

IMAS 2025

The 3rd IMAS International Conference on Multidisciplinary Academic Studies, Law Proceeding Book

Editorial Board

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Statement of Responsibility

The legal and scientific responsibility of the manuscripts belongs to the authors.

Declaration

We are pleased to invite you on Friday, May 16, at 09:00 a.m. to the "The 3rd International Conference Multidisciplinary Academic Studies (IMAS 2025)" at TITU MAIORESCU UNIVERSITY of Bucharest, Faculty of Law and Economic Science Targu Jiu Târgu Jiu town. The conference is in a hybrid system, with physical and online participants through Microsoft Teams.

Researchers from eight different countries presented their studies; Romania, Türkiye, North Macedonia, Kosovo, Indonesia, Pakistan, Uganda and Nigeria.

Conference theme: Legal, economic and medical transformations of contemporary society
between tradition and reform

Conference topics: Law, Economics, Accounting, Business Administration, Finance,
Econometrics, Nursing, Health Management.

The written and presentation languages are Romanian and English.

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Appreciation

I am very privileged to express my sincere appreciation as I address this gathering to provide a resolute expression of gratitude to the exceptional individuals who have contributed to the success of the IMAS 2025 Conference. I would like to express my sincere gratitude for the steadfast commitment and exceptional contributions demonstrated by the Congressional Coordinators, Congressional Committees, and Authors.

The unwavering dedication and significant contributions of individuals have played a pivotal role in the conference's remarkable achievements. The level of dedication exhibited by the individuals in devoting their knowledge, effort, and resources towards creating a valuable and instructive event for all participants is deserving of admiration.

When reflecting on my appreciation, I am prompted to acknowledge the significant influence that their cooperative endeavours have exerted on the progress of our mutual objectives and the circulation of innovative knowledge within their individual domains. The extent of their engagement and the exceptional performance they have exhibited are indicative of their steadfast dedication to the advancement of academics and society at large.

In conclusion, I express my utmost appreciation to all individuals who have contributed to the success of IMAS 2025. The combined endeavours and fervour exhibited by all those involved serve as the fundamental basis for the achievement we have attained, and as a result, we express our sincere appreciation. I want to express my gratitude for your assistance.

Lect. Cristian DRĂGHICI, PhD

“Titu Maiorescu” University

Dean of Faculty of Law and Economic Sciences - Târgu Jiu, Romania

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COMPANY LAW BETWEEN TRADITION AND REFORM

Cristian Drăghici

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Abstract. We live in an era where technology profoundly influences all aspects of life, including the way businesses are organized and managed. The digitalization of companies that carry out commercial activity is an essential process for adapting to new economic and social realities. This involves transforming traditional business processes through the use of digital technology, with the aim of increasing efficiency, competitiveness and innovation capacity. New technologies not only optimize internal processes, but also offer significant strategic opportunities.

The accelerated development of digital technologies has profoundly changed the way modern corporate organizations operate. These economic entities, often characterized by complex governance structures and dispersed capital, are increasingly adapting to the demands of a continuously digitalizing market.

In Romania, the Companies Law no. 31/1990¹ regulates the functioning of economic entities. Although initially conceived in a pre-digital context, the law has been constantly adapted to reflect the current needs of commercial companies in the digital era. The normative act entered into force on November 17, 1990, marking the transition to a market economy and over 35 years, it has been amended over 80 times, reflecting harmonization with European legislation; digitalization of public administration; the need to make corporate governance more flexible; digitalization of public administration; transposition of recent European directives (EU2019/1151, EU2023/25); debureaucratization of the business environment and stimulation of SMEs' access to the capital market.

¹ Republished in the Official Gazette Part I No. 33 of January 9, 1998

Our study aims to follow the evolution of the main legislative amendments to the company law, as well as legislative projects in the field of company law, aiming at digital transformation and alignment with the objectives of the European Union in the digital field.

Key words: digitalisation, AI, trade registers, companies, reform.

I. Evolution of the provisions of Law No. 31/1990

Over time, Law No. 31/1990 has undergone numerous changes to align with economic realities, European Union requirements, and international good practices.

1. Initial adoption – 1990

Law No. 31/1990 was adopted immediately after the fall of the communist regime, to allow the functioning of the market economy. At the time of entry into force, it provided regulations for five forms of companies: SNC, SCS, SA, SCA and SRL. Also, Law no. 31 introduced the modern concepts of shareholder, share capital, management and control bodies, etc.

2. Major changes after EU accession (2007)

After Romania joined the European Union, it was necessary to align corporate legislation with European directives. Following these new regulations, the formalities for setting up companies were simplified. The legislative changes also introduced the possibility of online registration and simplified the relationship with the Trade Register. The new changes led to the extension of protection for minority shareholders and increased transparency in the decision-making processes of corporate management bodies.

3. Corporate Governance Reform (2006–2011)

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The amendments to the Commercial Companies Law during this period concern important regulations for joint-stock companies (JSC). Thus, the legislator introduces the possibility for these types of companies to choose between the unitary and dualistic management system. Some stricter requirements are introduced regarding administrators and auditors. The legislative regulation also establishes more detailed obligations regarding the publicity of acts and decisions.

4. Digitalization and debureaucratization (2017–2022)

The amendments made by the legislator to the company legislation during this period aim at the elimination of some administrative requirements (e.g. proof of space for the registered office of a limited liability company). The procedure for transferring shares is also simplified. The new version of the Companies Law establishes the possibility of establishing companies with only one person, without other conditions. Limited liability companies have a faster establishment and registration procedure in the Trade Register, in 1-2 days in an electronic system.

5. Reform of 2020–2022 (Law no. 102/2020² and Law no. 265/2022³)

The year 2020 brings new changes to corporate legislation, one of the most important being the elimination of the restriction on the sole shareholder in a single LLC. Starting with the date of entry into force of Law no. 102/2020 (July 5, 2020) a natural person or a legal entity will be able to be the sole shareholder in several limited liability companies. Also, a limited liability company will be able to have as sole shareholder another limited liability company, consisting of a single person. Correspondingly, the obligation to present the affidavit regarding the status of sole shareholder in a single limited liability company is eliminated, since, according to the new amendments, it is no longer mandatory to hold the status of sole shareholder in only one limited liability company.

² Published in the Official Gazette No. 583 of July 2, 2020

³ Published in the Official Gazette No. 750 of July 26, 2022

Another new element is that of eliminating the obligation to present the certificate issued by the tax authority/affidavit regarding the transfer of the right of use over the same property/compliance with the conditions relating to the registered office. Therefore, several companies can operate at the same office, without other conditions regarding their surface area or number.

Law no. 265/2022 brought a broad reform of the Trade Register and Companies Law no. 31/1990.

From the perspective of corporate legislation, unlike the old regulation that required LLCs to pay the subscribed share capital in full at the date of establishment, the new legal provisions eliminated this requirement. Thus, these stipulate that limited liability companies must pay 30% of the value of the subscribed share capital within 3 months of the date of registration, but before commencing operations in the name of the company, and the difference in subscribed share capital will be paid, as the case may be, within 12 months of the date of registration, for cash contributions, respectively within 2 years at most, for contributions in kind.

The requirement to submit self-declarations regarding the fulfillment of the legal conditions for holding the status of associate/shareholder/administrator/founder is eliminated, with the mention that a clause will be inserted in the Articles of Association according to which, by signing the Articles of Association, the founders assume responsibility for fulfilling the conditions provided for in art. 6 of Law no. 31/1990, in order to found a company.

The new regulation requires the inclusion in the Articles of Association of the identification data of the beneficial owners and the methods of exercising control over the company, in the cases provided for by law.

Another change of interest is the obligation to submit to the Trade Register Office the decisions of the general meeting within 15 days from the date of adoption, given that the old regulation did not establish a specific deadline within which to proceed with the operations for the purpose of mentioning them in the register, respectively for publishing them in the Official Gazette of Romania, in order to ensure their enforceability against third parties.

Last but not least, the new form of Law no. 31/1990 establishes the obligation to include in the Articles of Association clauses regarding:

- * the method of adopting the decisions of the general meeting of associates, with the vote of all associates, in the event that, due to the parity of participation in the share capital, an absolute majority cannot be established;
- * the method of dissolution and liquidation of the company;
- * the methods of ensuring the discharge of liabilities or their regularization in agreement with creditors, in the case of dissolution without liquidation, when the partners agree on the distribution and liquidation of the company's assets;
- * the duration of the administrators' mandate, the powers conferred on them and whether they are to exercise them jointly or separately.

6. Law No. 299/2024⁴ amending Companies Law No. 31/1990

Law 299/2024 introduces a series of essential amendments to Companies Law No. 31/1990, aiming to adapt it to the realities of the digital age, as well as simplifying corporate procedures.

The amendments to the Companies Law have the potential to significantly change the way companies organize their activity, pursuing three major directions: simplifying administrative formalities, expanding the use of digital technologies and increasing efficiency in decision-making.

New elements provided by Law No. 299/2024:

- Simplification of the articles of association

The regulatory act eliminates the obligation to include data on the beneficial owners and the methods of exercising control over the company, for reasons of personal data protection, but also to ensure the efficiency of registering changes regarding the beneficial owners, which

⁴ Published in the Official Gazette No. 1212 of December 3, 2024

is currently done by registering amending declarations regarding the beneficial owners. . This change applies to all corporate forms, with the aim of reducing bureaucratic burdens.

- Participation in general meetings by electronic means

An important change is the regulation of the legal framework in relation to the organization and online conduct of General Meetings of shareholders and/or associates. The new regulation allows participation and voting by electronic means of remote communication, if the articles of association provide for it or if it is decided so. The electronic means used must ensure the identification of participants, effective participation, retransmission of deliberations, expression of vote and subsequent verification of the vote expressed. This digitalization applicable to all types of companies allows the involvement of shareholders/associates to be carried out from different locations, optimizing the decision-making process. Participation in general meetings by means of remote communication is possible if the articles of association so provide, if the shareholders/associates decide so with the majority provided for by law or if all associates agree so in writing (the latter case being applicable to limited liability companies, general partnerships and limited partnerships).

Beyond the digital transformation of general meetings, the new law also grants increased flexibility within the framework of the AGM held within the framework of the joint-stock company. According to the new provisions, the boards of directors will be able to modify the AGM convenor on their own initiative within 15 days of its publication, offering companies a greater capacity to adapt to unforeseen situations. In addition, the new regulations introduced in the Companies Law no. 31/1990 expand the specific powers that can be delegated to the boards of directors of joint stock companies by a decision of the extraordinary general meeting of shareholders or by the articles of association. More precisely, beyond those currently permitted (moving the company's registered office, changing the secondary object of activity or increasing the share capital), the extraordinary general meetings of shareholders may delegate to the boards of directors the power to establish and dissolve secondary offices.

- Delegation of powers regarding secondary offices

In joint stock companies, in the case of joint stock companies, Article 114 has been completed to expressly include the establishment or dissolution of secondary offices (branches,

agencies, representative offices or other such units without legal personality), in the categories of powers that can be delegated to the board of directors, respectively the management, by the articles of association or by a decision of the extraordinary general meeting of shareholders.

- Signing of GMS resolutions

The resolutions adopted during the general meeting of associates/shareholders held physically or by electronic means of distance communication, are signed in handwriting or with an electronic signature, “under the conditions of the law” (currently, Law no. 265/2022 on the trade register expressly provides for either a handwriting signature or a qualified electronic signature for signing certain other documents that are registered in the trade register).

Law no. 299/2024 represents an important step in the modernization of Romanian corporate law, favoring the digitalization and streamlining of the internal processes of commercial companies. The new provisions offer flexibility, reduce bureaucracy and facilitate the conduct of corporate activity in a digitalized environment.

II. Prospects for amending the Companies Law no. 31/1900

- **Transposition of Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards the extension and further improvement of the use of digital tools and processes in the field of company law**

Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards the further extension and improvement of the use of digital tools and processes in the field of company law was published in the Official Journal of the European Union, L series, of 10 January 2025. Directive (EU) 2025/25 represents a crucial moment in the digitalisation and modernisation of the European legal framework on companies⁵. This Directive brings a number of essential new elements, reflecting the European Union's efforts to adapt company law to the requirements of the digital age.

⁵ <https://www.juridice.ro/765258/directiva-privind-imbunatatirea-dreptului-societatilor-comerciale-pentru-era-digitala.html>

The main legislative innovations brought by the Directive:

1. Interconnection of business registers

Directive (EU) 2023/2325 brings significant improvements in terms of the interconnection of business registers in the Member States of the European Union, strengthening the existing system and facilitating the exchange of information between authorities and the public. The Directive provides for the connection of registration systems at European level, including the interconnection of business registers with information systems on beneficial ownership and insolvency proceedings.

The Business Registers Interconnection System (BRIS) allows access to information on companies in all EU Member States. Directive 2023/25 extends and improves this system, ensuring more efficient interoperability and easier access to relevant data⁶.

2. Preventive and legality control

The Directive introduces a uniform set of standards for the preventive control of company documents and information. Thus, the declared aim of these measures is to ensure a high level of accuracy and reliability of company information. Member States will have to implement procedures for verifying the legality of constituent documents, which will include verifying the identity of the founders, checking the formal and substantive aspects of the incorporation of companies, as well as examining the legal capacity of the persons involved in the establishment of commercial entities. The aim is to prevent the registration of potentially fraudulent companies and to increase confidence in the European business environment⁷.

At the national level, following the transposition of the Directive, ONRC and the Ministry of Justice will have to redefine the procedure for verifying documents in digital format, maintaining the control of legality but without unnecessary bureaucracy. A reform of the role of notaries public is also possible in the future, in the sense of integrating them into digital flows or limiting their intervention to special cases. Remote legality control will have great

⁶ https://europunkt.ro/2023/03/29/propunere-digitalizare-si-certificate-europene-pentru-societatile-comerciale-pentru-sporirea-transparentei-si-reducerea-birocratiei-in-mediul-de-afaceri-din-ue/?utm_source=chatgpt.com

⁷ <https://www.juridice.ro/765258/directiva-privind-imbunatatirea-dreptului-societatilor-comerciale-pentru-era-digitala.html>

applicability (e.g. through video-identification, automatic verification of statutes and standardized forms). For example, if a company is incorporated in Romania by an Italian citizen using the eIDAS electronic signature, ONRC will be able to verify the status and legality of the documents through BRIS, without requiring certified translations, physical presence or additional authentications.

3. EU Company Certificate

The EU Company Certificate, introduced by Directive (EU) 2023/25, is one of the most innovative measures in the new European legislative framework on the digitalisation of the business register. This instrument aims to facilitate cross-border recognition and support the mobility of companies within the EU internal market. The certificate is a standardised and multilingual document, issued in electronic format by the business registers of the Member States, containing essential information about a company registered in an EU country. It is recognised in all Member States, is available free of charge to anyone wishing to check a company and can be downloaded from the European e-Justice portal or through the BRIS (Business Registers Interconnection System).

According to the directive, the certificate will mandatorily include: company name; legal form; registered office; legal status (active/in liquidation/dissolved); business register registration number; date of registration; names of administrators or legal representatives; main activity and information on subsidiaries (if registered in other EU countries).

The purpose of this EU Company Certificate is to ensure transparency and trust in the European business environment, to reduce bureaucracy in cross-border transactions and partnerships and to facilitate legal procedures: setting up subsidiaries, participating in tenders, proving legal capacity before authorities in other countries.

The implications of these provisions for Romania imply the obligation of ONRC to ensure the automatic generation of this certificate in electronic format. The certificate will be issued in Romanian and one or more official EU languages. The certificate will be accessible online, free of charge, and can be used to prove the existence or status of a company in Romania anywhere in the EU.

Example of use: A Romanian company wants to open a subsidiary in Germany. Instead of providing certified translations of the documents from ONRC, it will be able to attach the EU certificate containing all the necessary information, already recognized by the German authorities.

4. EU digital power of attorney

The directive also creates a multilingual digital model (EU digital power of attorney), a tool designed to facilitate the legal representation of a company in all Member States of the European Union and to eliminate formalities such as the need for an apostille on company documents and unnecessary translations in cross-border procedures.

The characteristics of this digital tool are that the power of attorney is issued and recognised exclusively in digital format, with a qualified electronic signature, will be valid in all EU countries, without requiring apostille, legalisation or notarial translations, and will have a unified model at European level, established by implementing acts of the European Commission.

The usefulness of this tool is that companies will no longer have to go through costly translation and authentication procedures to prove that a person legally represents them in another Member State. This will considerably reduce the time needed to register subsidiaries, sign contracts or participate in tenders in other EU countries.

- **Corporate Sustainability Due Diligence Directive (CSDDD)**

The European Parliament has adopted the Corporate Sustainability Due Diligence Directive (CSDDD)⁸, which will oblige companies to adopt rigorous transparency and sustainability practices from 2027. It will aim to improve corporate responsibility in the areas of human rights and the environment, while presenting new challenges and opportunities for companies in the name of a greener future⁹.

⁸ DIRECTIVE (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859

⁹ <https://www.ie.edu/ie-elecnor-hub-on-ethical-business/en/aprobacion-de-la-directiva-sobre-la-debida-diligencia-de-sostenibilidad-corporativa-csddd-por-el-parlamento-europeo-un-paso-decisivo-hacia-la->

CSDDD is a European Directive designed to improve and extend the sustainability reporting requirements for companies in the European Union. It replaces and extends the Non-Financial Reporting Directive (NFRD), introducing stricter requirements applicable to a larger number of companies.

The directive is to be transposed into the national legislation of the member states, including Romania, and one of the likely options is to integrate its provisions into Law no. 31/1990 on companies, especially for companies with over 250 employees.

III. The use of A.I. in General Meetings of Associates / Shareholders (GMS)

“Public policies are necessary to facilitate the advancement and implementation of AI technologies that optimize their societal and economic advantages, including improving the transparency, reliability, and responsibility of AI systems.”¹⁰

The digitalization of the General Meetings of Shareholders opens the way for the integration of AI systems in the stages of the organizational process of the General Meetings.

Digitalization brings significant benefits, such as reducing bureaucracy; saving time and resources; increasing transparency and traceability; accessibility for shareholders, regardless of location; facilitating audit and fiscal control through clear digital records.

The challenges and limitations in the coming period will certainly be represented by the lack of uniform digitalization in public institutions, the reluctance to adopt new technologies in the traditional business environment, the need for clear regulation of the archiving and security of digital documents, but also the cybersecurity risks associated with the use of technology.

sostenibilidad-corporativa/?utm_source=google&utm_medium=cpc&utm_campaign=AO-PROS-DSA-HQ-REGLR-TIER1-WW-WFORM-LEAD-PW-MAS-BUS-BMNG-ALLP&utm_id=19787034685&ad_group_id=145394692503&ad_id=650567827111&placement_id=&network=g&gclid=EA1aIQobChMI-6KmneGGjQMvZhZWDBx2JsBU_EAAYASAAEgJnSfD_BwE

¹⁰ M. Pop, *Legal frameworks for artificial intelligence: a comparative analysis of Romania, the European Union, and international perspectives*, Journal of Law and Administrative Sciences, No.21/2024, p. 75

The use of artificial intelligence at the general meetings of companies will represent a support in the organization and conduct of these general meetings, at least for:

- * AI assistance for the automatic drafting of the convening notice and minutes, based on templates approved and endorsed by the company's management bodies.
- * Real-time monitoring of voting through AI platforms that detect voting errors or overlapping votes.
- * Automatic translation and multilingual interpretation, in the case of companies with foreign investors or associates.
- * Assessment of the compliance of GMS decisions with the articles of association and applicable legislation, through algorithms that identify applicable legal norms.
- * Analysis of voting behavior and issuance of predictive reports for boards of directors.
- * Automatic transmission of GMS decisions to ONRC, through an AI interface connected to e-governance systems. These tools are subject to human control and validation, according to the principle of legal liability for the decisions adopted.

Conclusions:

The evolution of Law no. 31/1990 reflects a continuous process of adaptation to the economic, technological and institutional challenges of the last three decades and demonstrates the transition from rigid, analog rules to a digital ecosystem oriented towards European investment and competitiveness. The amendments of 2024-2025 constitute the pivot point towards corporate governance, paving the way for transformations based on artificial intelligence and blockchain. Artificial intelligence, in particular, will significantly influence decision-making processes, traceability and legal efficiency, requiring continuous legislative adaptations.

The reforms in the field of corporate legislation position Romania among the European jurisdictions friendly to digital entrepreneurship and contribute to a more transparent, efficient and predictable business environment.

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Digitalization and simplification of formalities will contribute to increasing the transparency, efficiency and competitiveness of companies, marking a welcome change in current legislation from the perspective of the mechanisms and technologies allowed in the management of companies.

The adoption of these changes represents an important step towards the digitalization of companies' internal processes and the elimination of administrative barriers.

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THE CHALLENGES OF LAW REGARDING LEGAL SECURITY IN THE CONTEXT OF LEGISLATIVE EVOLUTION

Emilian CIONGARU*

Abstract:

The challenges of law regarding legal security are represented by the evolution of the legislative system within the context of legislative dynamics, with the main goal of analysing the protection of individual rights and freedoms of citizens, as well as ensuring a coherent and impartial application of the law. Legislative dynamics must consider that legal norms, in their evolution, should be predictable, stable, and accessible, thus allowing all citizens and state authorities to regulate their behaviour in accordance with legal provisions. Legal security must exist as a fundamental principle of the rule of law, regardless of legislative dynamics, which aim at the constant evolution of legal order and its adaptation to the changing economic, social, and political realities. To balance legislative dynamics with legal security, it is imperative that the entire legislative process be conducted transparently through public consultation and debate, as well as through the development of impact studies on the effects of legal norms on litigants, thus creating a stable, clear, and accessible legal framework, which contributes to increasing public trust in the legal system and, implicitly, to the protection of their fundamental rights and freedoms, regardless of the form(s) of government.

Keywords: legislative dynamics; legal order; legal security; fundamental rights; legal norms.

