, we can see an element that allows us to distinguish between the two crimes, showing that fraud can have a broader scope, while computer fraud is limited to activities that can be committed through computer systems and electronic means of payment.

One of the problems we encounter in practice in understanding the distinction between fraud and computer fraud is the act of misleading through certain online sites.

The material element represented by that action through which a person can be misled by accessing online sites can sometimes create confusion, requiring further clarification.

To clarify this issue, I refer to Decision No. 2106 of June 14, 2013, of the High Court of Cassation and Justice, which, among other things, stated that *"the offense of computer fraud provided for in Article 49 of Law No. 161/2003 consists of causing financial damage to a person by entering, modifying, or deleting computer data, by restricting access to such data, or by preventing in any way the functioning of a computer system, for the purpose of obtaining a material benefit for oneself or for another.*

Active sales of goods online, carried out through platforms specialising in online trading of goods, which cause harm to victims misled by the introduction of computer data regarding the existence of goods and determined, in this way, to pay the price of non-existent goods, meet the constituent elements of the crime of computer fraud provided for in Article 49 of Law No. 161/2003. In this case, the constituent elements of the crime of fraud are not met, since the crime of computer fraud is a variant of the crime of fraud committed in the virtual environment, and Article 49 of Law No. 161/2003 constitutes the special rule in relation to Article 215 of the Criminal Code, which constitutes the general rule, with the special rule being exclusively applicable".[6]

Even though this decision was handed down under the old Criminal Code, given the current regulation of the two offenses, I believe it is still relevant. Thus, from the above, it appears that the supreme court conducted a comprehensive analysis of the distinctive elements between fraud and computer fraud. Among other things, we can observe that, in the opinion of the High Court of Cassation and Justice, computer fraud constitutes fraud committed in the online environment.

[6] *www.scj.ro*.

The reasoning behind this solution has been criticized since it was announced, as it allowed for the interpretation that any criminal act that includes the characteristic elements of deception and is committed through the virtual environment constitutes computer fraud. I believe that this concept is flawed, as we cannot attach absolute value to the circumstances in which the act was committed in such a context and impose a harsher legal classification on the perpetrator.

Despite this decision, the courts are still required to conduct a thorough analysis of the context in which the crime was committed, i.e., of all the characteristic elements, in order to arrive at a correct legal classification and eliminate any confusion.

The above is also found in the grounds for a court decision that settled a case where, among other things, the principle of applying the more favorable criminal law was discussed, stating that *"the aforementioned rule (Article 49 of Law No. 161/2003, currently Article 249 of the Criminal Code), which, in relation to that provided for in Article 215 of the previous Criminal Code, now Article 244 of the Criminal Code, constitutes the special rule governing a particular form of fraud, namely computer fraud. Obviously, this pre-supposes, as a material element, the performance of specific activities (entering, modifying, deleting computer data, restricting access to such data, preventing the operation of a computer system) for the purpose of obtaining a financial gain and resulting in damage.*

It is thus noted that the normative variants of the offense – with reference to the multiple ways in which the objective aspect can be achieved in terms of its material element – have as their common point and effect, on the one hand, fraud with prejudicial consequences for the passive subject and, on the other hand, the manifestly unjust and illegal obtaining of a benefit by the active subject. It is also evident that defrauding the passive subject involves misleading them, because otherwise the crime would be impossible to commit".[7]

From the above, we note that judicial practice has aligned itself with the decision handed down by the supreme court, taking up the arguments we mentioned earlier, with the reasoning of the court of judicial review representing a natural continuation of the arguments put forward by the High Court of Cassation and Justice.

[7] Craiova Court of Appeal, criminal decision no. 279/2017, www.rejust.ro.

The difference between the two offenses lies, among other things, in the manner in which the material element is committed, since computer fraud involves action on a computer system[8], while deception involves action carried out through computer systems.

The arguments presented in legal literature are developed by the court when ruling on a case involving a conflict between the rules governing the two offenses, where it was shown that, *"from an analysis of the legal texts criminalizing the two offenses, although there is a similarity between them, in terms of purpose and consequences, with regard to the material element, the difference between these two crimes is that, while computer fraud is committed on a computer system, fraud committed in the manner described above, namely by placing offers to sell products, receiving an advance payment from the buyer, followed by failure to transfer ownership of the goods, takes place through a computer system".*[9]

Thus, computer fraud will be retained if the act involves both the manner of consumption and the consequences being achieved exclusively by accessing computer systems. Failure to meet this criterion will lead to the offense not being retained, as this is an indispensable condition.

Therefore, we can also make a comparison, since in the case of a crime of deception, we may have as a special legal object the social relations relating to protection against acts of fraud[10], in the case of a crime of computer fraud, the special legal object is expressed through social relations that have the role of protecting the integrity of computer data, the security of computer systems, and a person's assets[11].

We note that, in the absence of increased attention to the social relations that may represent their specific legal object, computer fraud and fraud may be confused, as they present a similarity that may create problems in certain circumstances.