1. Conceptual Elements

The two concepts, legislative dynamics and legal security, are fundamental concepts to the rule of law and must be harmonized to ensure a balanced, fair, and efficient legal system,

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and, from both a theoretical and practical perspective, legislative dynamics are among the most important components of legal security.¹¹

The predictability and stability of legal norms¹² are essential conditions for ensuring legal security, a principle developed mainly through jurisprudence and recognized as fundamental in both European legal order and the internal legal systems of EU member states.

The relationship between legal security and legislative dynamics is a complex subject that underscores the interdependence between the stability of the legal system and the continuous need to adapt it to social, sociopolitical, economic, technological and geopolitical developments.¹³

On the one hand, legislative dynamics involve the adoption of new legal norms, as well as the modification, update, and adaptation of existing ones, and, on the other, legal security aims at maintaining a necessary stability so that citizens can trust the legislative and judicial systems in force at the time of the analysis.

The relationships between these two basic concepts of the state are rather delicate because legislative dynamics can positively or negatively affect legal security in the rule of law, and it should be taken into consideration that, in any effective legal system, the two must be well balanced to ensure efficiency, balance, and adaptability to internal, regional, and international social relations¹⁴.

2. Conceptual Elements of Legal Security Principle

Conceptually, legal security implies that legal norms adopted and guaranteed by the state must be unambiguously formulated, very clear, predictable, stable, accessible, and easy to

¹¹ Montesquieu Ch. de (1964), *On the Spirit of Laws*, vol. 1, Scientific Publishing House, Bucharest, p. 17.

¹² Niemesch M. (2019). *General Theory of Law. 3rd edition, revised and added*. Hamangiu Publishing House. Bucharest. pp.77-78.

¹³ Schröder, R. (1992), *Rechtsgeschichte*, Juristische Lehrgänge Alpmann und Schmidt Verlagsges. GmbH&CO. KG, Münster, pp. 28-29.

¹⁴ See R. Ionescu, *Introduction to the Study of Law*, Măiastra Publishing, Târgu Jiu, 2015, p. 6.

understand, so that both litigants and authorities are able to fulfill their roles in society based on the law and in accordance with it.

In other words, respecting legal security might mean that fundamental rights and freedoms must be guaranteed, protected, and respected in accordance with EU and international standards.¹⁵

Although changing legal norms is absolutely necessary and useful in order to adapt to societal realities, such changes must not undermine the stability and predictability of the legal system. Excessive legal regulation or rapid changes without solid justification can lead to a sense of legal insecurity¹⁶, thus diminishing litigants' trust in the legal system, trust which is fundamental for ensuring social stability.

Therefore, in order to maintain a strong and realistic balance between these two concepts, the legislative process must be clear, well-analyzed, conceptualized, justified, and argued, and it must also include well-defined and balanced transition stages for applying new norms to avoid social deviations and ensure easy access to all up-to-date and useful legal information.

An example of the evolution of fundamental legal principles in the case law of the European Court of Human Rights is *Marcks v. Belgium*, 1979, which highlights the importance of respecting legal security, where it was considered part of both the European Convention on Human Rights and Community law.

Another example of this is *Brumărescu v. Romania*, published in the Official Gazette no. 414 of August 31, 2000, where the ECHR reiterated that one of the key elements of the rule of law is legal security of legal relationships - as social relationships regulated by specific legal norms, which implies that once a final judgment is rendered by the courts, it should not be called into question again.

¹⁵ Pop, M. (2024). *Conceptual Landmarks Regarding The Principle Of Legal Certainty From The Perspective Of European Private International Law*, The Annals of "Dunarea de Jos" University of Galati. Legal Sciences. Fascicle XXVI, 7(1), pp. 260-267.

¹⁶ Francois, L. (1993) *Le probleme de la securite juridique*, in work *La securite juridique*, Jeune Barreau de Liege Publishing House, Liege, p. 10

European jurisprudence has also enshrined legal security as part of the European legal system¹⁷, both at the level of the Member States of the European Union and in the area of the protection of fundamental rights and freedoms of individuals and, on the basis of these trends, the Court of Justice of the European Union has issued the thesis that legal security is part of the European legal order and is thus binding on both Member States and the institutions of the European Union, in situations where any of these institutions exercise the powers conferred by the provisions of the documents establishing and functioning of the European Union.¹⁸

Legal security is also enshrined in the case-law of the Court of First Instance, which states that: "the principle of legal security requires that all acts of the institutions which produce legal effects must be clear, precise and respectful of the interests of the parties concerned, so that they know with certainty when that act comes into existence and begins to produce legal effects. This need for legal security is particularly rigorous in the case of an act which may have financial consequences, in order to enable those concerned to know exactly what obligations are imposed on them"¹⁹.

As a member state of the European Union, this principle is enshrined in the internal legal system by the Constitutional Court of Romania, which decided that the rules of legislative technique, although "they have no constitutional value, (...) by regulating them, the legislator has imposed a series of mandatory criteria for the adoption of any normative act, compliance with which is necessary to ensure the systematization, unification and coordination of legislation, as well as the content and legal form appropriate for each normative act.

Thus, compliance with these rules contributes to ensuring a legislation that respects the security of legal relationships, with the necessary clarity and predictability"²⁰. According to these theses, "failure to comply with the rules of legislative technique gives rise to situations of

¹⁷ Micu G. (2007). *The Community Institutional Legal Order*, Paidea Publishing House, Bucharest, p.108.

¹⁸ *European Court of Justice Reports*, 1998, p. I-08153, Case C-381/97, Belgocodex, para. 26.

¹⁹ Auby J.B., Delphine D.B. (2007). *Les principes de sécurité juridique et de confiance légitime, Droit administratif européen*, Bruxelles, Bruylant Publishing House, p. 480.

²⁰ Constitutional Court Decision no. 26 of January 18, 2012, published in the Official Gazette of Romania, Part I, no. 116 of February 15, 2012.

incoherence and instability, contrary to the principle of the security of legal relations in its component relating to the clarity and predictability of the law”²¹.

As a consequence of the above, a very important feature of legal security is that existing legal rules must be predictable²², known and understood and the corresponding legal solutions must remain relatively stable and unambiguous.

Another basic characteristic of legal security is that legal rules, in their entirety, have as their fundamental purpose to ensure the protection of the subjects of the law - the persons subject to the law - against a potential threat that may be created by some provisions of the legal rules themselves.²³

The predictability of legal rules is an implicit condition for the achievement of the right to a fair trial, as well as a guarantee of the effectiveness and efficiency of free access to justice which the State makes available to those concerned, without which there can be no such trial.²⁴

In order to establish the relationship or relationships between legislative dynamics and legal security it is necessary to identify the most significant characteristics of legal security, which would be the following:

- Stability of the legislative system - an essential component identified as legislative dynamics and which implies that it is imperative that legal rules must not be changed very often and any change must guarantee a minimum degree of legal stability, in order that both the litigants²⁵ and state organizations can build a behaviour that fits into the dynamics of the legal system, thus acquiring greater confidence in the current legal framework²⁶.

²¹ Decision of the Constitutional Court of Romania no. 448 of October 29, 2013, published in the Official Gazette no. 5 of January 7, 2014.

²² Chevalier J. (2012), *The Rule of Law*, translated by Diana Danisor, Universitaria Publishing House, Craiova, p.101.

²³ François L. (1993), *Le problème de la sécurité juridique*, în *La sécurité juridique*, Editura Jeune Barreau de Liège, pp. 15-17.

²⁴ Niemesch, M. (2010). *The sources of international law and European Union law from the perspective of the general theory of law*, Hamangiu Publishing House, Bucharest, p. 2.

²⁵ Tutunaru M., Mihalea, E.-L. (2023). *Legal norm and church canons*, PIM Publishing House, Iasi, p.20

²⁶ R. Ionescu, A. Ionescu, *General Theory of Law*, Măiastra Publishing, Târgu Jiu, 2021, p. 214.

- Clarity of legal rules - in this sense the legislative framework must have legal rules formulated in an unequivocal manner, as clear and precise as possible, with the ultimate goal of understanding the legal rules without creating ambiguity. Legal rules that are superficial, unclear, or contradictory may create confusion for their addressees and may also lead to many abuses or to incorrect and inconsistent application of these rules.

- Ensuring the protection of citizens' legitimate rights and freedoms - is another basic component of legal security, which implies that legislative changes should not have retroactive effects on the rights already acquired by the litigants, and exceptions to this rule must be very well established by the specific laws and should exist only in situations of public order or major public interest, also very well provided for by the relevant legislation.

- Prevention achieved through legal norms - in this sense, the persons subject to the law must be able to foresee the legal consequences of their actions, which are determined by the sanctions in the logical-legal structure of legal norms. The provisions of the legal rules must also describe very well the conduct that the subjects of the law must adopt in their capacity as subjects of the law, so that they can be aware, with the greatest possible degree of certainty, which behaviours are permitted, which behaviours are prohibited and what possible actions they must refrain from in their conduct.

- Accessibility to the provisions of legal rules - in this sense, litigants interested in their existence must have easy and full access to all legal information, and legal rules should be accessible, available and easily understandable to all citizens.

3. The Conceptual Elements of Legislative Dynamics in the Evolution of Law

In its conceptual evolution, the concept of legislative dynamics can be nuanced as a continuous and permanent process of shaping the law by elaborating, modifying, supplementing or repealing legal rules according to the social, economic and political needs or necessities of a given society.²⁷ The evolution of the law through legislative change is inevitable, as the law has to reconfigure and adapt itself to the continuous evolution of society. However, legislation

²⁷ Micu, G. (2025). *European Union Law*, Pro Universitaria Publishing House, Bucharest. pp. 104-108.

that is too unstable or excessively amended may lead to legislative inflation, anomy or antinomy, thus creating a series of difficulties in the achievement, interpretation and application of the law.

As an example, it should be pointed out that the amendments made to commercial legislation to adapt to new economic trends and developments, regional or international conflicts or global economic crises are absolutely necessary in order to protect the commercial interests of the state and, by implication, of economic operators.

It is also necessary to adapt the tax legislative system accordingly to commercial relations, taking into account the fact that if a tax system changes frequently, both economic agents and citizens, as recipients of these legal norms, may be distrustful of the taxes and duties that are applicable to commercial activities, situations that may significantly reduce confidence in the economic and tax system and may lead to intentional avoidance of such taxes and duties or to the adoption of illegal or underground economic behaviour, thus preventing the optimization of economic and fiscal relations, whether at an internal, regional or international level.

Therefore, the concept of legislative dynamics as a fundamental element of legal security is influenced by multiple aspects²⁸ of society such as political, geopolitical, economic, social and technological changes, but nevertheless, any chaotic and excessive modification of the legislative system can jeopardize the legal security of citizens by creating uncertainties and doubts about the application of legal norms and implicitly on the decrease of citizens' trust in justice as a state monopoly and as the institution that can ensure the enforcement of public and private rights.

An analysis of the possible challenges to legislative stability implies identifying them as well as identifying the shortcomings that may arise in affecting legal security.

Thus, the most significant challenges to achieving legislative stability would consist of the following:

²⁸ Draghici, C. (2021). *Unele consideratii privind influenta dreptului roman asupra formei actului juridic din dreptul civil roman*, published in Antemeridian/Postmeridian Magazine, Constantin Brâncusi Tg-Jiu University, Academica Brancusi Publishing House, Tg.Jiu, 2021, Year 7, No.18, New series, Tg.Jiu, pp. 56-57.

- The necessity and usefulness of legislative reform - in certain well-defined cases, the legislative system needs to be adapted to geopolitical, socioeconomic or technological realities. Major changes in society or in technology may require certain changes to the legal system in order to adapt to the new challenges of developments. As both academics and practitioners have observed, law has its own genesis; it is born, transformed, adopted or abolished along with the society for which it is created.

- The contradictions between progress and stability - in the first sense, legislative stability is the key to predictability, but in the second sense, there is a constant need to adapt the legal system to any permanent developments in society.

- The emergence of major difficulties arising from too frequent legislative changes - quite a few legal systems, particularly in states still in transition, are faced with legislative instability caused by political changes or the constant need for reform of the rule of law, but these repeated changes can create confusion and reduce citizens' confidence in state institutions.

The methods to ensure the stability of the legislative system, at a conceptual level, must take into account the adoption of some essential measures which could be: clarity and precision of legal norms; consultation and public debate as well as transparency of the legislative process; respect for the principles of constitutional law; a regular evaluation of the legislative system.

Given the fact that there is a continuous and unavoidable globalization in the world²⁹, the stability of the internal legal system is influenced by regional regulations, international regulations as well as the legal systems of other states and geopolitical strategies.

As an example, the law of the European Union, which imposes certain common rules in various areas, requires adaptations of the internal legal system, but any major change, however, needs to be carried out with particular attention and analysis of the impact on the fundamental rights and freedoms of the litigants, which will lead to the long-term achievement of the internal legal system.

²⁹ Ciongaru, E. (2012). *Comparative law and globalization of law*, Valahia University, Bibliotheca Publishing House, Targoviste, p. 142.

Conclusions

In conclusion, legal security is fundamental in order to maintain a balanced, stable and predictable legal system aimed at protecting the fundamental rights and freedoms of citizens and ensuring the smooth and efficient functioning of the whole society. This mechanism is very important for preventing interpretable situations as well as for protecting confidence in the legal system, thus contributing to a society in which there is legal, economic and social stability. At the same time, the stability of a legal system is a basic element for the proper functioning of any rule of law, but this stability must be very well balanced with the need to continuously adapt the legal system to the wider social and economic realities, thus ensuring a coherent and efficient development of legal rules and any changes to legislation must be made in a consultative, visible framework and must have as its main aim the protection of all general public interests, as the sum of individual interests, and implicitly the maintenance of a predictable, efficient, effective and fair rule of law, seen as the ultimate goal of enshrining, implementing and enforcing legal security.

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Assigning Legal Responsibility in International Law

Mihaela POP³⁰

Abstract: *One branch of international law is the law of State responsibility, which deals with the consequences of breaches of obligations under international law. States cannot violate international law with impunity, and the legal ramifications of such violations are the subject of this branch of international law. Furthermore, international wrongful acts are evaluated from a legal perspective, and failed responsibilities are assessed. State responsibility may result from actions taken by State organs, including executive, legislative, and judicial acts, as well as by groups or entities which have a degree of independence from the State. Responsibilities also arise from omissions, including failure to take reasonable measures to ensure compliance with international law. Additionally, conduct of the State's agents committing a violation of the State's obligations is imputed to the State, whether they acted in their official capacity or not. Similarly, conduct taking place in a territory under a State's control or conduct of another State, whether formally or informally controlled by the State, is imputed to the State.*

JEL Classification : [K33, K38, K39]

Keywords: *international law, legal responsibility, State responsibility*

Definition

International law is the body of law governing relations between states and other entities in international relations³¹. This entry, however, focuses on a specific area of international law: the law of international liability, which addresses the issue of when a state or an international organization becomes legally liable for violating an international law rule. “Traditionally, the

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³¹ R. Ionescu, The State and the Law, Introduction to the Study of Law, Măiastra Publishing, Târgu Jiu, 2015, p. 41

law of international responsibility has been based on a unitary notion of responsibility.”³² International responsibility has a twofold purpose: first, it is a means for the reparation of injury, with possible remedies such as restitution of property, compensation in money or specific performance, and second, it is a means for the protection of international law and the international legal order. The coherent articulation of these two functions in the law of responsibility would contribute to a universality and systematization of international law delved into academic investigations.

But the law of international responsibility is also a subject in turmoil³³. On the one hand, there is a growing demand for liability concepts to be further refined in order to determine injury compensation, like damage taking the form of financial losses resulting from the destruction of a bridge or the sinking of a ship. On the other hand, the international legal order currently be confronted with pressing accountability issues, such as abuse of human rights or humanitarian law, the arbitrary arrest, indefinite detention and/or torture of a suspect under international law, or actions supportive of the operation of detention facilities outside the jurisdiction of a state. These changes suggest that international law is becoming constitutional, which means that the accountability standards covered by the law of international responsibility are completely different.

Fundamentals of International Law

Legal Responsibility denotes the capacity of a subject of law to be entitled to its rights and bound by its obligations. An infringement of a right entitles the right-holder to a legal remedy. Consequently, the subject in breach thereof may incur sanctions, including those entailing adverse consequences, e.g., compensation, most-favoured-nation treatment, or state responsibility. States are the primary subjects of public international law, but not the exclusive subjects; other subjects include international organizations, religious organizations, and individuals, notably natural persons as subjects of international humanitarian law, international

³² Nolkaemper, André (2009) "Constitutionalization and the Unity of the Law of International Responsibility," *Indiana Journal of Global Legal Studies*: Vol. 16: Iss. 2, Article 7

³³ R. Ionescu, A. Ionescu, *General Theory of Law*, 3rd edition, revised and expanded, Legal Liability, Măiastra Publishing, Târgu Jiu, 2021, p. 260.

human rights law, and international criminal law. “Where there is a breach of an obligation, the possibility of responsibility arises.”³⁴ So legal responsibility arises when a legal person breaches an obligation that qualifies as an internationally wrongful act (responsibility) on its part.

International law is now widely recognized as a law system. “Though the law necessarily claims authority over its subjects, it may not always enjoy it.”³⁵ Nevertheless, the question how to define it remains much debated. One view in international legal scholarship is that international law consists of norms of conduct that apply to international actors, which have been created in an internationally lawful manner. A legal system is characterized by a unity to the extent that its norms form a coherent totality. Traditionally, this coherence is guaranteed through a hierarchy of norms; a constitution provides for competences to create infra-constitutional norms and a procedure to modify the constitution itself. Such features of a norm system may contribute to allowing norms in the system to be applied and interpreted consistently and coherently. Such guarantees are not available at the international level. Nevertheless, there are mechanisms to control international illegality. Some control mechanisms are State-centred practices, such as the recognition of States, States’ protest against interferences with their territorial integrity, States’ refusal to recognize annexation of territories and calls for abstaining from the use of force in abrogation of a treaty. Other control mechanisms include treaty provisions aimed at controlling their own operation, i.e. by establishing reporting and auditing procedures, and so-called non-compliance procedures. Purely legal control mechanisms consist of rulings by international courts and tribunals. Much of the literature on sources acknowledges that sets of norms created by public actors in a lawful manner qualify as ‘law’. No public entity normally has itself to define the term ‘law’. Some theorists deny that traditional municipal legal systems are the only or best examples of a law system. Indeed, the international legal system is not a mere extrapolation of domestic legal orders. Amongst the characteristics of international law are the absence of a common sovereign, the absence of formal monopoly on law creation, the existence of and continuous increase of

³⁴ Thomas D. Grant, *International Responsibility and the Admission of States to the United Nations*, 30 MICH. J. INT’L L. 1095 (2009), p. 1101

³⁵ Lefkowitz, David. "The Sources of International Law: Some Philosophical Reflections." In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 187-203. New York: Oxford University Press, 2010, p. 191

various international norm creating entities and courts, horizontal relationships of these entities and their norms, the possibility to appeal and the absence of enforcement on a general basis.

Legal Personality in International Law

Civilized international law is frequently thought to be a body of rules to which states are the subjects, but it is nevertheless, or indeed for that very reason, a much broader rubric. As an essentially open system, international law is not confined to states. Individuals and other actors have, and have always had, some legal personality in international law. At any rate, there are many areas in contemporary international governance and law whose scope, capacity, or functions do not coincide with the territoriality or statehood of an interstate regime or system. International law and international governance, including international organizations and their agencies, functions in a pioneering manner as subsidiarily defaulting units in these many a-realms of public life.

Traditionally and generally, international law as a whole never contemplates the ultimate responsibility of states for their own conduct. “Modern positivist international law has typically been defined as a discipline, which deals with the rights and obligations subsisting between states.”³⁶ Furthers more, witnesses of these failings by international institutions never questioned their fitness and appropriateness. It is not obvious that it was capable to provide any solutions for the vicissitudes of states during the betwixt time, when responsibility took on worse forms than in the so-called pre-authoritarian days. When structural confidence slipped away, more capital borders were erected. So, International law as a solely structure cannot bring about what now is patently required: that states have to take responsibility for the injuries and damages they cause and that this can stare them in the face, not only from the side of a long list of rules and conventions of customary International law, but also from the side of obligations both substantive to financially cover damages and procedural to commit oneself to reconsider prior conduct and recovery damages.

³⁶ Ukri Soirila, Persons and Things in International Law and “Law of Humanity”, Journal: German Law Journal, : 2017, ISSN: 2071-8322, p. 1166

For centuries, the term "responsibility" signifies that a person is ethically, morally, and legally answerable for his/her act, i.e. having duty/obligation to do something/action, or work authorized by law or rule, but is capable of being punished. In a general sense, two basic elements are common to all forms of responsibility: the capacity to act and answerability for the act or failure to act. In short, the responsibility is something, which is the subject of a situation to defend its legality or relevance, or to answer for its conduct, particularly toward third parties. A general definition of the State responsibility cannot be presented due to the difficulties of defining State.

International law was once premised on the unthinkability of individual responsibility for violations of rules and norms established in an international arena. That rules existed and were recognized as binding was already remarkable. It had transformed a world of states operating in personalist and anarchic milieu, marked by self-help, into one where these legal judgements were to be made in an arena defined by shared norms and rules. What a state did in pursuit of its own ends could now be judged in light of how it bore upon the end defined by the norms of international law.

Legal issues surrounding multinational corporations (MNCs) have acquired global scope. A single MNC may, through its subsidiaries, enter into multiple ventures in different territories. In doing so, the MNC may become involved in activities and operations that give rise to human rights violations of a transnational character, which in turn raise the question of shared responsibility. MNCs are increasingly making their way onto the international judiciary's agenda. Establishing corporate responsibility, whether administrative, civil or criminal in nature, in the action of the MNC becomes a question for a multinational tribunal, vetting the legality of the MNC's actions in different states' jurisdictions.

Attribution of Conduct

The International Law Commission³⁷ (ILC) has been studying two topics, on the one hand, "State Responsibility" and, on the other, liability, which properly belongs to international

³⁷ <https://www.refworld.org/document-sources/international-law-commission-ilc>

law. Both deal with the obligations and duties of States in the "law" of nations. Such obligations and duties have different nomenclature depending on the perspective from which the obligations were viewed. A State's liability under international law is called "State Responsibility", while liability of a State which, of course, does not mean the responsibility of a State under municipal law, is termed "international liability". Liability in this sense denotes a State's obligation to pay compensation or to make reparations for injuries that non-nationals suffer outside the limits of its national boundaries as a result of activities within its national territory or under its control. If the view of "liability" is taken as defined above, then "State Responsibility" under international law of the ILC is concerned with a State's non-compliance with its obligations or duties under international law. The two are narrowly concentric, but liability, denoting a State's obligation vis-a-vis the international community or non-national acts, falls under the larger heading of responsibility. "A State's international liability is engaged not only under international law, but also within the national dimension of municipal legal systems in circumstances involving transnational relations."³⁸ A State is answerable under international law if it does not fulfil its obligations under a treaty, a general or customary rule of international law or a resolution of an international organization. The topic of responsibility is also appropriate for the ILC to examine because it has not undertaken a similar task for more than three decades and since the completion of the work on the European Convention on Human Rights³⁹ individual responsibility, this has not been touched upon by any International legal body.

Particularly challenging for anyone wishing to investigate the issue of legal responsibility in public international law is the element of 'assigning'. The very nature of the latter may be twofold: on the one hand, it may be construed as an inquiry into who can legally be responsible for wrongful conduct under public international law; on the other hand, it may lead to a determination of how conduct can be legally attributed to some subject of international law. In theoretical terms, the former would mean investigating the existential questions of legal personality and thus of the capacity to breach international obligations. The second line of

³⁸ Sompong Sucharitkul, State Responsibility and International Liability Under International Law, 18 Loyola of Los Angeles Int'l. & Comp. L.J. 821 (1996), p. 822

³⁹ https://www.echr.coe.int/documents/d/echr/convention_ENG

inquiry, however, as is here understood, relates to the more pragmatic concern of determining responsibility under a legal framework that presupposes certain parties already exist, i.e., assuming a pre-constructed universe of states and international organizations empowered to commit wrongs and hence raise consequences.

International Responsibility

Internationally wrongful acts are often attributed to states and give rise to the international responsibility of that state. This allocation of legal responsibility is distinct from the attribution of wrongful acts to a state per se, and a full understanding of the system of responsibility requires an account of both. It is still an open question whether the mechanisms for states as internationally responsible entities are the same as those for other entities, and indeed whether there are such mechanisms for the latter. Therefore, a more established institutional framework, such as the International Law Commission draft articles on state responsibility is initially a primary focus. Its outlines, which have been codified as subjects of inquiry by the ILC for more than a generation, are first discussed. Then, the ex-post international responsibility procedures and any challenges brought by the emerging accountability mechanisms at the international, national and civil society levels are addressed. Finally, the availability of ex-ante procedures for certain high-risk activities is highlighted.

Internationally wrongful acts give rise to the international responsibility of the state to which the act is attributed. The General Principles are based largely on the outcome of ILC preliminaries and their commentaries, and aim to secure an appropriate level of responsibility at different stages of the policy cycle. The General Principles, as rules of conduct, take the complementarity concept as their guiding principle, but the substantive provisions address only one side of international responsibility. The latest draft regulation concerning implementations of international responsibility by states - Responsibility of States for Internationally Wrongful Acts – 2001 - is also included to enhance the understanding of the lack of international control mechanism over states⁴⁰. A similar complementarity approach should be taken in future refinement of these draft regulations.

⁴⁰ https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Customary International Law

“Law of state responsibility is originally of customary international law and unlike state immunity it was almost exclusively an area of international law developed by state practice.”⁴¹ State practice, understood as a body of sufficiently representative and relatively uniform official behaviour, including divergent positions, statements, and types of behaviour relating to the custom in question and a temporal element, is the flawed foundation upon which the second element rests. The opposing state, or a reasonably equivalent, officially represented state practice, must contest the validity of a Customary International Law so that its legal authority is diminished as a matter of law. The debate over Customary International Law’s adherence to an observable objectified state practice persists despite the weight of issues. Locations over which governance is contested, or including non-state actors that self-object, offer glimpses of a search for something resembling Customary International Law’s presence, possession, or serious manifestation.

States can form law-like custom via non-legislative regimes. Groups of states can assign observatory, declarative, judicial, or quasi-judicial roles to international organs and treat their duties and actions as law. In less straightforward cases, distinct state practice may yield law-like custom, and the inclusion by some of states denouncing or opting out of updates, generally on moral grounds, may lack a basis under the narrow definition. Proponents may need another, justified, more comprehensive mechanism to account for these cases. Law’s efficacy is controversial, and some view law as a contingent practice carrying no normative weight. The lack of reputable general theory hinders the advancement of a discourse comparable to that regarding law itself. Nevertheless, scholars typically refer to authoritative agents or standards generating intersubjectively binding behavioural expectations as law-like or law-making, and these laws are considered true to some requisite degree.

⁴¹ Amdadul Hoque, Existence, breach and responses to the breach of state responsibility: A critical analysis, Journal of Law, Policy and Globalization, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online), Vol.53, 2016, p. 136

Accepting Customary International Law as law precludes its assessment as inefficient, irrelevant, or not operational. Efforts to provide evidence suggesting Customary International Law is nonetheless, perplexingly, frequently redundant or superfluous seem misplaced. Standard practice and treaties are legally obliged to dispense immunity to ambassadors, promote free passage, and prosecute piracy, or resemble something approximating these basic agreements. Almost every state observes these rules or accepts them on a bilateral, ad hoc, or informal basis that is not legally binding. Various codes of conduct recognize ample areas of relative unanimity in states' understanding of mutual obligations, including the Vienna Conventions. In the absence of formal prohibition, states are usually free to act, and customary rules were often beneficial to a subset of states.

Judicial Mechanisms for Enforcement

“International jurisprudence consistently states that any illicit act, qualified as such by international law, entails the liability of the respective state.”⁴² The general issue of the enforcement of international law is not a newly created issue. International law has various methods by which laws or rules may be enforced. These fall, generally, into two categories:

1. measures of public enforcement, either through traditional State instruments, i.e., a State accusing and punishing some acts by some accused before its internal courts and according to national law, or through international bodies, i.e., international treaties creating an international commercial court with jurisdiction about different States parties to the treaty.

2. private actions taken by a victim of the illicit act to pursue restorative justice either through a transnational torts jury or private civil and criminal suits against violators that may threaten to become widespread.

Owing to the very nature of the international legal system, it does not implicitly afford a central and compulsory mechanism for the universal enforcement of rules of international law despite the fact that some enforcement might exist through State actions and declarations, e.g.,

⁴² Dana Diaconu, Imputation of legal liability in legal relations regulated by international law, *Annals of the West University of Timișoara - Law Series*, 2013, p. 23

sanctions against an aggressor State in the case of an act of aggression. In any case, enforcement of international law by one State in respect of the obligations of another State might be construed as unlawful since to do so might amount to an infringement of the sovereignty of the latter State or a violation of its autonomy.

In such matters courts and other bodies established by treaties usually enjoy exclusive jurisdiction, or jurisdiction only in respect of states parties to the treaties, or exclude jurisdiction in respect of State acts. These bodies also often lack any control over the compliance of judgments or handle only limited issues of a given matter in dispute. Here again, no solution capable of ultimate enforcement of international law exists. Thus, some believe assert human rights norms, for example, independently of States and their legal order. Such extra-state norms possess a certain moral or social authority. Non-compliance with such rules may lead to condemnation by the court, or public sanction of some social actors, namely non-governmental organizations.

Future Directions in International Law

Addressing the challenge of distributive justice has been a central political preoccupation since antiquity. This interest has recently resurfaced in an international context due to widespread anxieties resulting from globalisation, concerning both the new inequalities and instabilities that it creates, and the inadequacy of existing institutions to mitigate these problems. This escalation of interest in the problem of global justice has met with an explosion of literature, classification, and critique. However, at the same time, notions of global distributive justice have gained traction in political circles, with strong soft law calls for reform being made by a host of international figures.

Accountability mechanisms provide an opportunity for the capacities within states, regions, or the global system framed as justifying claims of neglect of duty or as grounds for sanction overall through blame or punishment. Action/omission accountabilities are taken as the subject of analysis, given their relative prevalence despite being vulnerable to softly trapping patterns of harms and blame on the rules. Uncertainty of knowledge and information can create considerable challenges in proving causation relations between estimated patterns of

behaviours and the harms, whether mitigation failure, disruption avoidance, or avoidance. No one claims total knowledge, but an excessive or unjustifiably high level of knowledge or accuracy is demanded depending on claim type, jurisdiction, or bearing on judgment.

Conclusions

A more comprehensive set of rules governing State responsibility in international law has long been urged by States, scholars and practitioners. Positive international law concerning State responsibility has been for the most part partial. Modern rules on the responsibility of States are provided under the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. The Draft Articles are the first effort to elaborate a comprehensive and codified set of rules governing State responsibility in international law. The topic of international responsibility, however, is only partly synonymous with the topic of State responsibility. Proceedings of meetings attest to the prominence and variety of recent developments in the field of international responsibility. They may be separated into liability for damages, international liability for injuries, and liability for breach of an obligation. In other words, they stem from the consideration of what should be done following the commission of a wrongful act. The more elaborate scheme suggested by some commentators of distinguishing liabilities into remedial, preventive and guardian generally convey the same idea.

These types of responsibility form the core of the separate topic of international liability, which is one of the two aspects of the broader topic of legal responsibility under international law. The Draft Articles on State Responsibility consist of imaginative and to a great extent solid rules on principal obligations and also primary rules providing for responses. These Draft Articles, however, settle little preventative responsibility and hardly any damages. The recent emergence of extensive activities with potentially harmful effects has aggravated the need to elaboration of rules governing State liability for those harm. On the basis of international law, various organizations have endeavoured to prescribe rules and procedures to prevent and to remedy the occurrence of such harm. Focussing on State responsibility in the latter sense, an evaluation of the relevant rules adopted by those organizations may be followed by a plea for rules on insurance.

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THE SCIENCE AND ART OF JUDGING

REMUS IONESCU⁴³

Abstract: Even in the present day, as the contemporary world transitions into an "informational" era, it remains plausible to discuss the "art" of judging and presiding over debates as a sacrosanct human endeavor. The path to the mastery entailed by this "art" is unquestionably mediated by science, understood as a systematic body of verifiable knowledge concerning both objective and subjective reality. Nonetheless, art requires exemplars, and it is incumbent upon each judicial body to infuse the most appropriate forms of honoring the most distinguished practitioners, thereby generalizing the positive experiences of those sculptors of truth. In this way, it is expected that each of us—if not at the outset of our careers, at least at their zenith—will be able to assert, "This is the master to whom I aspired."

Keywords: *art, science, debates, court hearing, judge, impartiality, bias, artificial intelligence.*

Preliminary considerations

Today, the emergence of artificial intelligence (AI) and its applications has led to a profound disruption of traditional legal professions, the scope and consequences of which we have yet to fully comprehend. Undoubtedly, this marks the end of an era—one in which technology merely accompanied and served human thought. Today, we are entering an age where the former increasingly tends to replace the latter.

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In this context, can we still speak of the "art" of judging, of presiding over debates⁴⁴? Does it remain a human activity worthy of attention, one that provokes reflection and generates controversy?

In the following, we shall attempt to provide a reasoned response, beginning from the postulate that good is absolute and evil is relative, drawing upon nearly three decades of professional experience—first as a judge and for the past two decades as an evaluator.

I confess that in May 2007, during an informal debate about GMOs⁴⁵ with a distinguished professor and specialist in the field, we briefly discussed artificial intelligence. Following this conversation, which in hindsight I realize served to "shape" my perspective on the future of my profession, I, being young at the time, began researching and documenting the subject. After some time, somewhat disoriented, I was able to publish an article on this paradigm. However, after sharing it with some colleagues, I hesitated to publish it, as they told me it was almost "subversive" and, at best, pertained to a distant future.

After much internal deliberation, I proceeded to write the following lines, without claiming that they constitute a manual of judicial practice or a vade mecum.

Throughout my career as a judge, I have kept in mind and in my heart the "Prayer of a Judge,"⁴⁶ an apocryphal document that circulated among judges since the early days of my career. Whenever the opportunity arose (and it often did), I would, with reverence, hand it to my young colleagues, those whom the divine had chosen to wear the judicial robe, moved by the sentiments it expresses.

It begins as follows: "Lord! I am the only being in the world to whom You have granted a portion of Your omnipotence: the power to condemn or acquit my fellow beings..." and continues: "Help me, Lord! Make me just and resolute, honest and pure, moderate and gentle, open and humble. Let me be merciless toward wrongs, but understanding toward those who err. A friend of Truth and a guide for those who seek it. Let me be the one who applies the law, but, above all, the one who fulfills it."

⁴⁴ We are considering debates in a broad sense, not those normatively configured by Article 388 of the Code of Criminal Procedure, which is a distinct institution of criminal procedural law.

⁴⁵ Genetically modified organisms.

⁴⁶ This may be equivalent to the heavenly prayer for Christians.

The influence of artificial intelligence

Artificial intelligence (AI) is already transforming society, and has potential for even greater influence in the future.⁴⁷ Are judges still considered the "chosen ones of Heaven"⁴⁸ today, when artificial intelligence (AI) has opened the door wide and entered the judicial realm through videoconferencing, and, more concerningly, has broken through the final barriers of the judge's work, particularly in the drafting of judgments⁴⁹, thereby substantially altering the concept of justice and fairness?

Without delving into specifics, it is noteworthy that the use of videoconferencing in recent times has varied in intensity, particularly depending on the pandemic period. Prior to the declaration of the pandemic, the use of videoconferencing was quite limited. From the perspective of the defendant's right to participate meaningfully in the trial, such measures were to pursue a legitimate purpose⁵⁰, ensuring that their use did not infringe upon the right to access the courts or compromise the fairness of the trial⁵¹, including safeguarding the right to defense, which inherently involves the right to appear in person before a court⁵².

⁴⁷ M. Pop, Legal framework for artificial intelligence: a comparative analysis of Romania, European Union and international perspectives, *Journal of Law and Administrative Sciences*, No.21/2024, p. 75

⁴⁸ Calvin (1509-1564) in his work "Institution chrétieune" called judges the ministers of God on earth.

⁴⁹ Over time, I have stated that this activity is also an art, see: R. Ionescu, The technique of drafting court decisions and their content, *Journal of Legal Sciences*, no. 31, University of Craiova, Faculty of Law "Nicolae Titulescu", pp. 208 et seq.; R. Ionescu, Motivation of court decisions. Preliminary Chamber. Convincing the judge, *Annals of the "Constantin Brâncuși" University of Târgu Jiu, Legal Sciences Series*, No. 17/2021, p. 45.

⁵⁰ At the domestic level, the regulation of videoconferencing is given in art. 106 paragraph (2) of the Code of Criminal Procedure, which regulates special rules regarding hearings, it is provided that the person in detention may be heard at the place of detention via videoconference, in exceptional cases and if the judicial body considers that this does not prejudice the proper conduct of the trial or the rights and interests of the parties.

⁵¹ At the domestic level, the regulation of videoconferencing is given in art. 106 paragraph (2) of the Code of Criminal Procedure, which regulates special rules regarding hearings, it is provided that the person in detention may be heard at the place of detention via videoconference, in exceptional cases and if the judicial body considers that this does not prejudice the proper conduct of the trial or the rights and interests of the parties.

⁵² To guarantee these rights, the technical conditions in which the trial is conducted are also relevant, so that access to the court is effective for the accused.

Once the COVID-19 pandemic was declared, most countries imposed a state of emergency, and the entire world entered a "lockdown."⁵³ In Romania, the judicial activity was significantly reduced starting from March 16, 2020, following the imposition of the state of emergency, as per Presidential Decrees No. 195/2020⁵⁴ and No. 240/2020⁵⁵.

At that time, videoconferencing was lauded by decision-makers, but from the outset, the reality proved otherwise, with significant difficulties arising in the administration of justice due to the lack of effective communication between the parties and the judge.

Even though, from a technical perspective, we can see the person in front of us—the most expressive part of the body, the face—in reality, our perception is distorted when using videoconferencing technology. Human perception is diminished when our senses are limited to sight and sound, especially considering that the context in which a person appears before the video camera is easily manipulable and fundamentally different from the setting of a courtroom, which imposes a formality that operates at a subconscious level.

It is a truism among practitioners that a crucial element in decision-making is observing the litigant in the courtroom. Only in this way can a psychological connection be established, enabling non-verbal communication to take place and the body language to be observed, knowing that non-verbal cues carry five times more weight than verbal ones⁵⁶. When the two are in discord, people rely on the non-verbal message, often disregarding the verbal content. How could one assess the self-control⁵⁷ of a party appearing⁵⁸ for trial via videoconferencing⁵⁹?

⁵³ Among the "benefits" of the pandemic, we recall that, amid the restrictive measures imposed by the state, in Romania, in the first 9 months of 2020, police bodies issued almost 6,500 temporary protection orders.

⁵⁴ Published in the Official Gazette no. 212 of March 16, 2020.

⁵⁵ Published in the Official Gazette no. 311 of April 14, 2020.

⁵⁶ See A. Pease, *Body Language*, Polimark Publishing House, Bucharest 2002, p. 173; P. Collet, *The Book of European Gestures*, Trei Publishing House, Bucharest, 2006, p. 133; P. Collet, *The Book of Gestures*, Trei Publishing House, Bucharest 2005, p. 66; M. K. de Vries, *Leadership*, Codecs Publishing House, Bucharest, 2003, pp. 35-38.

⁵⁷ See D. Goleman, *Emotional Intelligence, the Key to Success in Life*, Allfa Publishing House, Bucharest, 2008, p. 18

⁵⁸ When lying, the individual establishes reduced eye contact with the interlocutor (1/3).

⁵⁹ Other issues raised include: the difficulty for parties to assess and, where necessary, challenge the identity or credibility of witnesses; interference with lawyer-client confidentiality or the effective access to private conversations between them; the difficulty for defendants to access the technology necessary to participate in online proceedings;

If we were to look at a judge's case notebook⁶⁰, we would notice notes, drawings, and various symbols regarding each person being heard or directly involved in various procedures, which are not overlooked in the deliberation process.

Judges recognized, even during the pandemic, that even in simple cases, such as safety measures (Art. 245-248 of the Criminal Procedure Code) or conditional release (Art. 99-105 of the Penal Code)⁶¹, videoconferencing posed significant shortcomings.

Regarding the second breach in the judge's activity—the drafting of judicial decisions—which may herald the imminent end of human justice—although it does not fall within the scope of this analysis⁶², we will merely note that a court in Rotterdam recently used artificial intelligence in the reasoning of a sentencing judgment⁶³, contradicting the view that AI can only be used sparingly in criminal matters⁶⁴.

Thus, the Rotterdam District Court⁶⁵ conducted a criminal trial using artificial intelligence (AI) to assist in drafting the judgment's reasoning. The court's statement from March 27 specifies that AI was used solely as a tool for drafting the section explaining the rationale behind the conviction and that AI did not participate in the decision-making process itself. It was also noted that, in this experiment, judges and court clerks used AI to generate an initial draft of the

the greater likelihood that sensitive information will be disclosed to the public; frequent technological failures that may negatively affect the fairness of the proceedings; and the difficulty for persons with disabilities to participate in proceedings.

⁶⁰ It is true that this is not mandatory, today it is increasingly rarely seen on the judge's desk, its place being taken by the computer system, which, being naive, we call a telephone, not to mention that its use in the courtroom can take on other connotations, which can bring into question the judge's deontic education.

⁶¹ Thus, in a case involving a request for conditional release, the decision also weighed in the balance of the fact that the petitioner was missing a leg from the hip (lost during detention), an aspect that was not seen during the videoconference, a working method used by the first instance.

⁶² We can imagine the judge's work as a circle, which begins with the receipt of the court's notification and ends with the enforcement of the decision. The work carried out in the courtroom will have an influence on the deliberation and the way the decision is drafted.

⁶³ See, *The End of Human Justice is Near*, article available on the Luju website, accessed on March 31, 2025.

⁶⁴ See P. Buneci, B. Buneci, *The use of artificial intelligence in criminal matters*, Dreptul Magazine No. 1/2020, p. 105.

⁶⁵ Since the early 1980s, the information society has been all the rage in the Netherlands. See J. J. Van Cuilenburg, O. Scholten, G. W. Noomen, *The Science of Communication*, Humanitas Publishing House, 2nd Edition, Bucharest, 1998, p. 56.

reasoning⁶⁶. The judges and court clerks reported that AI helped accelerate the drafting process and provided a more structured and organized approach to the reasoning of the judgment. The statement further noted that, despite the positive results, the judges and clerk expressed concerns about the future use of public AI tools within the judicial system.

Despite the fact that a solid legal framework has been developed recently regarding the ethical use of AI,⁶⁷ with numerous studies on the subject⁶⁸, the use of artificial intelligence, as previously noted, poses genuine risks that infringe upon fundamental rights, such as the right to privacy, the risk of meaning loss, the erosion of judicial autonomy, and the reproduction of statistical biases that may lead to creating or perpetuating discrimination. In the future, such tools must be implemented cautiously, with clear guidelines and an ethical framework for their optional use by judges⁶⁹.

As Professor Carmen Silva Paraschiv stated in her time (in the context of the postmodern society in which we operate): "It is not unemployment that is terrifying, but the transfer of authority from people to algorithms that can shatter the last bastion of liberalism, facilitating the rise of digital dictatorship."⁷⁰

And yes, had we seriously focused on a technical-legal laboratory within each law faculty, with the main objective of improving access to justice for both educational and methodological purposes, today, we would not find ourselves in such a vast laboratory⁷¹, nor in a situation where we must say that the end of the world will come through intelligence, not wisdom.

⁶⁶ After the verdict, all parties involved were promptly notified of the use of AI in the drafting process. The court then issued a public statement regarding the experiment. The AI-generated suggestions for the reasons for the conviction were based on general details of the case and were carefully reviewed by the judges and the clerk.

⁶⁷ Concerns in this regard also exist at the level of the Council of Europe and the European Union. In December 2018, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe adopted the "European Charter of Ethics on the Use of Artificial Intelligence in Justice and Related Areas". See <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence>.