Regarding other issues involved in the two crimes, legal literature shows that they are aimed at harming the assets of a natural or legal person, and the rules that criminalize them establish the existence of a competition of incompatible legal qualifications, so that we will not have a single con-

[8] Alexandru Boroi, *Criminal Law. Special Part*, C.H. Beck Publishing House, Bucharest, 2025, p. 317.

[9] Mediaș Court, criminal case no. 88 of April 3, 2018, www.rejust.ro.

[10] Mihail Udroiu, *Syntheses of Criminal Law. Special Section*, C.H. Beck, Publishing House, Bucharest, 2025, p. 637.

[11] Alexandru Boroi, *op.cit.,* p. 317.

currence of offenses, but a single offense when the criteria set out in the text of the law are met, computer fraud, as it is criminalized by a special rule, in relation to the rule criminalizing fraud[12].

Another difference between the two crimes stems from an analysis of the material element, with computer fraud involving the commission of the crime on a computer system, while fraud can be committed in certain situations through a computer system.

Thus, for example, in a case brought before the court, it was established that the provisions governing the crime of computer fraud apply when advertisements are posted on various web platforms, resulting in the defrauding of customers, who are no longer sold the promised goods or services. In this regard, ignoring the arguments presented above, a court ruled that posting an advertisement on a specialized website regarding the employment of interested persons in Germany and the need to pay a fee of 65 lei for the intermediation of this service constitutes the offense of computer fraud. In the end, after traveling to Germany, it was found that the advertisement was false[13].

In view of the above explanations, we consider that such a decision is erroneous, because the means of communication is not directly relevant to the commission of the offense, as the perpetrator interacted with the victim through messages, telephone calls, etc., and the act of sending false information to the victim was decisive in the commission of the criminal activity. The court's reasoning suggests that, following that announcement, the victim contacted the perpetrator, who informed them of the conditions necessary to go abroad, and ultimately transferred the sum of money to the account indicated by the perpetrator.

In our view, posting on an online platform, an application that requires the use of the internet, in a written newspaper, with the aim of obtaining financial gain by misleading the victim who expresses interest or intention to purchase the goods or service, meets the characteristic features of the crime of fraud, which we find criminalized in art. 244 para. (2) of the Criminal Code, and not in art. 249 of the Criminal Code.

In line with the above, the court of judicial review ruled in a case similar to the one described above, where it stated, among other things, that posting

[12] Sergiu Bogdan; Doris Alina Șerban; George Zlati, *The New Penal Code. Special Section*, Universul Juridic Publishing House, Bucharest, 2014, p. 280.

[13] Sinaia Court, criminal case no. 68/23.05.2016, www.rejust.ro.

advertisements on various communication platforms, followed by deceiving the person who shows interest in purchasing those services or goods, constitutes the offense of fraud, and not that of computer fraud. Thus, computer fraud, as provided for and punished by Article 249 of the Criminal Code, is a particular form of the crime of deception and will be retained in its place whenever the act fulfills the typical characteristics of the former[14].

The court's decision is fully justified, since the introduction of computer data involves, among other things, the insertion of data in a computer-processable format, which is an attempt to circumvent the will of the injured party.

Given the issues identified in judicial practice, the Supreme Court was asked to intervene and resolve the issue of the legal classification of cases in which damage is caused by the publication of fictitious advertisements online, whether it constitutes computer fraud or deception.

The High Court of Cassation and Justice ruled that, in a situation where the publication of fictitious online advertisements causes damage to the injured party, the computer system is only a means of misleading the victim, and the acts of conduct are not directed against the victim as in the case of computer fraud. In order for damage to occur, there must be an interpersonal relationship between the active and passive subjects of the crime, as the mere publication of fictitious online advertisements is not capable of causing financial damage. Thus, the Supreme Court ruled that the defendants' actions fall within the scope of the crime of fraud provided for in Article 244 of the Criminal Code[15].

The solution pronounced by the supreme court is predictable, given the arguments we have mentioned, which led to the idea that in such situations we cannot have the crime of computer fraud or an ideal concurrence, as has been shown in judicial practice, between fraud and computer fraud.

3. Conclusions

The differences between computer fraud and fraud have long led to inconsistent judicial practice, which has ultimately been largely corrected.

[14] Alba Iulia Court of Appeal, criminal decision no. 821 A of October 10, 2017, www.rejust.ro.

[15] Decision No. 37 of 21 June 2021 of the High Court of Cassation and Justice, Panel for the Resolution of Criminal Matters, www.scj.ro.

However, at this point, in order to avoid contradictory solutions, we believe that a careful analysis of all the elements brought to trial is still necessary, as the characteristics of the two crimes can always raise issues regarding the legal classification and all other related matters.

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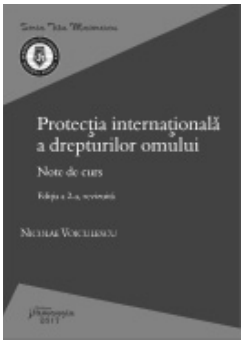

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Lucrarea de față prezintă principalele sisteme internaționale de protecție a drepturilor omului (Organizația Națiunilor Unite, Consiliul Europei și Uniunea Europeană), precum și textele celor mai importante documente internaționale în materie.
Sunt trecute în revistă politicile, normele și soluțiile jurisprudențiale reprezentative, cu deosebire cele europene, precum și obligațiile ce incumbă țării noastre în calitate de stat membru în diversele mecanisme ale drepturilor omului.
Deși aceste pagini au fost concepute într-un scop didactic, ele se adresează, în același timp, prin caracterul sintetic și modul accesibil de prezentare a informației, tuturor celor care doresc să cunoască și să înțeleagă modul de structurare și de garantare a drepturilor omului la nivel internațional întru beneficiul perfecționării propriei lor formări civice.

Curs de drept privat roman

Ediția a 2-a, revăzută și adăugită

Alina-Monica Axente

ISBN 978-606-27-2602-7
139 lei, 504 pagini (sept. 2024)

Prezentul curs reunește principalele instituții ale dreptului privat roman cu teoria generală a obligațiilor, întrucât ***„cel ce știe drept roman, știe drept civil, iar cel ce știe drept civil, știe DREPT” .*** Această sintagmă deja întipărită în ADN-ul tuturor juriștilor autohtoni își are izvorul în tocmai *Teoria generală a obligațiilor din dreptul roman.*

Nevoia cunoașterii teoriei obligațiilor decurge din rațiuni care nu țin doar de obligativitatea justificată a existenței acestei materii în programa academică, ci și de însăși formarea raționamentului juridic de tip cauză-efect. Materia obligațiilor romane, așa cum vor vedea studenții în anii superiori, reprezintă „mama” dreptului civil actual, fundația pe care s-a consolidat Codul civil român.

Din acest motiv, considerăm că este de datoria noastră morală și academică a menține vie flacăra sistemului de drept care a îndeplinit o funcție aproape demiurgică în elaborarea dreptului așa cum îl cunoaștem în prezent.

Lucrarea propune niște exerciții de imaginație, menite a devoala rațiunile făuritoare de norme juridice. Cu scopul de a încuraja vizualizarea în spațiu a unor concepte abstracte, întru consolidarea unei gândiri de jurist, expunerea materiei îmbracă forma unui dialog imaginar purtat cu studenții. Numeroasele exemple prezentate au rolul de a răspunde atât posibilelor întrebări pe care viitori studenți le-ar putea ridica, precum și tuturor întrebărilor deja exprimate de-a lungul anilor de foști studenți cărora le port o eternă apreciere. Desigur, interpretările personale nu constituie materie obligatorie pentru examene. În acest sens, îmi exprim convingerea că studenții cititori vor discerne între informația obiectivă și inserțiile autoarei, menite a-i forța mereu să se întrebe: „de ce?”. În speranța că nu vor întrerupe niciodată căutarea sensului din spatele fiecărui dat, prezentul curs nu se dorește a fi doar un instrument util în înțelegerea materiei dreptului roman, ci și o primă treaptă pe care studenții o vor parcurge pe drumul spre măiestria profesională.

Autoarea

Contracte speciale

Camelia Spasici

ISBN 978-606-27-2848-9
99 lei, 360 pagini

Lucrarea oferă o privire de ansamblu asupra tabloului contractelor speciale reglementate de Codul civil. În acest sens, autoarea procedează la detalierea aspectelor ce caracterizează fiecare contract în parte, prezentând, într-o manieră structurată, informații cu privire la noțiunile de bază precum: consimțământul, obiectul, cauza, forma sau obligațiile fiecărui cocontractant, specifice fiecărui tip de contract.

Cursul este structurat pe 20 de capitole, ce respectă, în principiu, ordinea impusă în Codul civil, Cartea a V-a, Titlul IX „Diferite contracte speciale", art. 1650-2278, și Cartea a IV-a, Capitolul al II-lea, „Donația", art. 1011-1033. Alături de explicațiile în detaliu ale autoarei, care abordează nu doar aspecte generale, dar și problematici specifice fiecărui contract în parte, lucrarea conține și un aparat critic consistent, menit nu doar să consolideze viziunea acesteia, dar și să constituie un punct de referință pentru un studiu aprofundat. În plus, legislația adusă la zi, precum și jurisprudența instanțelor naționale evocată în cadrul lucrării consolidează caracterul de instrument indispensabil al lucrării de față.

Cartea se adresează cu precădere studenților și își propune să ofere acestora cunoștințe introductive în materia contractelor numite de Codul civil. De asemenea, lucrarea poate fi folosită drept ghid de către orice persoană interesată, având în vedere faptul că subiectul contractelor este unul actual, prezent în realitatea cotidiană a fiecăruia dintre noi.

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