⁶⁸ See C. M. Drăgușin, The current state of ethics in the field of artificial intelligence, Dreptul Magazine No. 3/2020, pp. 90-102.

⁶⁹ See M. Duțu, The world of law and the challenges of the "AI revolution", published on the website, Juridice on March 12, 2025, accessed on March 26, 2025.

⁷⁰ See C. S. Paraschiv, Digitalization and Law, Dreptul Magazine No. 9/2019, p. 125. According to the German author Manfred Spitzer, digital media make us use our brain less, and its efficiency decreases over time. See Digital Dementia, Humanitas Publishing House, Bucharest 2020, p. 280.

⁷¹ See C. S. Paraschiv, op. cit., p. 127.

Human activity

After this excursus, returning in medias res, we observe that the presiding judge holds not only the right to conduct the courtroom hearing, but also the corresponding obligation to master, at the highest level, the technique of managing debates—to maintain control over unruly parties and the case file, to cultivate an analytical and comprehensive mindset, and to demonstrate tact, complete impartiality⁷², and an absence of any form of bias or premature judgment regarding the outcome.

Discretionary powers were granted to the presiding judge in our traditional judicial system, dating back to the time when justice was dispensed in the *divanuri domnești* (princely courts). In those days, the lord—acting as judge within the *divan*—would have his hand kissed by boyars who knelt either during audience hearings⁷³ or formal adjudications⁷⁴. Those accused of criminal acts were invariably brought in shackled or in chains, both for trial and during the investigative proceedings.

At the other judicial bodies (such as the *veliți boieri*, departments, and *ispravnici*), litigants—regardless of social rank (“peasant or boyar”)—were required to maintain a demeanor of deep respect: one of “piety and reverence.” They had to appear before the court bareheaded

⁷² As is well known, impartiality is the fundamental quality required of a judge and the essential attribute of the judiciary. Impartiality may exist both as an actual state of affairs and as a matter of reasonable perception. If bias is perceived based on well-founded indications, such an image will likely give rise to a sense that injustices are being committed, thereby eroding public confidence in the judicial system. The appearance of impartiality is assessed against the standard of the reasonable observer. Impartiality is not merely a matter of perception; it is fundamentally tied to the absence of bias and prejudice. This dual aspect is reflected in the oft-repeated phrase: “Justice must not only be done, but must also be seen to be done.”

See: Judicial Ethics Code. Application Guide, Hamangiu Publishing House, Bucharest, 2007, p. 29.

⁷³ See V. Batthyani, in *Foreign Travellers on the Romanian Principalities, 19th Century*, manuscript at the “N. Iorga” Institute of History: Travellers through Transylvania and Moldova, 1805, as cited in Val. Al. Georgescu, P. Strihan, *The Princely Judicature in Wallachia and Moldavia, 1611–1831, Part I: Judicial Organization, Vol. II (1740–1831)*, Romanian Academy Publishing House, Bucharest, 1981, p. 179.

⁷⁴ C. de Lagarde, *Voyage de Moscou à Vienne par Kiev, Odessa, Constantinople, Bucarest et Hermannstadt*, Paris, 1829, manuscript translation held at the “N. Iorga” Institute of History, Foreign Travellers, 19th Century. The journey took place in 1813, as cited in Val. Al. Georgescu, P. Strihan, op. cit., p. 179.

(“without their *ișlic*”) and remain standing throughout the proceedings⁷⁵. It is likely that these provisions were directed especially at the boyars, who were known to display contemptuous attitudes both toward commoners and toward boyars of lower rank.

Judges were also required to behave appropriately towards the accused. The legal texts and princely orders contained provisions originating from the Basilicas or other Byzantine sources. Judges were expected to possess—*mutatis mutandis*—the virtues of the emperor, which reflected those of the “heavenly judge”: gentleness, prudence, moderation, patience, and impartiality. The harsh and repeated prohibition of insulting words, curses, physical blows, etc., was enforced. The instructions of Michael Suțu from September 22, 1783, specified that the penalty for the accused who would insult the judge was corporal punishment, but only if the judge had not previously insulted him⁷⁶.

As in the past, the judge's behavior is crucial for maintaining their impartiality⁷⁷, as it is what others perceive. Improper behavior can undermine the judicial process, giving the impression of bias or indifference. Disrespectful conduct towards the accused violates their right to be heard and compromises the dignity⁷⁸ and solemnity of the courtroom⁷⁹.

Lack of politeness⁸⁰ affects the level of satisfaction of the litigant regarding how the case was handled and creates a negative impression of the judiciary and courts in general.

⁷⁵ M. Suțu, Instructions to the Judges of the Divan of Craiova, in V. A. Urechia, *Istoria românilor*, Vol. I, p. 351, as cited in Val. Al. Georgescu, P. Strihan, *op. cit.*, p. 180.

⁷⁶ See V. A. Urechia, *Ist. rom.*, Vol. I, p. 351, in Val. Al. Georgescu, P. Strihan, *op. cit.*, p. 180.

⁷⁷ Francis Bacon noted at the time, evidently with irony, that “the trial progresses very quickly when the judge has already decided the verdict in advance.”

⁷⁸ Rising from the “throne of justice” and walking around the podium or pounding the fist on the table calls into question the judge's inner balance.

⁷⁹ Solemnity refers to an atmosphere of attention and sincere effort, signaling to both the participants and the public that the matter before the court is being addressed in a serious and fair manner.

⁸⁰ The fact that a judge dozes off in the courtroom may provoke astonishment, even condescension, but clearly, it does not align with the expectations of the judicial bench.

The judge must direct their reactions appropriately. Regardless of the circumstances, the judicial response must be measured⁸¹. Even if provoked by the impolite conduct of a lawyer⁸², the judge will take the necessary steps to maintain control over the courtroom without resorting to retaliation. If a reprimand is necessary, it is sometimes advisable for this to occur separately from the formal hearing of the matter before the court⁸³. It is inappropriate for the judge to interrupt a lawyer without justification, or to insult⁸⁴ or ridicule the lawyer's appearance⁸⁵, conduct, or arguments⁸⁶. On the other hand, the judge is not obligated to listen to arguments that are clearly legally irrelevant or abusive towards them, other lawyers, parties, or witnesses, but must always ensure that the judicial proceedings are conducted properly⁸⁷.

The judge must rise above personal animosities and should not have favorites among the lawyers appearing before the court. Unjustified reprimands of lawyers, insulting remarks towards the accused or witnesses, crude jokes, malicious sarcasm, and uncontrolled behavior from a judge undermine both order and solemnity in the courtroom. When the judge intervenes on an issue, they must ensure that impartiality and the perception of impartiality are not

⁸¹ Simply raising the tone with one of the parties or their lawyer can give rise to such suspicions, even though the judge, in their inner forum, has no impartiality issues (objectively). The fact that the judge opens the law code and shows the lawyer the applicable legal text to resolve the legal dilemma by lifting the code and pointing to the article with their index finger not only fails to resolve the case but also leaves a bitter taste for both the lawyer and the party they represent. These situations have been frequently encountered, especially after the entry into force of the new codes (February 1, 2014).

⁸² Thus, the judge's statement that the party's lawyer was a "small child" when the judge was administering justice has the effect of astonishment and creates shock, even if the remark is made in response to the lawyer's claim that the judge is unaware of the case file.

⁸³ This is the case where the lawyer and the prosecutor exchange insults, effectively engaging in a personal attack. The judge must intervene firmly and bring the two "roosters" to order, with the note that the imposition of a fine cannot be excluded in carrying out this action.

⁸⁴ Throwing the lawyer's code into the courtroom for them to look at is a despicable gesture, devoid of any deontic education or respect.

⁸⁵ In addition to ensuring the solemnity of the court session, the robe also serves the purpose of concealing any eccentricities in attire.

⁸⁶ One of the best arguments I remember in favor of replacing the preventive measure of arrest goes like this: "Mr. President, I hope that my arguments in support of the thesis presented do not weigh in the decision as much as 1 in multiplication."

⁸⁷ Order refers to the level of adherence to the solemnity and politeness required to ensure that the court's activities proceed in accordance with the rules governing the procedure.

negatively affected by the manner in which the intervention is made, demonstrating themselves to be a good communicator.⁸⁸.

On the other hand, the abuse of power regarding deviations from courtroom procedures is a manifestation of bias or prejudice.

The ability to identify courtroom/judicial deviations (not to mention courtroom offenses) and to exercise "courtroom policing" gives the judge the power to control the courtroom and maintain order. Since this power may involve financial penalties, it should be used as a last resort, only for valid legal reasons and strictly in accordance with procedural requirements. It is a power that must be exercised with caution, discernment, and care, and any abuse constitutes a manifestation of bias. This can occur when the judge has lost control and tries to score a personal "victory," especially as retaliation against a party or a lawyer⁸⁹ or a witness with whom they have clashed, but who is also unaware of the criminal procedure rules.⁹⁰.

⁸⁸ The Guide for the Evaluation of Judges' Professional Performance stipulates that the evaluation of judges' activity in the courtroom should consider the following:

a) Clear and logical communication skills of the judge, taking into account: clear and logical recording during the court session/communicating clear, accurate messages; ensuring that the participants in the process understand the essential aspects of the case and their obligations; receptiveness to requests and exceptions raised by the parties/listening attentively to the parties; creating a favorable environment for the parties to express themselves in the dispute.

b) Social professionalism of the judge's interaction, which includes: appropriate, courteous, and attentive attitude towards the parties/participants during the process; using an adequate, polite tone, ability to manage a crisis situation in the courtroom; avoiding arrogant or contemptuous behavior.

⁸⁹ If you apply 10 fines to the court clerk because they did not issue certain letters ordered at the previous hearing, even though the court orders had not been drafted for that session, it only undermines the prestige of the judge, who is the manager of the case. The application of sanctions to a colleague, even if they are the clerk, should be a "last resort." These fines, even if justified, leave a bitter taste for both the litigants and, especially, the clerks, who feel humiliated, and reflect an attitude lacking calm, patience, and politeness.

⁹⁰ The successive reprimanding of the lawyer by the presiding judge for repeatedly and insistently advising their client, the defendant, not to answer the president's questions, while reminding the defense attorney that the judge

The judge, being responsible for conducting the court session, must also consider the behavior of the other participants in the proceedings. They will maintain order and solemnity in all procedures that take place before them and will be patient, dignified, and polite in their interactions with others⁹¹.

Cases where the court session is led by another participant in the proceedings, such as the prosecutor⁹², a colleague from the panel⁹³, the lawyer⁹⁴, or the court clerk⁹⁵, are rare. Their position should not be considered entirely outside the authority of the presiding judge, but they must not claim the right to intervene in the debates at their discretion, nor should they take over any prerogatives exclusively reserved for the presiding judge.

It is important to note that some of the qualities required of a judge in leading the debates must also be possessed by the prosecutor as well as the lawyer⁹⁶.

Thus, it is true, albeit less common, that a judge may find themselves in the position of imposing fines on the prosecutor. It should be noted that there is often reluctance on the part of the judge to sanction the prosecutor, even if the prosecutor is the one initiating the judicial confrontation with the lawyer. The lack of intervention by the presiding judge when the lawyer

presides over and conducts the court session and requesting them not to intervene, can only be seen as a violation of the ethical code, as well as evident procedural gaps in criminal procedure.

⁹¹ The quality of discernment and conduct in court can be much more important than being erudite in the field of law.

⁹² This can manifest in various forms, ranging from repeated requests to warn or fine various participants in the proceedings, to direct interference in the way hearings are conducted, the recording of statements, the formulation of meaningless questions with no clear beginning or end, or the repeated initiation of investigations for the crime of perjury. If the presiding judge does not react procedurally, the prosecutor takes over the management of the debates entirely, creating an aura of "factotum."

⁹³ Equally harmful, as is the management of the session by the prosecutor, it can leave serious doubts regarding the deliberations to follow. Nothing prevents a panel colleague from respecting the procedure regarding how to address the court (Article 357 of the Criminal Procedure Code). It is true that this disagreement should be resolved either before or after the court session.

⁹⁴ This happens rarely, and it is usually done by lawyers who believe they have an advantage over the judge, whether real or perceived (some lawyers shamelessly flaunt their former or current high-ranking positions), or it is the case with young lawyers who believe they know everything about everything, while in reality, many of them know very little about a lot.

⁹⁵ This situation is especially encountered at the beginning of a career, when the court clerk senses the weaknesses and reluctance of the judge.

⁹⁶ It is not uncommon for lawyers to use strategies that provoke the prosecutor in order to get the court/judge to impose judicial fines, which are, in fact, justified, and then proceed to challenge the judge.

and prosecutor "duel and attack each other personally" is just as toxic as applying a sanction not provided for by the Criminal Procedure Code.

All of the above brings into question the notion of firmness and how firm a judge should be?

Firmness is generally seen as a necessary quality for a judge, as it instills trust and confidence that the decision made is the correct one. However, firmness must be distinguished from stubbornness, as the judge must have the ability to reconsider their own opinions when the arguments presented by the parties are compelling⁹⁷.

The firmness of the judge cannot be manifested through harshness towards the parties in the courtroom or through excessive punishment imposed on individuals found guilty of committing crimes⁹⁸.

Over time, I have observed that the activity of leading the court session—where both professional skill and grace are fully manifested—is the most stressful, thankless, and often avoided by fellow judges.

All of the above leads us to question whether there exists a style, an archetype of the judge in leading the debates? Just as there are extroverted and introverted people, there are also extroverted and introverted judges, and we can categorize them as participative, authoritative, or participative-authoritative types.

If a style exists, in our opinion, it represents the totality of the judge's skills and attitude in their work, especially in the courtroom⁹⁹.

We observe that at the beginning of our careers, we are more authoritarian¹⁰⁰ and desire to become famous, not realizing that a judge typically gains immortality through the defendant

⁹⁷ See C. Ghigheci, *Ethics of Legal Professions*, Hamangiu Publishing, Bucharest, 2017, p. 258

⁹⁸ In this sense, the punishment applied to the defendant at the maximum level, with the justification that they were chewing gum during the proceedings, is unfounded.

⁹⁹ In management, the style represents the totality of the manifestations of the qualities, knowledge, and skills of managers in their relationships with subordinates, superiors, and colleagues. See E. Burduş, I. Popa, *Fundamentals of Organizational Management*, 3rd Edition, Pro Universitaria Publishing, Bucharest, 2018, pp. 83 and following.

¹⁰⁰ Everyone thinks they know everything, but few realize how little they actually know.

they judge¹⁰¹ or through their era¹⁰². Over time, we become more participative¹⁰³, more paternalistic, aware that we must, by preference, live with the vocation of anonymity¹⁰⁴.

Conclusions

Yes, there is an art to judging, to presiding over debates, a procedural culture in this regard. It should represent an ideal towards which we strive, and which naturally involves models of behavior. However, to make judicial work a form of "art" does not mean limiting ourselves to mere skill plus "certain" knowledge. The path to mastery that art entails undeniably passes through science, through that systematic body of truthful knowledge about objective reality and subjective reality.

Avoiding errors in judicial activity requires those entrusted with administering justice to have a vast specialized culture¹⁰⁵ and a solid legal technique, enabling them to resolve the most difficult and varied cases with skill and efficiency, based on prior preparation. If, for every legal incident or issue raised before the court, the judge was to retreat to the deliberation room and either "defer the decision" or "pronounce the deferral" for ad-hoc technical documentation, it would implicitly reveal their incompetence¹⁰⁶.

¹⁰¹ It is the case of Pontius Pilate, to whom Jesus Christ created a celebrity over time that neither his predecessors nor any of his mortal successors ever knew. For details, see M. Duțu, *Pilat din Pont, judecătorul lui Iisus*, Neverland Publishing, Bucharest, 2018.

¹⁰² For example, the beginning of Christianity, see in this regard M. Duțu, *Procesul lui Iisus*, Neverland Publishing, Bucharest, 2017; M. Duțu, *Procesul lui Pavel, Apostolul neamurilor*, Neverland Publishing, Bucharest, 2018.

¹⁰³ Being aware that where there is competence, there can and should also be harmony.

¹⁰⁴ As a judge (not as a bearer of the robe), you must know how to receive compliments with measure, learn from less successful or less benevolent criticism, but above all, strive continually and work towards professional perfection.

¹⁰⁵ The need for legal culture today is not only born out of natural human curiosity or the thirst for encyclopedic knowledge but, increasingly, it demands the complex condition of the postmodern man, simultaneously anchored in communities of belonging and participating in the global world, through the internet and individual aspirations. See M. Duțu, "It's time for a science of law and a Romanian legal culture!" *Revista Dreptul* No. 4/2019, p.10

¹⁰⁶ As a component of legal culture and, to a greater extent, of the general culture of the postmodern man, judicial culture acquires particular importance in a period in which justice and the rule of law are assumed and affirmed as priority values of society. See M. Duțu, "Judicial Culture and Its Role in the Rule of Law," *Revista Dreptul* No. 10/2015, pp. 113 and following.

Such a practice, even in the case of a just resolution of the case, nevertheless demonstrates that it is about a "case judge," who, with the help of technological factors, has managed to "enlighten" himself ¹⁰⁷. This implies procrastination, with all its consequences, not to mention the embarrassing impression it leaves on the audience and especially on the litigants.

A solid legal education is inconceivable without a serious general culture. In order to be a good jurist, a judge must also be a cultured person. They will be able to provide a fair legal interpretation of the conflicts brought before the court only to the extent that they possess diverse knowledge in various areas of social life. Life often puts the judge in a position where they must rule on trivial insults, but more often, they are confronted with cases that require complicated knowledge, such as: forensic/medical science, advanced technology, aeronautics, scientific organization of production, security and occupational safety, techniques, art (painting, sculpture, music, etc.) ¹⁰⁸.

But general culture cannot be acquired and consolidated solely through the internet¹⁰⁹. The lack of continuous and in-depth reading leads¹¹⁰ irreversibly to a neocognitive atrophy, where epistemic aristocrats will decide in our place.

¹⁰⁷ This can be achieved only if there is no power outage.

¹⁰⁸ It is known that a century ago, an American court was asked by Brâncuși to decide whether his works were industrial pieces, as claimed by American customs officials, or art, in the new sense of the word. The ruling, which favored the great sculptor, turned a judicial document into an art document, a true birth certificate of modern sculpture. The court's verdict came on November 26, 1928, and was delivered by Judge Waite: "The object now under consideration is beautiful and symmetrical in its forms, and even though there may be some difficulty in associating it with a bird, it is no less pleasant to look at and appreciate from an ornamental point of view. Now that we have evidence that it is the original product of a professional sculptor and that, in fact, it is a sculpture and a work of art according to the statements of the persons mentioned above, we support the protest and decide that it has the right to enter the country without subjecting it to customs duties. The school called 'modern art' develops on the tendency to represent abstract ideas rather than trying to imitate nature. Whether we agree or disagree with these new ideas and the schools they represent, we believe that their existence and influence on the artistic world must be recognized by the courts." See "Brâncuși's Exhibitions, A Guide to Understanding Modern Art," published in *Historia Special*, no. 24, September 2018 edition, now available in digital format on Cumpără.acumpaydemic.com, accessed today, March 25, 2025.

¹⁰⁹ Those who know nothing think of Google.

¹¹⁰ The more you know, the freer you are.

I concluded that presiding over debates is also a matter of art¹¹¹, a sacerdotal exercise, but, in this field, the craft is sometimes "stolen," as in theater, where the value has passed from master to master.

Speaking of role models, beyond the written works in the field that highlight the prominent personalities of our judiciary¹¹², it remains the responsibility of each court to market the most appropriate forms of honoring the best of the best, to generalize the positive experiences of those sculptors of truth, so that young judges will be able to continue and surpass the local tradition and, at the zenith of their career, be able to say: "This is the master toward whom I have aspired."

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¹¹¹ In this activity, the judge must reflect on what Brâncuși said about genius, namely, to create like a god, to command like a king, and to work like a slave. By doing so, they ensure that they continue to reside within our legal space, both in a broad sense and in a narrower sense within the space of Romanian justice.

¹¹² The reference is to M. Duțu's *Istoria Înaltei Curți de Casație și Justiție*, published by Editura Economic in 2007. Regarding this magnificent work, I can mention that, although I lent it to all the trainee judges, very few of them chose a role model to follow, even though the author of the monograph is a learned historian and an exceptional portrayer of the judiciary profession and the epochs that the scientific endeavor traverses throughout history.

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POLITICAL REGIME AND DEMOCRACY IN A RULE OF LAW

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Abstract: *It is already well known that any form of human community necessarily involves a leadership, without which the organization, existence and functionality of the respective group are not possible. Taking into account such a thesis, we will be able to affirm that the beginnings of governance, therefore of the political phenomenon, coincide with those of social life, conditioning and influencing each other mutually during their long evolution. All modern democracies have recognized fundamental human rights; these are rights that cannot be abrogated by any power, they are inalienable rights that stem from the sovereignty of the people. Democracy presupposes the existence of values such as freedom, justice and equality. These represent ideals for which people have always fought and, at the same time, benchmarks on the basis of which the norms that regulate life in society have been created. The essential factor that determines the character of current political systems is the constitutional regime.*

Keywords: *democracy, state, law, constitution, political regime, political pluralism*

1. Political regime

1.1. Concept

Knowing and understanding the mechanism of formation, organization and functioning of social life, especially political life, necessarily requires, in addition to the study of the other

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components of the political system, also that of the political regime. The issue of defining the political regime interests lawyers, politicians, political scientists, but also citizens to the same extent - a fact that proves the importance, both theoretical and especially practical, that is given to this element of the contemporary political system.

Among political scientists, there is no unified point of view in defining and classifying political regimes, but they all approach it from the positions of the theory of institutions, but they conceive and use this theory in different ways. Such an approach to defining the political regime has generated two distinct orientations.

A) A first orientation has at its center **M. Duverger** and **G. Burdeau**, who define the political regime exclusively on the basis of institutional theory. Within political institutions, they take political parties as the main element.

"He who knows constitutional law and ignores the role of political parties, writes M. Duverger, has a false image of contemporary political regimes."¹¹³ In the same spirit, G. Burdeau says: "Nowadays, in order to characterize the regime that functions in the state, we no longer need to ask on what basis – parliamentary or presidential – the division of powers is carried out, but we must first clarify the quality of the parties, their structure and their goals."¹¹⁴. Consistently following the institutionalist line of defining the political regime, M. Duverger concludes "The totality of political institutions that function in the respective country, in a certain period, constitutes the political regime."¹¹⁵ Although he places the political party at the center of political institutions, M. Duverger conceives the political regime as a direct interdependence of all political institutions. He also shows the close correlation between the political regime and social, economic and cultural institutions.

The construction of the definition of the political regime in G. Burdeau proves to be extremely complex. For G. Burdeau, the political regime is defined by "the totality of the norms, adopted or simply practiced in the country in question, with the help of which the leadership of the people is carried out."¹¹⁶

At first glance, it would seem that G. Burdeau leaves the institutional line in defining the political regime, since the main source of the norms that regulate the exercise of power is the interaction between political and social institutions; his definition is, as he himself admits, an "extended institutional definition."¹¹⁷

The institutionalist conception also includes **M. Lesage's** approach. In his opinion, "the definition and study of the political regime represents the study of the relationships existing between all categories of institutions, in the process of adopting political decisions."¹¹⁸

¹¹³ M.Duverger, *Les partis politiques*, Librairie Armand Colin, Paris, 1951, p.328.

¹¹⁴ G.Burdeau, *Droit constitutionnel et institutions politique*, Paris, 1968, p.147.

¹¹⁵ M.Duverger, *Institutions politiques et droit constitutionnel*, P.U.F., Paris, 1966, p.13

¹¹⁶ G.Burdeau, *Traite de science politique*, volumul IV, Paris, 1952, p.21.

¹¹⁷ Ibidem, p.14.

¹¹⁸ M.Lesage, *Les regimes politiques de la URSS et de laEurope de L'Est*, În: *Revue internationale de droit comparé*, Vol. 25 Nr. 3, iulie-septembrie 1973, p. 765-768

B) The second orientation abandons the positions of pure, exclusive institutionalism, and has as its main exponent **R.Aron**.

For R.Aron, "the political regime is not reduced to the simple combination of institutions."¹¹⁹ This orientation, although it retains the institutional elements in defining the political regime, also brings in other components to support it, thus giving a much more complex and realistic picture of the nature and role of the political regime in society.

In explaining the defining criteria of the political regime, R. Aron considers that important are not only "the connection between institutions and the ways in which they function, but also the forms of its interdependencies with the infrastructure, the role and place that the administration occupies within the regime, the historical context in which the regime operates."¹²⁰

Starting from these considerations, in relation to the definition, content and essence of the political regime, we can appreciate the following:

- The political regime represents the concrete form of organization and functioning of the political system and, consequently, by political regime is understood the concrete way of organization, institutionalization and functioning of the political system and of exercising political power by a socio-political force within a social community or a global social system;¹²¹
- Although within the political regime the institutions and organs of state power have an important role in its establishment and functioning, the political regime cannot be reduced to these, but it encompasses, organizationally and functionally, the entire political system;
- The nature of the political regime, its form of expression in the social practice plan is the result of the balance of forces between classes, social groups, parties, political formations, in a word, between citizens and organizations, between these and civil and political society;
- The political regime cannot and should not be identified with the form of government.

The form of government designates the concrete way of forming and organizing the organs of state power¹²², their characteristics and principles, the relations between them and the other organs of the state, as well as the relations between them and the other institutionalized forms of the political system. In contrast, the political regime means the express materialization of some axiological operations, of a specific hierarchy of values in general and of political values, in particular. Even if some elements of the political regime overlap, to some extent and under certain aspects, with those of the form of government or the state structure, this does not dissolve their identity, the distinct quality of being defining sides of the political regime. With the exception of absolutist monarchies and/or dictatorial regimes, the form of government cannot decide the nature of the political regime, but it is, to the greatest extent, the result of the relationship between it and the citizens.

¹¹⁹ R.Aron, *Democratie et totalitarisme*, volumul IV, Paris, 1952, p.89.

¹²⁰ Ibidem, p.129.

¹²¹ G. Micu, *Protecția minorităților naționale, vol.I - Rolul statului în reglementarea statutului persoanelor aparținând minorităților naționale*, Ed. Pro Universitaria, București, 2023, pp. 63-65.

¹²² M. Tutunaru, *Drept constituțional și instituții politice*, Ed. Scrisul Românesc, Craiova, 2022, p.156

1.2. Classification

Along with the definition of the political regime, special attention is paid in the specialized literature to the problem of their typology. The importance given to this problem is demonstrated by the organization in 1967, in Brussels, of an International Congress of Political Sciences that had as its object of debate the problem of classifying political regimes. However, the specialized literature is not able to present a unitary position, on the contrary, the proposed classifications are extremely diverse. Finally, on this issue, in contemporary political science, two major orientations have been established regarding the positions of typifying political regimes, a fact that does not cancel, especially within these orientations, the great diversity of options and attitudes:

A. Classifications that start from traditional foundations (**M.Prélot** and **G.Vedel** being reference authors in this orientation);

B. Classifications that go beyond the traditional framework (**M.Duverger**, **G.Burdeau**, **R.Aron**).

One of the traditional classifications of political regimes is that of M.Prélot; he divides political regimes into groups, according to the number of leaders. According to this criterion, he distinguishes the following types of political regimes: *democracy*; *monocracy*; *oligarchy*; *mixed regime*.

Democracy is represented by those regimes in which "the people in the majority freely determine the orientation and assume control of the leadership and legislation."¹²³

Leadership by one person is called *monocracy* by Prélot; the term is distinct from the classical one – monarchy, which designates "only the inheritance of the functions of the head of state", while monocracy has a double aspect, of holding power and of formulating ideology.¹²⁴

Oligarchic regimes are, according to M.Prélot, the political leadership of society by a part of the population. Going further with the analysis, within oligarchic regimes he distinguishes¹²⁵ several types of leadership:

- Leadership by the privileged class - aristocracy;
- Leadership by wealthy individuals - census plutocracy;
- Leadership by one or several parties - particracy.

In M.Prélot's conception, mixed regimes are those that occupy an intermediate place between democracy and monocracy. These can be of two types:

- Mixed regime, inclined towards democracy;
- Mixed regime, inclined towards monocracy.

¹²³ M.Prélot, *Institutions politique et droit constitutionnel*, Dalloz, Paris, 1980, p.55.

¹²⁴ Ibidem, p.108

¹²⁵ Ibidem, p.132

We consider it necessary to note that within the framework of mixed regimes with monocratic tendencies he includes the former communist regimes. On the other hand, we cannot agree with the inclusion within the framework of the mixed democratic regime of regimes such as that of Franco's Spain or Salazar's Portugal.

To a certain extent, **G.Vedel** also follows the traditional foundations in the classification of political regimes. In his opinion¹²⁶, From a political point of view, two types of regimes must be distinguished:

- Regimes in which the legislative and executive powers are only different branches of the activity of a political party;
- Regimes in which the absence of the majority party or party discipline does not allow the simple union of the legislative and executive powers to take place.

As can be seen, Vedel's classification ignores any class or social criteria, considering as necessary conditions of these regimes the cohesion and spirit of discipline of the party, as well as the mono-party majority in parliament or the monopoly of a party.

Much more complex and closer to the reality of political life are the classifications made of political regimes by political scientists who go beyond the traditional framework.

One of these classifications is that made by **M. Duverger**. It bases the classification of political regimes on four criteria which, in essence, concern: the basis of political power; the problem of choosing and structuring the leader; the formation of the governing bodies; the relations between them.

Starting from these criteria, M. Duverger distinguishes¹²⁷ two fundamental groups of regimes:

- *Liberal-democratic regimes*;
- *Authoritarian regimes*.

Within the framework of liberal-democratic regimes, *presidential* and *parliamentary* regimes are included.

Authoritarian regimes are divided into: *communist, fascist regimes* and *political regimes of developing countries*.

An interesting classification of political regimes is found in **G. Burdeau**. Starting from three essential criteria: the origin and basis of power, the purpose of the regime and the type of society; the system of organization of the organs of state power and the distribution of powers between them, G. Burdeau distinguishes¹²⁸ two major types of political regimes: *authoritarian* and *democratic*. *Authoritarianism* "is characterized by the dominance of the head of state and the limitation of political freedoms."¹²⁹ All authoritarian political regimes, argues the French

¹²⁶ G.Vedel, *Des rapports de législatif et de la exécutif*, în *Revue française de science politique*, 1958, p.757-781

¹²⁷ M.Duverger, *Institutions politiques et droit constitutionnel*, Paris, 1966, p.15-16

¹²⁸ G.Burdeau, *Traite de science politique*, op.cit., p.355

¹²⁹ Ibidem, p.391

political scientist G. Burdeau, are dictatorships and they come "not so much from political theory as from social crisis."¹³⁰

Within democratic regimes, G. Burdeau discovers regimes of *managed democracy* and regimes of *leading democracy*.

In the first type of regimes, of *managed democracy*, the people are led from above. Such regimes were those of the classical liberal democracies of the 19th century. This type of managed democratic political regimes also includes the former communist regimes.

Starting with the 20th century, regimes of *leading democracy* are established. They are characterized by the fact that they ensure the possibility of the people to exercise a direct influence on the exercise of state power. In this last type of political regimes, G. Burdeau includes contemporary bourgeois-democratic countries.

In turn, Raymond Aron starts the classification of political regimes from political parties, more precisely from the number of political parties that rule in society. From this point of view, he distinguishes the following types of political regimes:

- *Single-party political regimes*, considered by their content and essence to be undemocratic, totalitarian regimes;

- *Multi-party or constitutionally pluralist political regimes*, democratic by their character.

These two types of regimes, according to R. Aron, "symbolize two characteristic ways of institutional expression of the idea of popular sovereignty, two ways of organizing the struggle of political forces."¹³¹

Within the framework of *single-party regimes*, R. Aron includes fascist regimes and those in former communist countries.

As for *multi-party political regimes*, in R. Aron's opinion: "it is impossible to make a consistent classification of them."¹³² For this reason, the author limits himself to the analysis of their main variables.

After this brief review of the main orientations and positions expressed in the specialized literature regarding the typology of political regimes, the following assessments can be made:

- The typology of political regimes must be based on a variety of criteria, since only these are able to reveal their true nature, significance and individuality;

- Among the criteria that must be used in the classification of political regimes, we highlight: the way in which the state power bodies are constituted and function (their appointment, direct or indirect election); the way in which leaders are elected; the content and scope of citizens' rights and freedoms, especially political ones, and, above all, the way in which they are found and materialized in the practice of socio-political life, the nature and ideological basis of the regime; the party system (single-party, bi- and multi-party); the nature, depth and amplitude of social relations, especially political ones.

¹³⁰ Ibidem, p.375

¹³¹ R.Aron, op.cit., p.98.

¹³² Ibidem, p.112

Based on these guidelines, political regimes can be classified into:

- A) *democratic* political regimes;
- B) *dictatorial* or *totalitarian* political regimes.

Of course, such a typology of political regimes cannot be rigid and cannot exhaust the great variety of forms and manifestations that they can take in the real, practical political life of each society. In this, we must take into account the ample phenomenon of mobility to which political regimes are subject. The transition from one form of political regime to another is today a reality and is the result of changes in the balance of power, of political combinations that can appear in the political landscape of a society. An eloquent example is the collapse of communist political regimes in Eastern and Central Europe and their commitment to democratic regimes.

The way in which political regimes express themselves on a legal and constitutional organizational level is called a constitutional regime. As the fundamental law of the state, the constitution will enshrine the political ideas and the organizational modalities that are reflected in the respective political system. Depending on the political regime of a state, but also on the form of government, constitutional provisions enshrine different principles based on which the notions of executive power are delimited, referring here to the powers of the president, to his role as mediator, or to the powers of the government, the weight of the prerogatives of the president or the government varying depending on the type of constitutional regime.¹³³

Speaking of political regimes, we distinguish several types of constitutional regimes. Here we can mention the *presidential* regime, the *semi-presidential* regime, the *parliamentary* regime and, last but not least, the *directorial* regime.

A. The presidential regime. It is the first of the political regimes and is notable for the fact that this regime confers a large number of powers on the president. These powers can be neutralized through a procedure that confers transparency and also allows for the control of public opinion, as well as holding the head of state accountable for deviations from the mandate that was offered to him.

The broad powers that are offered to the president do not affect in any way the implementation of the entire mechanism of democratic institutions, since the president himself is under the control of the Constitution.

The election of the president is based on a democratic procedure of consultation of the people. Therefore, the adoption or application of the presidential regime is not so much influenced by the president's prerogatives, the weight and type that belong to him, but by the way in which this power fits into the mechanisms of democratic control and verification of the way in which the president exercises his prerogatives..¹³⁴

¹³³ Vezi: Benone Pușcă, Andy Pușcă, *Drept constituțional comparat*, Ed. Fundației Academice Danubius, Galați 2004

¹³⁴ Vezi: V. Duculescu, C. Călinoiu, G. Duculescu, *Drept constituțional comparat*, Ed. Lumina Lex, București 2007, p.59

B. The semi-presidential regime imagines a middle ground between the presidential system, in which the president is granted very broad prerogatives, and the parliamentary system, in which the president is granted nothing.¹³⁵

As common elements between the two regimes mentioned above, the presidential and the semi-presidential regime, we note the possibility of impeaching the president in certain serious situations, for deviating from the mandate entrusted to him. It is worth noting that in both the presidential and semi-presidential systems the president does not have legislative initiative, but he can stop the adoption of draft laws and order their sending for a new discussion to the Chamber (or Chambers) for the purpose of re-examination for the project he does not accept¹³⁶.

In the semi-presidential system, the president plays the role of arbiter between the powers of the state, being elected by the entire people, in fact the executive power belonging to the Government. At the same time, in the semi-presidential system, the president can dissolve the parliament, in certain specific situations provided for in the Constitution, while in the presidential system, the president cannot do this, this representing the most important difference between the presidential and semi-presidential regimes.

In the system of certain constitutions, the president has the same attributions regarding military and foreign policy functions.

C. Parliamentary regime. The parliamentary regime gives special importance to the Parliament, which becomes the true political forum of governance.

Within this regime, the Government is led by a prime minister, who is responsible for his actions before the Parliament. The latter, if he considers that he is not fulfilling his mandate, can withdraw the confidence granted to him.

The President of the Republic has representation and protocol duties, having a minor political role in relation to the prominent position of the Prime Minister, however, in crisis situations the President can act successfully.

As main features of the parliamentary regime we can list the following: the rule that the head of state is not politically accountable; the rule according to which the head of state can dissolve the parliament; the rule that the government is politically accountable to the parliament, both for its own acts and for those of the head of state; the rule according to which the government must enjoy the confidence of the parliament, and will resign when it loses it, etc.

Regarding the relationship between the republic and the monarchy, it should be noted that under current historical conditions the monarchy can only exist in the form of the constitutional one¹³⁷, while republics can be both presidential, semi-presidential and parliamentary. In conclusion, in countries where a monarchical regime currently exists, in reality it is a constitutional monarchical one governed by the fundamental principle according to which the king does not interfere in politics but remains only a symbol of the state, preserving the powers of the president of the republic within the framework of parliamentary systems.

¹³⁵ Benone Pușcă, Andy Pușcă, op.cit.

¹³⁶ V. Duculescu, C. Călinoiu, G. Duculescu, op.cit., p.60

¹³⁷ V. Duculescu, C. Călinoiu, G. Duculescu, op.cit., p.165

D. The directorate regime. A variety of regimes based on the principle of political pluralism is the directorate regime. This regime is characterized by the fact that the executive power is held by a college elected by the legislature, for a certain term until the expiration of which it cannot be revoked. Such a system is clearly distinguished from the parliamentary regime, since the government (executive) cannot be revoked by Parliament until its mandate has ended. The directorate regime does not know the institution of political responsibility of ministers. A specific element within the directorial regime is that although the legislative power cannot revoke the executive before the expiration of its mandate, it can annul or modify its acts. The directorial regime also differs from the presidential regime in that the executive of the directorial regime is by its origin dependent on the legislative, and the presidential regime creates a strong executive that enjoys the same authority as the legislative power.

The executive of the directorial regime, being collegial, presupposes a debate within itself of the main acts it issues, and since power is not concentrated in the hands of a single person, it will always be necessary to achieve a unity of will among those who are part of the collegial executive.

This directorial regime operates in Switzerland and, according to specialists, there is a strong influence of the executive on the legislature.

As Maurice Duverger observed, the stability of the members of the Federal Council – some remaining in office for over 25 years – gives them great authority over the assemblies, but also a thorough knowledge of the issues, determined by the rich practice that each of the members and the Federal Council as a whole have accumulated over time.¹³⁸

2. The concept of democracy

The term "democracy" comes from the Greek language, designating "the supremacy of the people", and represents, in the simplest sense, a form of state organization and leadership in which power comes from the people and in which they express it directly or (and) indirectly.

Modern democracy emerged from the religious struggles of the Calvinists in the 17th century, especially in Scotland, England and the Netherlands, areas where the community imposed itself as a supporter of religious and political life, later transpiring in the Enlightenment theories, especially in the theories regarding freedom and equality and the normative importance of the rational thinking of the individual. Fundamental in this sense were the theories of J. J. Rousseau about the sovereignty of the people as a unique and inalienable right.

The first modern and democratic country was the USA. In Europe, the French Revolution brought with it the first state established on democratic principles.

Democracy appears in the West in particularly distinct forms: first of all, there is a clear distinction between plebiscite and representative democracy. Plebiscite democracy is distinguished by the possibility of resorting to direct popular decisions, the people being able to elect the supreme body of the state, which can, in addition, acquire the qualities of a legislative body by organizing a referendum. But even in this situation, the parliament retains

¹³⁸ M. Duverger, *Institutiones politiques et droit constitutionnel*, op.cit., p.174

its function as a legislative body. Plebiscite decisions are only exceptional cases (they occur most often in Switzerland), in representative democracies there is no such decision. Another important distinction can be made between parliamentary and non-parliamentary democracy. By parliamentarism we do not primarily understand the presence and functioning of the parliament, but the dependence of the government on the vote of confidence granted by the legislative power. At the opposite pole is the United States. There, the president – in whose person the functions of head of state and head of government are combined – does not depend at all on the vote of confidence of Congress; The House of Representatives and the Senate cannot force the president to resign.

As can be seen from the diagram below, in our modern society there is no longer a single type of democracy, it manifests itself in different variants that sometimes combine common features (in terms of the general principles on which modern democracy is based) but also elements that often call a democratic regime only on the surface, being in fact a mask of non-democratic regimes.

These fundamental types of realization of the democratic state form allow us to observe the more detailed differences. The differences at the level of national tradition and the existence of social particularities, different from one country to another, make democracy a task of modernity, which appears in many forms. The principled observation that state power comes from the people (and not from a privileged class or social group) opens up countless paths and possibilities for a distinct materialization of democracy at the level of the countries that practice it. Therefore, democracy represents for all peoples, at any moment in history, a special task.

Democracy is not the work of recent centuries. The idea of democracy appeared in ancient Greece. It became a reaction, an "antidote" against tyranny¹³⁹ being joined to concepts such as: "isonomy" (equality of all before the law), "liberty" (condition for exercising political rights), "isocracy" (equality of power), "isogory" (equal freedom of expression¹⁴⁰ and based on three principles: Constitution, citizenship and law.¹⁴¹

3. Modern democracy

The model of government outlined in the ancient world in the writings of Plato, Aristotle, Polybius, Cicero, and Augustine was centered on the ideal of a mixed Constitution, in which rulers were subordinate to virtue or law, or possibly to each other, through a system of reciprocal limitations. This ideal placed the reign of virtue and law above the people. Monarchs guided by temperance and governed by law could be virtuous. Aristocratic or democratic assemblies not subject to moderation and reason could prove corrupt.

Thus, in the modern political tradition, born during the Renaissance, philosophers such as Machiavelli in his *Discourses* and Montesquieu in *The Spirit of the Laws* considered democracy a pure form of government, which could be included without risks in the art of government only

¹³⁹ Ionescu Victor, Navroțchi Izabella, *Democrație - vis și realitate*, Ed. C.H.Beck, București, 2006, p.17

¹⁴⁰ Istituto Geografico deAgostini, *Enciclopedia de istorie universală*, p.527

¹⁴¹ Ionescu Victor, Navroțchi Izabella, op.cit., p.18

as a component of a mixed republican system.¹⁴² For Montesquieu, the concept of democracy is based on the model of the democracy of the ancients..¹⁴³ The existence of democracy required that the *sovereignty of the people* be established (to preserve equality between individuals) and that *the vote be universal* (as a direct consequence of political equality).¹⁴⁴

J.J. Rousseau, the greatest of the early modern theorists of democracy, distinguished between a democratic sovereign (responsible for the promulgation of fundamental law) and a democratic government (responsible for the current application of written laws). He agreed with the former, but considered the latter impossible. Arguing that the ultimate source of all governmental authority lies in individuals endowed with both natural freedom and natural rights, the Social Contract theory laid the foundation for later democratic government.¹⁴⁵

Both the American and French revolutions were launched in the name of democracy..¹⁴⁶ In the revolutionary ideologies of America and France, democratic principles were definitively affirmed against absolutism. *"The life of mankind belongs henceforth, whatever we do, to the faith that says: freedom, the association of progress for all through the effort of all. We believe in a social order that will have God and his supreme law, the people, the universality of free and equal citizens, at its foundation, progress as the norm to be followed, association as the means, sacrifice as baptism, gender and virtue as advisors on the path to be followed. [...] Concretely, the government must be born of public opinion, to which it must remain accountable."*¹⁴⁷

Modern democracy requires both representative mechanisms and the institutional division of state and civil society.¹⁴⁸ Modern societies seem dominated by an instinct for safety.¹⁴⁹ Democracy implies that all citizens can vote and be elected, as long as they are equal in rights.¹⁵⁰ Consequently, a true democracy requires that any form of selection of voters be prohibited. Whether it is, for example, a selection by birth (people of color had to wait until 1870 to be recognized as having the right to vote in the United States), by income or tax payment (in France, census-type suffrage remained in force for a long time), or by sex (women's right to vote was only introduced progressively in Western democracies in the 20th century).¹⁵¹

¹⁴² Miller, David. *Enciclopedia Blackwell a gândirii politice*, Ed. Humanitas, București, 2006, p.154

¹⁴³ Mastellone, Salvo. *Istoria democrației în Europa*, Ed. Antet, București, 2006, p.24

¹⁴⁴ Chagnollaude, Dominique. *Dictionar al vieții politice și sociale*, Ed. ALL Educational, București, 1999, p.44-45

¹⁴⁵ Miller, David. op. cit., p.154

¹⁴⁶ Grugel, Jean. *Democratizarea*, Ed. Polirom, Iași, 2008, p.27

¹⁴⁷ Mazzini - *Manifestul Comitetului central democrat european, 1850*, apud Istituto Geografico deAgostini, *Enciclopedia de istorie universală*, p.529

¹⁴⁸ Keane, John. *Mass-media și democrația*, Institutul European, Iași, 2000, p.141

¹⁴⁹ Millon- Delsol, Chantal. *Ideile politice ale secolului XX*, Institutul European, Iași, 2002, p.184

¹⁵⁰ Gabriel Micu, *Protecția minorităților naționale, vol.II – Concepte și principii de drept internațional*, Ed. Pro – Universitaria, București, 2023, pp. 155-163.

¹⁵¹ Chagnollaude, Dominique. *Dicționar al vieții politice și sociale*, Ed. ALL Educational, București, 1999, p.44-45

The democracy that could be achieved in practice was, however, not, for Rousseau, the direct one (proper only to small states), but the representative one. This idea found its application at the end of the 18th century in the US constitution as well as in those created by the French Revolution.¹⁵² Towards the end of the modern period, the democratic process was determined and fueled in Europe and North America by a cultural predisposition and a degree of economic development and material prosperity.¹⁵³ While a regime can collapse overnight, democratization is a process that takes time: *"it would be more correct to think of a long march than a simple transition to democracy."*¹⁵⁴

4. The relationship between democracy and the rule of law

The rule of law¹⁵⁵ is inconceivable outside of democracy and political pluralism, the recognition of the diversity of options and political programs for governing a country. The doctrine stated that the rule of law can be understood as a political-legal concept that defines a form of democratic governance from the perspective of the relationship between the state and law, between power and law, by ensuring the rule of law and fundamental human rights and freedoms in the exercise of power.¹⁵⁶ Democracy actually designates the political order and the way the political system functions in which the right of the people to govern themselves is realized¹⁵⁷.

If the voting process occurs, it does not mean that it is enough for democracy to exist. Free elections and majority rule are not enough to define modern democracy; they are only minimal, procedurally necessary conditions but not sufficient¹⁵⁸.

In the early 2000s, 119 out of about 190 countries were considered democratic, and 16 of them were only partially democratic. Yet, there are still autocratic regimes in almost 50 countries¹⁵⁹.

The conditions that a regime should meet to be democratic, in the opinion of D. Fisichella¹⁶⁰, are:

¹⁵² Istituto Geografico deAgostini, *Enciclopedie de istorie universală*, p.529

¹⁵³ Hermet, Guy. *Poporul contra democrației*, Institutul European, Iași, 1998, p.282

¹⁵⁴ Rose R., Mishler W., Haerpfer C., *Democrația și alternativele ei*, Institutul European, Iași, 2003, p.63

¹⁵⁵ Ciongaru, Emilian. *The globalisation, law and justice - general considerations*, Journal of Law and Administrative Sciences No.9/2018. Petroleum and Gas University Publishing House of Ploiești, 2018. Romania. pp. 97-98.

¹⁵⁶ Remus Ionescu, *Introducere în studiul dreptului*, Editura Măiastra Târgu Jiu, 2015, p.53

¹⁵⁷ M. Tutunaru, *Probleme teoretice și practice în edificarea statului de drept*, Ed. Scrisul Românesc, Craiova, 2010, p. 98

¹⁵⁸ În același sens, vezi: Phillippe C. Schmitter și Terry Lynn Karl, *Ce este... și ce nu este democrația*. În: Revista Română de Științe Politice, vol. 2, nr. 1, aprilie 2002, p. 4-5

¹⁵⁹ Domenico Fisichella, *Știința politică: Probleme, concepte, teorii*, Ed. Polirom, colecția Collegium, Iași, 2007, p.313

¹⁶⁰ Idem, p.313-341

- Considering the "enemy" (the one who has a different opinion about the possession of power and expresses his disagreement) as an adversary, in other words, democracy presupposes tolerance towards other regimes;

- The adversary is not only allowed to express his opposition, but, in addition, he can even peacefully reach power;

- The criterion by which it is oriented is called competitiveness, and conflict is seen as a constitutive element of politics, as an element that could have favorable consequences for the construction of the general interest, which should also analyze other visions, since the community is not homogeneous, competition is a conflict accepted by the rules;

- Precisely because politics is the one that forms and organizes society, which is made up of people who could commit abuses, it must guarantee autonomy without affecting pluralism, thus being limited;

- "democracy represents political power subject to political control", says Fisichella, so that, in the case of participation, democracy can be either participatory or non-participatory, that is, direct or indirect, political representation being "a prerogative of democratic regimes", then he adds that "modern times have developed a conception of individual freedom which, in political terms, is primarily a set of guarantees that refer to political power; in the modern era, it has its main institutional expression in the state."

- Today, due to the separation of powers in the state, democracy is representative and should respect the appropriate rules, complying with the majority principle, because the extreme majority counts because it has unlimited power;

- The moderate majority principle refers to granting equal opportunities to both the majority and the minority;¹⁶¹

- The eighth characteristic is the establishment of the limits of freedom, so as not to abuse power;

- The ninth criterion that democracy meets is the "plurality of arenas", because it is not only composed of politics - which in turn includes several arenas such as electoral, union, parliamentary, etc., but also of other areas, such as culture, economy or family.

- The last feature that characterizes the democratic paradigm consists of the plurality of roles. People have several roles in society simultaneously (citizen, employee, can be registered in a party, etc.) so that role conflicts can be generated that lead to the process of competitiveness favorable to democracy.¹⁶²

The rule of law as a historical reality and concept presents undeniable requirements and certain advantages as a contemporary value, while at the same time being perfectible, in relation to historical experience and trends in social progress.¹⁶³ Therefore, what must be remembered is that democracy implies tolerance towards other regimes and towards the mentalities of their

¹⁶¹ Gabriel Micu, *Protecția minorităților naționale, vol. III – Corelarea dreptului intern al statelor cu normele internaționale*, Ed. Pro Universitaria, București, 2023.

¹⁶² Gabriel Micu, *Subiectele specifice diplomației publice*, Ed. Pro Universitaria, 2022.

¹⁶³ Remus Ionescu, op.cit., p.55

leaders, even giving them the chance to aspire to power peacefully, also, freedom of expression is present only in democracy and that it advocates for equal opportunities for all. “The role of justice within the structure of state power, along with the guiding principles that govern the specific actions of judicial authorities, guarantee the efficient implementation of unrestricted access to justice and, more broadly, the enjoyment of basic rights and freedoms.”¹⁶⁴

Even if some critics see an apparent contradiction between freedom of expression as a fundamental principle and the strict rules imposed, it can be countered by the fact that any political regime constrains by respecting certain rules and, in addition, democracy offers the most freedom of expression.

CONCLUSIONS

There is a great difference between the modern and ancient conceptions of democracy, just as there is between the ancient and modern conceptions of freedom. Direct democracy allows for the continuous participation of individuals in the “direct exercise” of power, while indirect democracy presupposes a system of “limitation” and “control” of power. In contemporary democracies, except for short periods of time, there are rulers and ruled, there is the state and there are citizens, those who make politics a profession and those who do not care about politics. In contrast, in ancient democracies, these distinctions had little relevance.

Democracy based on personal participation is possible only under certain conditions and, consequently, when such conditions do not exist, democracy through representation is the only possible model. The foundation of democracy on the legality and constitutional legitimacy of power is closely linked to those provisions of the Constitution that refer to the need for hierarchy, the competence of political managers or the rationality of acts of power. In democratic regimes, power, as the term suggests, is held by the people. It is also delegated, but on the basis of legal rules, written in the Constitution, without which power would be arbitrary and illegitimate, and at the same time, illegal. The separation of powers in the state is an example in this area. The Romanian Constitution clearly specifies the holders of legislative, executive and judicial powers. In the French system, historical tradition has imposed a written, rigid constitution since the beginning of democracy. The British Kingdom does not have a Constitution in the formal sense of the word, but in the material sense it is made up of several acts with constitutional value and a large number of constitutional traditions and customs. Although a democratic regime is established in both political systems, the way in which it was put into practice is largely different, preserving only the general principles that govern modern democracy. For this reason, it cannot be stated that the way in which a democratic regime manifests itself is more advantageous than another, the strengths and weaknesses of a system varying depending on historical, economic and social conditions, but especially on the mentality honed over centuries of each nation, explaining in this way why a regime that in a certain country has yielded good results, in another region can lead to negative effects.

¹⁶⁴ Mihaela Pop, *Constitutional principles governing the fundamental rights, freedoms and duties of Romanian citizens*, Journal of Law and Administrative Sciences, No.20/2023, p. 65

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LATEST BILL REGARDING MAGISTRATES' SERVICE PENSIONS IN THE CONTEXT OF THE NRRO: BETWEEN CONSTITUTIONAL REQUIREMENTS AND EUROPEAN CONDITIONS

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This paper examines the recently proposed reform of Romanian magistrates' service pensions in the context of the National Recovery and Resilience Plan (NRRP). By analyzing the interplay between constitutional principles, EU fiscal requirements and judicial independence, the study explores whether the proposed legislative changes comply with the national and European legal standards. Drawing on relevant jurisprudence of the Romanian Constitutional Court, as well as insights from general EU and ECHR practice, the paper argues that service pensions for magistrates are not privileges but institutional guarantees vital to the independence of the judiciary. The reforms must therefore be assessed through a strict proportionality test, ensuring that fiscal objectives do not disproportionately affect fundamental rights. The study concludes with recommendations for maintaining a balanced and constitutionally compliant service pension scheme, aligned with both internal legal constraints and external commitments.

Keywords: judicial independence, service pensions, NRRP, Constitutional Court, comparative law.

Introduction

The reform of the public pension system is one of the essential components undertaken by Romania within the National Recovery and Resilience Plan (NRRP), in the context of increasing budgetary pressure and commitments regarding fiscal sustainability. Among the most sensitive aspects of this reform is the legal regime of magistrates' service pensions, often

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categorized in public discourse as "special pensions", but which have a distinct legal nature, having a function of guaranteeing the independence of the judiciary¹⁶⁶.

In this context, the latest legislative initiative to modify service pensions raises a number of issues of constitutionality and compatibility with European standards regarding the independence of the judiciary. On the one hand, the obligations assumed by the Romanian state within the NRRP include reforming the pension system in order to reduce inequities and align it with the contributory principle. On the other hand, the Constitutional Court has consistently established a standard of protection of the status of magistrates, including their pension rights, considering them an intrinsic component of the independence of the judiciary.

The purpose of this article is to analyze, from a legal-constitutional and comparative perspective, to what extent the most recent proposal to amend certain normative acts in the field of service pensions, motivated by the NRRP commitments, falls within the limits of the rule of law and the internal constitutional order. The paper proposes a critical examination of the latest bill, in relation to the jurisprudence of the Constitutional Court of Romania, to the requirements of the European Commission and to international standards regarding the independence of the judiciary.

The method used is one of normative and jurisprudential analysis, with comparative insertions where relevant for a complete understanding of the phenomenon. The central question that structures the approach is whether the latest proposed reform of service pensions for magistrates

¹⁶⁶ In Romania, the terms "special pension" and "service pension" are often confused or used interchangeably, but there is a clear difference between them, both legally and in public discourse. Service pensions, as a legal official term, is used in Romanian legislation for certain professional categories that benefit from a different retirement regime. It is found, for example, in Law 303/2022 – judges and prosecutors, Law 223/2015 – military pensions or Law 567/2004 – for court clerks. Special pension is a generic and evaluative notion, often used with a negative meaning in public debate. It is not expressly defined in Romanian legislation, but is frequently used in public space, including in political debates and decisions of the Constitutional Court.

constitutes a necessary progress in the logic of making the pension system more efficient or a risk of affecting a fundamental constitutional principle – the independence of the judiciary.

NRRP objectives and conditionalities regarding service pensions

The National Recovery and Resilience Plan (NRRP), officially approved by the European Commission on September 27, 2021, and later endorsed by the Council of the European Union on October 28, 2021, represents a strategic instrument through which Romania has undertaken a set of major reforms and investments, in exchange for access to European funds worth approximately 28.5 billion euros¹⁶⁷.

It serves as a key policy tool aimed at tackling significant economic and social challenges across the European Union, especially in light of the widespread impacts of the COVID-19 pandemic. In line with other EU member states, Romania has developed its own NRRP, customized to reflect its unique needs and priorities. A core element of this plan is the thorough review and reform of the national pension system, which plays a vital role in the country's overall economic and social framework¹⁶⁸.

As anticipated, although the plan itself seems well written and articulated, its implementation proves arduous, as can be observed by examining the fulfillment of Milestone 215¹⁶⁹.

Within the framework of milestone 215 of the PNRR, Romania committed to adopt legislation by the end of 2022 in the view of ensuring fiscal sustainability in an environment of ageing population, to correct inequities, to ensure the sustainability and predictability of the system and respect the contributory principle in relation to the beneficiaries of pension entitlements.

¹⁶⁷ https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/romania-recovery-and-resilience-plan_en.

¹⁶⁸ Croitoru E.L., Roșu A.C. „, Analysis of the Romanian pension system in the context of the national recovery and resilience plan”, STRATEGICA International Conference, 11th edition, October 26–27 2023, Bucharest.

¹⁶⁹ Dimitriu R., „ National Recovery and Resilience Plan: Romania”, Italian Labour Law e-Journal, Special Issue 1, Vol. 15 (2022), The NextGeneration EU in Action: Impact on Social and Labour Policies, ISSN 1561-8048, <https://doi.org/10.6092/issn.1561-8048/15673>.

At the same time, the milestone stipulates that this reform must be compatible with constitutional principles and the jurisprudence of the Constitutional Court of Romania.

More specifically, the reform was aimed at the entrance into force of the legislative framework for reducing expenditure on special pensions, namely the new legislative framework shall review special pensions and bring them in line with the contributory principle.

In particular, the legislator would make sure that no new categories of special pensions shall be created and current categories shall be streamlined; current special pensions shall be calculated based on the contributory principle, seniority in the profession, and the readjustment of the percentage related to the obtained income; the minimum contribution period shall be similar to that applied in the public pension fund; the protection of the decisions of the Constitutional Court shall refer only to the pensions of magistrates and not for other categories and shall refer only to the limits explicit in the arguments of the Court and no special pension shall exceed the income obtained during the contribution period¹⁷⁰.

The regulatory framework regarding magistrates' pensions

According to art.211 of Law no.303/2022, in the form prior to the amendment by Law no.282/2023¹⁷¹, in order to benefit from a service pension, having the legal regime of an old-age pension, a magistrate had to meet minimum seniority conditions, at least 25 years in specific positions, regardless of age, recognizing seniority in positions such as lawyer, legal advisor or other legal positions, alongside those of magistrate, to meet the seniority condition. Also, as regards the calculation basis, the service pension was set at 80% of the gross monthly employment allowance and the bonuses received in the last month of activity before retirement.

Currently, after the amendments brought by Law no. 282/2023, beneficiaries must have at least 25 years of seniority carried out exclusively in the positions of judge, prosecutor, judge at the

¹⁷⁰ Annex to the Council implementing decision amending Implementing Decision of 29 October 2021 on the approval of the assessment of the recovery and resilience plan for Romania, p.276. https://commission.europa.eu/publications/commission-proposal-council-implementing-decision-amending-council-implementing-decision-29-october_en.

¹⁷¹ Law no. 282 of October 19, 2023 on amending and supplementing certain normative acts in the field of service pensions and Law no. 227/2015 on the Fiscal Code published in the Official Gazette no. 950 of October 20, 2023.

Constitutional Court, assistant magistrate at the High Court of Cassation and Justice or at the Constitutional Court, as well as the legal specialist staff provided for in art. 221 paragraph (1) of Law 303/2022. Additionally, it is necessary to meet the condition regarding reaching the age of 60. As for the calculation basis, the service pension is calculated as 80% of the average of the gross monthly employment allowances and the bonuses received in the last 48 months of activity before the retirement date, the net amount of the service pension being capped, it cannot be higher than 100% of the net income received in the last month of activity before the retirement date.

However, there are exemptions for transitional situations, regarding both age and seniority, in the sense that starting with January 1, 2024, the age requirement is at least 47 years and 4 months, this minimum age increases annually by 4 months, until the threshold of 60 years is reached in 2051. Regarding seniority in other legal positions, as part of the 25 years required for the service pension, it decreases by one year every eight years, from a maximum of 5 years in the period 2024–2031, to 0 years after 2061.

While the European Commission initially assessed Milestone 215 as positively met, a subsequent detailed evaluation stated that the reforms did not meet the necessary criteria, leading to a revised assessment and the proposal to suspend part of the payment until the milestone is satisfactorily fulfilled.

In the context of the 25 March 2025 assessment, the European Commission confirmed the initiation of a partial payment procedure due to the lack of progress regarding Milestone 215. The Commission stated: “Today, the Commission also found that milestone 215 (...) is not fulfilled at this stage. This milestone adds to five others from Romania's third payment request that the Commission assessed as unmet in its Communication of 15 October 2024.”¹⁷².

Concerns regarding transparency and accountability were raised, as the European Commission hasn't yet provided an explanation for its revision of the assessment of Milestone 215¹⁷³.

¹⁷² https://ec.europa.eu/commission/presscorner/detail/en/ip_25_870.

¹⁷³ „We note that the official document of the European Commission could not be identified either on the ministry's website or on the European Commission's website, the last document relating to Romania on its website dating from 19.06.2024 https://commission.europa.eu/business-economy-euro/european-semester/european-semester-your-country/european-semester-documents-romania_en?prefLang=ro&etrans=ro”, ROJUST requests regarding

Furthermore, it has not publicly acknowledged that its original evaluation, which deemed the milestone satisfactorily fulfilled, was amended. The text of the original preliminary assessment is no longer accessible to the public, thereby hindering the ability of the general public to trace and review past evaluations by the Commission. In light of this, it was recommended that it would be beneficial for the Commission to adopt a more transparent approach in revising its assessments of the fulfillment of milestones and targets, accompanied by clearer communication regarding the reasons for such revisions in the future¹⁷⁴.

As a result of this assessment, a new bill has been proposed¹⁷⁵, to change once again the regulatory framework for service pensions of magistrates.

The explanatory memorandum states that, according to the jurisprudence of the Constitutional Court, the parameters of magistrates' service pensions differ substantially from those of other service pensions. It was also stated that benefits for all (our note magistrates) new entrants to the profession, as well as for beneficiaries of other occupational pension plans, will be indexed to inflation. Two major measures were proposed: reducing the retirement replacement rate from 80% to 65% and accelerating the increase in the retirement age for magistrates, from 4 months per year to 6 months per year, until reaching the age of 65¹⁷⁶. The explanatory memorandum mentions that the although Law 282 of 2003, which regulated the reform of service pensions, was approved by the European Commission as fulfilling the commitments assumed through the

magistrates' service pensions, <https://www.juridice.ro/777692/solicitari-rojust-privind-pensiile-de-serviciu-ale-magistratilor.html>.

¹⁷⁴ [https://www.europarl.europa.eu/RegData/etudes/IDAN/2025/764350/ECTI_IDA\(2025\)764350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2025/764350/ECTI_IDA(2025)764350_EN.pdf) In the lack of an official motivation, it is thought that the decision to amend the previous assessment of Milestone 215 is linked to a judgment issued by the Romanian Constitutional Court in December 2024, which invalidated the legislation that had modified the taxation of special pensions. This ruling has consequently led to the reversal of the fulfillment status of the related milestone in October 2024. The material also shows that this may also explain why six milestones, rather than the anticipated seven, were listed as unmet when the suspension of payments was decided.

¹⁷⁵ https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=22310.

¹⁷⁶ "Magistrates who will enter the judiciary, those who will begin their careers in the judiciary, must retire at 65, like all other citizens of this country. I asked the coalition for this, this principle was accepted. (...) It is about – once again – special pensions in the judiciary and the retirement age in the judiciary," Crin Antonescu, <https://www.mediafax.ro/stirile-zilei/antonescu-a-cerut-coalitie-de-guvernare-ca-varsta-de-pensionare-in-magistratura-sa-fie-65-de-ani-23537650chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.cdep.ro/proiecte/2025/100/00/3/em109.pdf>.

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NRRP, the Constitutional Court's decision 724/2024 declared the increase in progressive taxation for service pensions unconstitutional¹⁷⁷.

The new bill mainly stipulates several differences from the current law: the age requirement is at least 48 years, this minimum age increases annually by 6 months, until the threshold of 65 years is reached in 2045; the service pension is in the amount of 65% of the calculation base represented by the average of the gross monthly employment allowances and the bonuses received in the last 48 months of activity before the retirement date.

The aspects that need to be outlined at this moment are the following: although it was stated by the representatives of the legislative power that the law would apply only to the persons who become magistrates after the bill becomes a law, no such provision exists¹⁷⁸; there is no gradual increase after the first four years, therefore the magistrates born in 1980 are allowed to retire at 50 while those born in 1981 will retire only at 65.

The magistrates' pensions in view of the Romanian Constitutional Court

The Romanian Constitutional Court has repeatedly emphasized the importance of protecting judicial independence and ensuring that the rights of magistrates, including their pensions, are respected. Any attempt to alter or reform the pension system for magistrates must balance fiscal responsibility with constitutional safeguards related to equality, property rights, and the independence of the judiciary¹⁷⁹.

The Court has shown that, as a principle, any regulation regarding the salary and pension establishment for magistrates must respect the two principles of judicial independence and the rule of law, the current constitutional framework underpinning the financial security of

¹⁷⁷ Decision no. 724 of December 19, 2024 regarding the exception of unconstitutionality of the provisions of art. 101 of Law no. 227/2015 on the Fiscal Code, Constitutional Court published in the Official Gazette no. 91 of January 31, 2025, <https://legislatie.just.ro/Public/DetaliiDocument/294171>.

¹⁷⁸ <https://adevarul.ro/politica/crin-antonescu-despre-pensiile-speciale-cei-2434519.html>

¹⁷⁹ For explanations regarding the Constitutional Court jurisprudence as a source of law, R. Ionescu, A. Ionescu, General theory of law, 3rd edition, revised and added, Maiastra Publishing House, Tg.-Jiu, 2021, p.160-165.

magistrates¹⁸⁰. The Court reiterated that both the Constitution and the jurisprudence of the Constitutional Court, which develops the principle of judicial independence enshrined in art. 124 paragraph (3) and art. 145 of the Fundamental Law, only guarantee the service pensions of those who have exercised the capacity of judge, judge at the Constitutional Court, prosecutor or assistant magistrate at the High Court of Cassation and Justice or at the Constitutional Court for the entire period imposed by law, therefore who have had a career in the respective professions, and in no way the service pensions of other professional categories, assimilated or with assimilated seniority, according to the legal provisions in force.

The institutional component of the independence of justice covers the entire judicial system and implies the existence of guarantees, such as: the status of magistrates (access conditions, appointment procedure, solid guarantees to ensure the transparency of the procedures by which magistrates are appointed, promotion and transfer, suspension and termination of office), their stability or irrevocability, financial guarantees, the administrative independence of magistrates, as well as the independence of the judiciary from the other powers in the state, financial security, which also implies the provision of a social guarantee, such as the service pension of magistrates. In conclusion, the Court found that the principle of the independence of justice protects the service pension of magistrates, as an integral part of their financial stability, to the same extent as it protects the other guarantees of this principle. The constitutional status of magistrates requires the granting of a service pension as a component of the independence of the judiciary, a guarantee of the rule of law, provided for by art. 1 paragraph (3) of the Constitution¹⁸¹.

Regarding the changes that the lawmaker wanted to bring through the initial form of Law no. 282/2023, the Constitutional Court found that these were unconstitutional.

¹⁸⁰ Decision no. 900 of the Constitutional Court of Romania, December 15, 2020, published in the Official Gazette of Romania, Part I, no. 1274 of December 2, 2020, paragraph 127, <https://legislatie.just.ro/Public/DetaliiDocument/235523>.

¹⁸¹ Decision no. 873 of December 9, 2020, published in the Official Gazette of Romania, Part I, no. 50 of January 15, 2021, chrome-extension://efaidnbmnnnnibpcajpcglefindmkaj/https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_873_2020.pdf, and Decision no. 20 of February 2, 2000, published in the Official Gazette of Romania, Part I, no. 72 of February 18, 2000, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/21010>

As for the calculation basis, it is noted that this must be reported to the gross income from the moment of opening the right to a service pension in order to reflect a level as close as possible to the income related to the position, professional rank, seniority considered at the date of retirement. Categorically, the jurisprudence of the Constitutional Court does not oblige to establish the calculation basis as the income related to the last month prior to retirement, but excludes the possibility that the calculation basis be established by reporting to the average income of the person over a period of 25 years, during which he or she had different positions, ranks, seniority that do not correspond to a contemporary moment with that of retirement. Thus, in establishing the calculation basis, a formula can be considered that would express the income of the position/rank/seniority held at the time of retirement, allowing the value of the service pension to be as close as possible to that of the last remuneration received.

With regard to the retirement age, the omission to regulate transitional norms intended to ensure the coherence of the regulatory framework represents a violation of the constitutional requirements regarding the principle of legal certainty, which imposes limits on the legislator in the activity of amending legal norms, limits that ensure the stability of the established rules. The role of the transitional provisions is to allow a gradual and natural transition over time from the existing factual and legal situation to that pursued/intended by the new regulation. Analyzing the staggered increase in the retirement age established in Annex No. 2 to the law, the Court found that, in reality, this staggered increase, on the one hand, starts from a retirement age that is not supported by the existing rules, hypothetically, the retirement age in the system starts at 47 years, and not 50, operating from the start with a legal fiction lacking rationality and that, on the other hand, it does not include regulations that lead to the gradual achievement of the objective pursued, but, through the defective manner of drafting, a sudden and untimely increase in the retirement age by 10 years is made for people born since 1976¹⁸².

¹⁸² Decision no. 467 of August 2, 2023 regarding the objection of unconstitutionality of the provisions of Articles I-IV, of Article XIII paragraphs (5) and (6) and of Article XV of the Law amending and supplementing certain normative acts in the field of service pensions and of Law no. 227/2015 on the Fiscal Code, of Annexes no. 1-3 thereto, as well as of the law as a whole Published in the Official Gazette no. 727 of 07.08.2023, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ccr.ro/wp-content/uploads/2023/08/Decizie_467_2023.pdf

General EU and ECHR Perspective

The Romanian Constitution explicitly guarantees and protects the fundamental human rights and freedoms that are deemed to be of utmost importance.¹⁸³ European Court of Human Rights (ECtHR) has consistently emphasized that judicial independence is a cornerstone of the right to a fair trial under Article 6 of the European Convention on Human Rights. This includes not just structural guarantees, like security of tenure or protection from dismissal, but also the financial security of judges, including their salaries and pensions.

Relevant practice can be found in *Baka v. Hungary* (GC, 23 June 2016, no. 20261/12) tackling the issue of premature removal of the President of the Hungarian Supreme Court following his public criticism of government reforms, including judicial pension policies¹⁸⁴.

The court held there was a violation of Article 6 §1, access to a court, and Article 10, freedom of expression.

The decision is relevant because the Court emphasized that judicial independence is not just institutional—it includes the individual independence of judges, which must be protected from political retaliation. The security of tenure, protection of remuneration, such as pensions, and the ability to speak out in defense of judicial independence are essential safeguards.

Although the case focused on the premature dismissal of a judge, one of the key issues *Baka* had criticized as head of the judiciary was the government's interference with judges' pensions and retirement age. "The Court reiterates that the principle of the independence of the judiciary is inherent in the very notion of a fair trial as guaranteed by Article 6 §1 of the Convention." In context, *Baka's* criticism of pension-related reforms was considered legitimate speech defending judicial independence, protected by Article 10, and retaliation against it was a breach

¹⁸³ Pop, M., Constitutional principles governing the fundamental rights, freedoms and duties of Romanian citizens, *Journal of Law and Administrative Sciences*, No. 20/2023, p. 59.

¹⁸⁴ *Baka v. Hungary*,
https://r.search.yahoo.com/_ylt=Awr.oIpb.gRoq1gdI1dLBQx.:_ylu=Y29sbwNpcjIEcG9zAzIEdnRpZAMEc2VjA3Ny/RV=2/RE=1745185499/RO=10/RU=https%3a%2f%2fhudoc.echr.coe.int%2fapp%2fconversion%2fpdf%2f%3flibrary%3dECHR%26id%3d002-9473%26filename%3d002-9473.pdf%26TID%3dthkbhnlzk/RK=2/RS=sbMusAoGJ7SSbIdHVIL4datSnhA-

of the Convention. While pensions were not the direct object of the case, the judgment recognized their importance as part of structural independence.

Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and a fair trial is linked with judicial independence, the Court of Justice of the European Union (CJEU) interpreting this to encompass conditions of service, including judicial pensions and retirement guarantees¹⁸⁵.

CJEU addressed these issues and confirmed that conditions of service, including pensions, are part of judicial independence under EU law¹⁸⁶.

Case C-619/18, *Commission v. Poland, Independence of the Supreme Court*, Judgment of 24 June 2019, revolves around the fact that Poland had lowered the retirement age of Supreme Court judges from 70 to 65, effectively forcing many judges, including the First President, into early retirement.

C.J.U.E. stated that “The principle of the irrevocability of judges forms part of the essence of judicial independence.”, “[A]ny measure that affects the duration of the judicial mandate, or the conditions under which the mandate may be prematurely terminated, directly affects judicial independence.”¹⁸⁷.

Although the ruling focuses on retirement age, the Court’s reasoning clearly includes conditions of service, and has been widely interpreted, including by the Commission, to extend to pension rights, because forced early retirement directly affects pension eligibility and entitlements.

The case C-64/16, *Associação Sindical dos Juízes Portugueses* (2018) is another significant ruling by the Court of Justice of the European Union (CJEU) regarding the independence of the

¹⁸⁵ https://eur-lex.europa.eu/eli/treaty/char_2012/oj/eng.

¹⁸⁶ For explanations regarding the Constitutional Court jurisprudence, R. Ionescu, A. Ionescu, *Institutions and Policies of the European Union*, Sitech Publishing House, Craiova, 202, p.104.

¹⁸⁷ Judgment of the Court (Grand Chamber) of 24 June 2019, *European Commission v Republic of Poland. Failure of a Member State to fulfil obligations — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by Union law — Principles of the irremovability of judges and judicial independence — Lowering of the retirement age of Supreme Court judges — Application to judges in post — Possibility of continuing to carry out the duties of judge beyond that age subject to obtaining authorization granted by discretionary decision of the President of the Republic*, Case C-619/18. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0619>.

judiciary and the protection of judges' conditions of service, particularly with respect to their pensions.

This case involved a dispute between the Portuguese association of judges, Associação Sindical dos Juízes Portugueses, and the Portuguese government. The issue stemmed from changes in the Portuguese judicial pension system, which judges argued could undermine judicial independence. The reform to the pension system would have affected their financial security upon retirement, and the association contended that such changes were inconsistent with EU law, which guarantees judicial independence.

The main legal question before the CJEU was whether changes to the judicial pension system in Portugal, which could potentially undermine the financial stability of judges' careers, were compatible with EU law, especially regarding judicial independence.

On 27 February 2018, the CJEU ruled that judicial independence is not only about the functional independence of judges but also extends to all conditions of service, including pensions. The Court emphasized that the financial stability of judges, which includes their pensions, is an essential aspect of their independence. The Court further highlighted that any changes to judicial pensions that might threaten the stability of a judicial career would be of concern under EU law.

In this context, the Court found that the reforms in Portugal, which could potentially affect judges' pensions and their financial security, could compromise their independence. As such, any measures that undermine the stability of judges' career conditions, including pensions, could violate the principle of judicial independence enshrined in EU law¹⁸⁸.

¹⁸⁸ Judgment of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, Request for a preliminary ruling from the Supremo Tribunal Administrativo, Reference for a preliminary ruling — Article 19(1) TEU — Legal remedies — Effective judicial protection — Judicial independence — Charter of Fundamental Rights of the European Union — Article 47 — Reduction of remuneration in the national public administration — Budgetary austerity measures, Case C-64/16, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0064>.

Conclusions

The proposed reform of Romanian magistrates' service pensions, as outlined in the NRRP, represents a critical point of intersection between fiscal responsibility and the fundamental rights of magistrates. While the goal of aligning the pension system with the contributory principle is understandable, it is essential that reforms respect the constitutional safeguards related to the independence of the judiciary. Drawing on constitutional jurisprudence and EU law, this paper argues that any changes must be proportional, gradual, and transparent, ensuring that magistrates' financial security—including pensions—is not undermined. Reforms that disregard these safeguards may expose Romania to legal challenges, both domestically and at the European level, potentially undermining the rule of law and judicial independence.

The present bill egregiously contravenes the principles established in the jurisprudence of both the Constitutional Court and European courts. From our perspective, it appears highly unlikely to withstand constitutional scrutiny.

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State of Necessity - Exceeding the Limits

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Abstract: This work deals with exceeding the limits of the state of necessity, a topic that is equally delicate and important for this legal institution.

One talk about exceeding the limits of the state of necessity only if the perpetrator was in a state of necessity, but his rescue action was exaggerated, exceeding the limits of proportionality required by the provisions of Article 20, paragraph (2), Penal Code. Also, exceeding the limits of the state of necessity is directly related to the foresight of the obviously more serious consequences of the rescue action.

Thus, if in the case of the non-imputable excess under the conditions of the state of necessity provided for in Article 26, paragraph (2), Penal Code, we find ourselves in a state of necessity, being an imperfect form thereof, in the case of the excusable exceeding of the limits of the state necessity provided for in Article 75, letter c, Penal Code, we speak only of a mitigating circumstance, not of a non-imputability cause.

Keywords: state of necessity, limits, cause of non-imputability, mitigating circumstance

1. Exceeding the limits of the state of necessity

It can be talked about exceeding the limits of the state of necessity only if *the perpetrator was in a state of necessity, but his rescue action was exaggerated*¹⁸⁹, exceeding the limits of proportionality required by the provisions of Article 20 paragraph (2) Penal Code¹⁹⁰.

1.1. Non-imputability excess in the conditions of a state of necessity – article 26 paragraph (2) Penal Code

This *imperfect form of the state of necessity* is provided under Article 26 paragraph (2) Penal Code¹⁹¹, which states: "An act provided for by the criminal law committed by a person in a state of necessity, who did not realize, at the time of committing the act, that he was causing clearly more serious consequences than those that could have occurred if the danger had not been removed, is not imputable."

¹⁸⁹ View supported by the entire doctrine. See in this sense: M. Udrioiu, Criminal law files. General part., 4th edition, Universul Juridic Publishing House, Bucharest, 2018, page 94, F. Streteanu, D. Nițu, the Criminal Law. General part. 1st volume, Universul Juridic Publishing House, Bucharest, 2014, page 459, C. Mitrache, C. Mitrache, the Romanian Criminal Law. General part, Universul Juridic Publishing House, Bucharest, 2009, page 153, M.A. Hotca, Criminal Code. Comments and explanations, C.H. Beck, Bucharest, 2007, page 555, C. Bulai in C. Bulai, A. Filipaș, C. Mitrache, Institutions of Criminal law, Three Publishing House, Bucharest, 2001, page 162, Gh. Nistoreanu, Al. Boroi, Criminal Law. Selective course for the license exam. 4th edition, All Beck Publishing House, Bucharest, 2002, page 128, V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, Theoretical explanations of the Romanian Criminal Code, General part, 1st volume, Academy Publishing House, Bucharest, 1969, page 363, V. Dobrinioiu, Gh. Nistoreanu, I. Pascu, Al. Boroi, I. Molnar, V. Lazăr, Criminal Law, General part., 1st volume, Academy Publishing House, Bucharest, 1969, page 367, V.A. Ionescu, Legitimate defense and the state of necessity, Scientific Publishing House, Bucharest, 1972, page 205;

¹⁹⁰ Article 20, second paragraph, Penal Code, <https://legislatie.just.ro/Public/DetaliiDocument/38070>;

¹⁹¹ Article 26, 2nd paragraph, Penal Code, site cit;

It is worth noting and appreciating that, whereas in the previous Penal Code "justified exceeding of the limits of a state of necessity" could be inferred *per a contrario* from the provisions of Article 45, paragraph (3) Penal Code¹⁹², in the current Penal Code it is explicitly provided for by the legislator.

Another parallel, this time on the same timeline, but in a different space, namely in relation to the criminal law of the Republic of Moldova, reveals to us the fact that although the Moldovan legislator, in the case of self-defense, does not grant legal efficiency to a non-imputable excess of defense- reason why we consider it necessary *de lege ferenda* to provide for it - surprisingly, in the case of a state of necessity, the "justified excess of rescue" is recognized, being regulated in Article 38, paragraph (3) Penal Code of the Republic of Moldova¹⁹³; the drafting style being similar to that of Article 26, paragraph (2) of the Penal Code.

Therefore, *in a situation where the perpetrator did not have the representation of the fact that he would cause consequences that were clearly more serious than those that could have occurred if the danger had not been removed, he will be granted the benefit of the non-imputable excess of defense*, this imperfect form of the state of necessity being assimilated to the perfect one in terms of its effects, with the specification that if in the case of the perfect form these occur *in rem*, in the case of the non-imputable excess they will occur *in personam*.

Although *from an objective point of view there is a clear disproportion* between the consequences produced and those that could have been produced, *from a subjective point of view there is no guilt* on the part of the person who carries out the rescue action, due to the psychological constraint generated by the danger that prevents him from correctly assessing the consequences of his action, a reason that determines that *the act provided for by the criminal law, committed under these conditions, does not constitute a crime*.

¹⁹²Article 45, 3rd paragraph, Penal Code 1968, republished in 1997, <https://legislatie.just.ro/Public/DetaliiDocument/38070>;

¹⁹³ Article 38, 3rd paragraph, C.p.R.M., https://www.legis.md/cautare/getResults?doc_id=121991&lang=ro;

The *per a contrario* analysis of the provisions Of Article 26, paragraph (2) of the Criminal Code and the granting of the benefit of the state of necessity to the perpetrator requires the following to be established:

- from an objective point of view - the existence of clearly more serious consequences than those that could have occurred if the danger had not been removed;
- from a subjective aspect - the circumstance that the perpetrator did not realize at the time of committing the act, that it would cause obviously more serious consequences.

The first condition, of an objective nature, presupposes *an ex post finding*, made by *comparing a certain situation*, namely the obviously more serious consequences produced, *with a possible situation, logically and rationally deduced from the materiality of the facts* (the gravity and imminence or actuality of the danger, the concrete circumstances in which it occurred, the possibilities and means of rescue available to the perpetrator, etc.), respectively the consequences that "could have occurred" if the danger had not been removed.

Because the fulfillment of this objective condition can lead, by its mere existence, to the removal of the benefit of the state of necessity, and because in real life there are situations when the perpetrator, due to the special psychological condition in which he finds himself, does not have the possibility to foresee it, the legislator imposed **the negative subjective requirement that the perpetrator must not have realized it, not have had its representation**, precisely in order not to create an unfavorable legal situation for someone who commits an act without guilt. Consequently, the perpetrator is required by law to analyze the situation, assessing not only the seriousness of the danger and its degree of imminence, but also the possible consequences that could occur if it were not removed, quickly comparing them with the consequences that could occur in the case of different variants of rescue actions that he could perform, if - of course - he has several variants available¹⁹⁴. Based on this analysis, he must decide whether to save the protected social value, by proceeding to the rescue action, or whether to abandon it to the respective danger, in the first case having the obligation not to produce

¹⁹⁴ See also in this regard: T. Dima, Criminal Law. General Part, Lumina Lex Publishing House, Bucharest, 2001, page 282;

manifestly more serious consequences. This means that *granting the benefit of the state of necessity in the conditions of non-imputable excess is due to the lack of guilt*, while maintaining a relative proportion between the possible consequences of the danger and the certain consequences of the rescue action.

On the other hand, the deliberate production of clearly more serious consequences, of which the perpetrator is aware (pursues or accepts them), attests that, at that moment, he was not under the influence of a sufficiently strong psychological constraint to justify the disproportionate rescue action. The minor nature of the psychological constraint or its lack means that the rescue action committed with guilt, the clearly more serious consequences being due to the perpetrator's direct or indirect intent.

1.2.Excusable exceeding of the limits of the state of necessity – Article 75 letter c) Penal Code¹⁹⁵

Exceeding the limits of the state of necessity is directly related to the foreseeability of the obviously more serious consequences of the rescue action. The requirement that the perpetrator should have realized that the consequences of his act are obviously more serious than those that would have occurred if the danger had not been removed entails his criminal liability.

Therefore, knowingly exceeding the limits of the state of necessity does not remove the criminal nature of the act, but, if the other conditions are met, the perpetrator will benefit from the legal mitigating circumstance provided by Article 75 letter c) of the Criminal Code¹⁹⁶. The Moldovan legislation also gives it the same importance, as it is provided for as a legal mitigating circumstance in Article 76, paragraph (1), letter j) of the Criminal Code of the Republic of Moldova.¹⁹⁷

¹⁹⁵ Article 75 letter C Penal Code, site cit.;

¹⁹⁶ See in this sense: M. Udriou, op. cit., page 228, F. Streteanu, op. cit., page 460, Hotca, op. cit., page 555, C. Mitrache, C. Mitrache, op. cit., page 153, Gh. Nistoreanu, Al. Boroii, op. cit., page 128, C. Bulai în C. Bulai and collaborators, op. cit., pages 164 - 165, M.A. V.A. Ionescu, op. cit., page 206;

¹⁹⁷ Article 76, 1st paragraph, letter j C.p.R.M., site cit.;

Although quite difficult to prove, the circumstance that the perpetrator realized or not that he was causing obviously more serious consequences will have to be analyzed concretely, from case to case, always refusing the benefit of the state of necessity to the one who intentionally caused such consequences.

It was argued¹⁹⁸ *that the expression used by the legislator - "did not realize that he was causing obviously more serious consequences" - also includes the situation in which the perpetrator would have had the possibility to realize the occurrence of such consequences*, arguing that, if in the case of self- defense, obvious fault in an exaggerated defense excludes the aggressor from the benefit of the cause that removes the criminal nature of the act, by analogy, the solution should be the same in the case of a state of necessity. We agree with this opinion, adding that for the state of necessity, in which damages may occur to an innocent third party, the conditions required by law are generally more restrictive than in the case of self-defense, which additionally obliges the person who commits an act provided for by criminal law to analyze the situation and foresee those obviously more serious consequences, and if he failed to do so, although he could and should have, he will be held criminally liable for his obvious fault. In any case, in establishing negligence with foresight, it must be taken into account both whether, in the exceptional circumstances in which he acted, the perpetrator would have had the possibility to foresee the obviously more serious consequences, as well as the mental state determined by the threat generated by the danger.

Also, starting from this constraint, we believe that in judicial practice it is necessary to distinguish, in establishing negligence with foresight, between the perpetrator who acted to save his own life, bodily integrity or health and the intervener who committed the act provided for by the criminal law in order to save another person, because the latter had more freedom of determination and more psychological possibilities to accurately assess the situation and foresee the possible consequences of his act.

¹⁹⁸ V.A. Ionescu, op. cit., pages 206 – 207.

CONCLUSIONS

The criminal liability of a person who commits a criminal act by exceeding the limits of a state of necessity is inextricably linked to the foreseeability of producing more serious consequences. Thus, in the case of knowingly exceeding the limits of a state of necessity, the perpetrator will be held criminally liable, but will benefit from *the legal mitigating circumstance* provided by *Article 75 letter c) of the Penal Code*, if the other conditions are met.

Exceeding the limits of the state of necessity without the perpetrator realizing that it is causing more serious consequences than if it had not intervened constitutes *a ground for non-imputability*, provided under *Article 26 paragraph (2) of the Penal Code*, and exempts them from criminal liability, its effects are similar to those of a state of necessity, with the difference that, in the case of the perfect form, these effects occur *in rem*, while in the case of the imperfect form, they occur *in personam*.

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Some observations regarding the individual employment contract concluded for a fixed term - Aspects of national and European law –

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Keyword: individual employment contract, fixed-term work, employee, rights and obligations, term, equal rights

Summary: This topic analyzes the issue of the individual employment contract for a fixed term viewed through the lens of current domestic labor legislation.

It was argued that this type of employment contract must be concluded in writing, specifying the date of conclusion, the object of the work and other essential elements necessary for the proper execution of the employer's tasks.

It was also highlighted that this employment contract has been harmonized with European provisions, namely Council Directive 1197/70/EC of 28 June 1999 on certain, internal rules of this contract correspond to the relevant European rules.

The situation was analyzed in which an individual employment contract for a fixed term cannot be concluded for a period exceeding 36 months, and those concluded within 3 months of the termination of a fixed term employment contract are considered successive contracts and cannot have a duration exceeding 12 months each.

At the same time, cases were analyzed when an individual fixed-term employment contract can be concluded, showing that if there are other cases of concluding these contracts, they will be null and void according to labor legislation.

According to labor law¹⁹⁹, an individual employment contract is a contract under which a natural person, called an employee, undertakes to perform work for and under the authority of an employer, a natural or legal person, in exchange for a remuneration called a salary.

A legally established employment relationship requires the conclusion of an individual employment contract

Given the activity carried out by an employer, its specific situation and the needs it has, that employer may conclude an individual employment contract, a contract that may be concluded for a fixed or indefinite period.

It is specified that, according to the Labor Code²⁰⁰ individual employment contract is concluded for an indefinite period and by exception this contract can also be concluded for a fixed period but only under the conditions expressly provided by law.

Therefore, the conclusion of an individual employment contract for an indefinite period is the rule, and the conclusion of this contract for a fixed period is the exception.

The legal framework relating to the individual employment contract for a fixed period is established, domestically, by the provisions of art. 82-87 of the Labour Code republished and subsequently amended, and at European level by the provisions of Council Directive 1997/70/EC of 28 June 1999 on the framework agreement on fixed-term work concluded between CES²⁰¹, UNICEF²⁰², CEEP²⁰³ on fixed-term work²⁰⁴.

It is mentioned that the provisions relating to the individual fixed-term employment contract are intended to harmonise domestic labour legislation with those of the European directive.

The main role of the Directive is to establish minimum requirements relating to fixed-term employment, so as to ensure equal treatment for workers and to prevent abuses that may result from the use of successive fixed-term employment relationships or contracts. In this

¹⁹⁹ Art.10 of the Labor Code, adopted by Law No. 53 of January 24, 2003, published in the Official Gazette No. 345 of May 18, 2011, republished and subsequently amended.

²⁰⁰ Art.12 paragraphs (1) and (2).

²⁰¹ CES- European Trade Union Confederation

²⁰² UNICEF - European Center for Public Enterprises

²⁰³ CEEP - European Center for Public Enterprises

²⁰⁴ Published in J.O.U.E L 178/43 of 28 June 1999

regard, the Directive stipulates special clauses in order to limit the administrative formalities that could result for small and medium-sized enterprises from the application of these new standards.

Analysing the issue of the individual fixed-term employment contract, it is found that the provisions of domestic labour legislation have been harmonised with the text of the European Directive in question²⁰⁵.

But, unlike the European norm which makes more vague specifications, in the issue at hand, the Romanian text is more restrictive, indicating in art. 83 of the Labor Code, expressly the situations in which such an employment contract can be concluded.

If art. 12 of the amended Labor Code shows that an individual employment contract is concluded for an indefinite period, and by exception that contract can also be concluded for a fixed period under the conditions provided by law, art. 82 paragraph (1) of the same normative act provides that by derogation from the rule mentioned above, employers have the possibility to hire, in the cases and under the conditions of the law in question, salaried personnel with an individual employment contract for a fixed period, depending on the specifics of the situation in which the employer finds himself. Thus, the specifics of the activity presuppose a concrete analysis of the employer's activity in order to establish whether the work performed is compatible with the person who wishes to conclude such a contract.

Given the above, the individual fixed-term employment contract can be defined as a contract (agreement, understanding, etc.) under which a natural person (looking for a job) undertakes to perform work for and under the power (authority) of an employer-natural or legal person, in exchange for remuneration (salary), for a determined period of time (i.e., previously established).

Given the above definition, it can be shown that this type of contract presents some elements that differentiate it from other types of contracts.

Thus, the performance of an activity involves the performance of work that can only be lawful and moral. Then the salary received under this type of contract is for consideration and is in consideration of the performance of work performed in a period of time well defined by law.

²⁰⁵ Article 2 of Directive 1999/70/EC states, "Member States shall adopt and implement the laws, regulations and administrative provisions necessary to comply with this Directive..."

In another context, this type of contract involves the element of subordination of the employee to the employer, given that the employee performs his activity for and under the authority of that employer. It is an essential element that distinguishes it from other types of contracts (civil, commercial, fiscal, etc.).

Finally, the last element of this contract is its fixed duration, as a temporary element. Although the work is performed successively, the maximum duration of its activity cannot exceed more than 36 months, after which it will develop later.

Although it is an employment contract, the individual fixed-term employment contract has some common features with other contracts, but also features specific to this type of contract.

Thus, this is a contract called, because it is regulated by labor law norms. These norms are usually included in the Labor Code, but also in the Collective Labor Agreement. The parties (employee and employer) are obliged to conclude an individual fixed-term employment contract in compliance with the conditions provided for in those norms.

Then, this type of contract is a legal act, that is, a manifestation of will that takes place between two legal subjects, being governed by the principle of freedom of will of the two parties. This distinguishes it from civil or commercial contracts that can have a plurality of debtors or creditors.

In another vein, the individual employment contract for a determined duration (period) is a bilateral legal act, because it represents the concordant agreement of the will of the two parties. Thus, the employee (the employee - a natural person who undertakes to perform the work) and the employer (the boss or the unit - a legal person or a natural person who uses labor).

Likewise, a fixed-term individual employment contract is an onerous and commutative legal act because each party seeks to obtain an advantage in exchange for the obligations assumed, and on the other hand, the existence of the rights and obligations of the parties are known at the time of conclusion of the contract. Another characteristic feature of this type of contract is the fact that it is a synallagmatic contract because it contains rights and obligations

for both parties: the cause of the obligation of one of them is the exercise of the obligation of the other, that is, the employee to perform the work, and the employer to remunerate his work²⁰⁶.

At the same time, this type of contract is also a personal contract (*intuitu personae*) and with successive execution. This means, on the one hand, that it is concluded taking into account the training, skills and quality of the employee, the contract not being possible to transmit, and on the other hand, within this contract, the work is carried out within a certain time. The reciprocal and correlative services carried out by the two parties are not executed at once (*una ictu*) but staggered over time, even if it is concluded for a specific period. As such, this contract is subject to termination which produces, by its nature, effects for the future (e.g. *nume*) and not resolution, which abolishes the contract with retroactive effect for the past (*ex tunc*).

The nullity of an individual fixed-term employment contract will only have effects in the future and not in the past, since the services performed are practically irreversible, "the termination of the contract in question for culpable or non-culpable failure to fulfill the duties can only be ordered by the employer.

The employee cannot refuse to perform the work nor request its termination by invoking *non adimpleti contractus*, which only has the possibility of taking legal action.

And an important feature of this type of contract is the fact that it cannot be concluded under a suspensive condition²⁰⁷ or a resolutive condition.

Therefore, an individual employment contract for a fixed period cannot be concluded under a suspensive condition since it cannot be conceived that the effects of this contract will arise depending on the achievement of a future and uncertain event, nor can it be affected by a resolutive condition because otherwise the provisions of the Labor Code that establish the grounds and conditions for its termination would be circumvented.

It is specified that exceptionally this type of contract may be affected by a extinction term²⁰⁸ as well as by a suspensive but certain term.

²⁰⁶ Ion Păducel, Cristina-Maria Udriștioiu, Labor law - individual and collective labor contracts - revised edition, Academica Brâncuși publishing house, 2024, Tg Jiu, pages 25-26.

²⁰⁷ Art.1412 paragraph (1) of the Civil Code, "the term is suspensive when until its fulfillment; the maturity of the obligation is postponed".

²⁰⁸ Art. 1412 paragraph (2) of the Civil Code shows that the term is extinctive when, upon its fulfillment, the obligation is extinguished.

Thus, the contract affected by an extinctive term is the contract concluded for a fixed period, for temporary work, and the one affected by a suspensive but certain term, is the contract that takes effect on a date subsequent to its conclusion (for example: the contract is concluded on June 15 with effect from July 1, the date on which it is known with certainty that the position (function) is created or becomes vacant). Returning to the exception provided for in art. 82 of the Labor Code which provides that the individual labor contract is also concluded for a fixed period, it is mentioned that it can only be concluded in writing, with the express specification of the duration for which it is concluded and depending on the specifics of the employer's concrete activity²⁰⁹.

Even if the individual employment contract is concluded for a fixed period, the employer has the obligation to inform the employee, especially in the case of replacing another employee whose individual employment contract has been suspended. Of course, this obligation to inform is considered fulfilled from the moment the employee signs the individual employment contract for a fixed period.²¹⁰

As provided for in Article 82 of the updated Labor Code, the individual employment contract for a fixed term may only be concluded in writing, expressly specifying the duration for which it is concluded.

The question that arises is whether the employer may use the electronic signature, advanced electronic signature or qualified electronic signatures as is the case for concluding an employment contract for an indefinite period, according to Article 16, paragraph (11-18) of the amended Labor Code.²¹¹

According to art. 12 of the updated Labor Code, the individual employment contract is concluded for an indefinite period, and art. 16 paragraph (11) shows that the parties may opt to

²⁰⁹ O.C. Nieruesch, discrimination in employment relationships, Universul Juridic Publishing House, Bucharest 2020, p.87-88

²¹⁰ M.V Duca, Fixed-term C.I.M. essential clause of individual information. Guarantees provided by Council Directive 1999/70/EC of 28 June 1999 on the framework agreement on fixed-term work concluded between ETUC, NICE and CEEP in the magazine, „Dreptul” No.2/2022, pages 17-19

²¹¹ Art. 16 para. (11-18) of the Labor Code was amended by Law no. 208/2021 for the application of Government Emergency Ordinance; 36/2021 on the use of electronic signature (published in the Official Gazette no. 720 of July 22, 2021).

use the advanced electronic signature or qualified electronic signature upon conclusion, modification, suspension or, as the case may be, termination of the individual employment contract.

For the same reasons, I appreciate that in the case of the individual employment contract for a fixed term, the employer may opt to use the electronic signature, advanced electronic signature or qualified electronic signature or the employer's electronic seal (art. 16 paragraph 12) of the Labor Code amended by Law no. 208/2021.

Although the individual employment contract is concluded for a fixed term, only in writing and with the express specification of the duration for which it is concluded, it can still be extended after the expiry of the initial term, with the written agreement of the parties and only under the conditions provided for in art. 63 letter a)-b) of the Labor Code as follows:

- Replacement of an employee in the event of suspension of his employment contract, except in the case where that employee participates in a strike. Considering that the right to strike, provided for in art. 233-236 of the Labor Code is free, no employee can be forced to participate or not to participate in such a manifestation.

- Increase and/or temporary change in the structure of the employer's activity. This increase may be exceptional or ordinary and occasional. The burden of this activity lies with the employer who must prove it.

- Carrying out seasonal activities. This concerns the performance of certain activities during a certain period of the year, having a temporary nature, such as harvesting in the autumn period of the year.

- In the situation where an employment contract is concluded under legal provisions issued with the aim of temporarily favoring certain categories of unemployed persons. This aspect concerns the situation when a special normative act must specify the category of persons to which it refers (for example, the situation of persons with disabilities).

- Employment of a person who, within 5 years from the date of employment, meets the retirement conditions for the age limits. This may be the situation of employers who employ

unemployed persons who, within 5 years from the date of employment, meet the conditions for requesting early retirement or granting an old-age pension according to the law²¹².

-Occupation of an eligible position within trade union, employer or non-governmental organizations, during the term of office. In this situation, the position being eligible, it is necessary that the person concerned must be an employee (employee) at one of the respective organizations.

-Employment of pensioners who, under the law, can cumulate pension with salary. In this situation, the employer's consent is imperatively required.

-In other cases expressly provided for by special laws or for the implementation of works, projects or programs.

These are the imperative cases, expressly provided for by labor legislation, which allow the conclusion, modification, execution or termination of an individual employment contract for a fixed term.

In the situation in which an individual employment contract for a fixed term is concluded in situations other than those provided for by law, the provisions of art. 57 of the Labor Code, which regulates the nullity of the individual employment contract, become applicable.

Therefore, in the event that an individual employment contract for a fixed term is concluded against the law, then it is struck by absolute nullity, but only the clause by which that contract is concluded will be null. The effect consists in the legal replacement of the clause that states the fixed duration of the contract with a clause that establishes the rule regarding the conclusion of an individual employment contract for an indefinite period.

It is also specified that an individual employment contract for a fixed term cannot be concluded for a period exceeding 36 months. It may be extended after the expiry of the initial term with the written agreement of the parties, for the period of carrying out a project, program or work. However, there is no maximum limit for each extension, but all extensions must fall within the limit of 36 months. During 36 months, a maximum of 3 fixed-term contracts can be concluded, these having a duration of less than 12 months and concluding in less than 3 months from the end of the first contract.

²¹² Art. 85 paragraph (5) of Law no. 76/2002 on the unemployment insurance system and employment stimulation (published in the Official Gazette no. 103 of February 6, 2022).

Regarding the termination of the individual fixed-term employment contract, it may terminate by law upon expiry of the term specified in the contract, but it may also terminate before the expiry of the term by any other means of terminating the individual fixed-term employment contract such as: termination by law (art. 56 para. (1) let.i) of the Labor Code; dismissal; resignation; agreement of the parties.

In conclusion, it can be shown that an individual fixed-term employment contract is useful to the employer because it represents a flexible and useful way of controlling human resources in different fields of activity. Then, it offers that employer increased flexibility in managing human resources depending on the various requirements of the activity, specific projects, seasons or temporary personnel replacements.

At the same time, the employee employed for a fixed term also benefits from protection in that he has the same rights as in the case of permanent employment contracts, including the right to vacation leave, social insurance and protection against discrimination.

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The relevance of defining the concept of national minority in international law

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Abstract

Similar to many areas of international law, the norms regulating the protection of fundamental human rights and freedoms, especially of persons belonging to minorities, have established a legislative and institutional framework without expressly defining the concepts with which they operate. The need to adopt a unanimously accepted definition of the concept of national minority has been particularly amplified in the last two centuries, since, during this period, the regulations in the field have acquired a general character, after a long period of time, international documents have focused more on certain religious and ethnic minorities.

This study aims to identify the specific features of the concept of national minority, which have been the focus of international regulations on the matter, as well as several attempts to define this concept in various international documents.

Keywords: *national minorities, human rights, ethnic group*

Consequently, most international documents, as well as most authors who have written on the issue of minorities, avoid giving a definition of this concept. In international doctrine, however, the lack of a definition is justified differently by the authors of specialized works in this field, some denying the need for such a definition ²¹³, others expressing doubts about its usefulness in concrete cases in state practice.

²¹³ Alfredsson, Gudmundur & Alfred de Zayas, "Minority Rights: Protection by the United Nations", în *Human Rights Law Journal*, vol. 14, 1993, nr. 1-2, p. 3.

There are also authors who start from the principle that the essential elements of the concept of minority are known, and its content seems to be axiomatic, they consider that the notion of national minority is delimited by the terms of national, ethnic, linguistic and religious, which either accompany it or determine the common meaning in which it must be interpreted.²¹⁴

There are also opinions that support the uselessness of a definition in general and abstract terms, accepting the hypothesis of an extremely general definition, with a minimum number of terms that can be unanimously accepted, based on self-identification, since, in most cases, it can be easily deduced which of the groups are minorities. In this hypothesis, unclear situations would be left to the practice of international bodies following the model of the concept of *people*.²¹⁵

In conclusion, there is no generally accepted definition internationally that can be invoked with international standard authority and, consequently, can be opposed to any state. The absence of agreement on a definition favors those states that do not agree with this trend that is manifested internationally to grant specific rights to minority groups located on their territory.²¹⁶ The lack of clarity on the concept is often invoked by some states that fear its legal and political consequences, in order not to accept certain international documents on the subject.

International practice highlights that the absence of a definition places the interpretation of this concept in the discretionary area of the unilateral will of each state. This gap is also highlighted by the fact that some international documents condition the application of the respective regulations on the existence of minorities in different states, thus placing the discussion in the area of recognition of these minorities by states.

²¹⁴ Hannum, Hurst, *Autonomie, suveranitate și autodeterminare*, Philadelphia, University of Pennsylvania Press, 1990, p. 143.

²¹⁵ Capotorti, Francesco, "Minorities", în *Enciclopedia of Public International Law*, vol. 8, 1985, ed. R. Bernhardt, p. 386.

²¹⁶ Alfredsson, Gudmundur, *Council of Europe, Report on Equality and Nondiscrimination: Minority Rights*, Strasbourg, 1990, p. 8.

To exemplify the above, we can recall the situation of the Greek-Bulgarian communities that emigrated following the war between the two states, in which the Permanent Court of International Justice issued an advisory opinion on July 31, 1930, stating that: "The criterion for the notion of community within the meaning of the articles of the Convention (...) is the existence of a group of persons living in a given country or locality, who have a race, a religion, a language and traditions of their own and are united by the identity of this race, this religion, this language and these traditions in a sense of solidarity, in order to preserve their traditions, to maintain their worship, to ensure the instruction and education of their children, according to the genius of their race and to help each other"²¹⁷.

Another attempt to define national minority belongs to the U.N. Sub-Commission. for the prevention of discrimination and the protection of minorities, which proposed in 1950 the following approach: "The term minority includes only those non-dominant groups of the population which possess and wish to maintain stable ethnic, religious or linguistic traditions or characteristics which are clearly different from those of the rest of the population.

Such minorities must include a sufficient number of persons to enable them to develop such characteristics.

Members of such minorities must be loyal to the State of which they are citizens."²¹⁸

Within the same Sub-Commission, in 1950, a minority was defined in a study on the rights of persons belonging to minorities, as "a numerically inferior group to the rest of the population of a state, in a non-dominant position, whose members - citizens of the state - possess, from an ethnic, religious or linguistic point of view, characteristics different from those of the rest of the population and who manifest, even implicitly, a sense of solidarity, with the aim of preserving their culture, traditions, religion or language"²¹⁹.

Fifteen years later, in 1985, another study developed within the Sub-Commission provided another definition according to which a minority represents: "A group of citizens of a state, who constitute a numerical minority, are in a non-dominant position in this state, who

²¹⁷ C.P.I.J., seria B, nr. 17, p. 33.

²¹⁸ Doc. E/CN. 4/358 din 30 ianuarie 1950.

²¹⁹ Capotorti, Francesco, *Rap.cit.*, parag. 568.

have ethnic, religious or linguistic characteristics different from those of the majority of the population and who have a sense of solidarity among themselves, motivated, even implicitly, by a collective will to survive and whose aim is to achieve equality in fact and in law with the majority.”²²⁰

Another attempt to outline the concept of national minority was also made within the U.N. Sub-Commission. in a report on the existing means for facilitating the peaceful and constructive resolution of problems involving minorities, where it was specified that a national minority would be understood as: ”any group of persons residing in a sovereign State, representing less than half of the population of the national society and whose members share ethnic, religious or linguistic characteristics which distinguish them from the rest of the population”²²¹.

Although the Commission on Human Rights took note of the aforementioned reports, it cannot be said that this would mean accepting the definition used, especially since the first two reports did not even have any follow-up. Moreover, the last report did not follow the mechanism known within the Commission on Human Rights to give it legal significance, and no draft convention or recommendation was prepared to be submitted to the member states for analysis and adoption.

A regional forum in which some definitions of national minorities have been attempted is the *Commission for Democracy through Law of the Council of Europe*. Within this body, a draft Convention on the issue of national minorities was drawn up in 1993, in which the following definition was proposed: “For the purposes of this Convention, the term minority means a group numerically inferior to the rest of the population of a State, whose members, who are citizens of that State, possess ethnic, religious or linguistic characteristics which are different from those of the rest of the population and are motivated by the will to preserve their culture, traditions, religion or language.”²²²

²²⁰ Deschenes, Jules, *Rap.cit.*, parag. 181.

²²¹ Doc. E/CN. 4/Sub 2/1993/34.

²²² Doc. C.D.L. (91)7 adoptat la 8 februarie 1991.

Also within the Council of Europe, in a draft document from 1993, annexed to Recommendation no. 1201 of the Parliamentary Assembly of this Council, which was to be submitted for adoption by the member states, as an additional *Protocol to the European Convention on Human Rights concerning persons belonging to national minorities*, proposed the following definition: “For the purposes of this Convention, the term national minority means a group of persons within a State who: a) reside in the territory of that State and are its citizens; b) have ancient, solid and durable ties with that State; c) have specific ethnic, cultural, religious or linguistic characteristics; d) are sufficiently representative, although less numerous, than the rest of the population of that State or of a region thereof; e) are animated by the will to preserve together what forms their common identity, in particular their culture, traditions, religion and language.”.

From the above, it can be seen that, in the definition proposed within the U.N. Sub-Commission since 1993, the criterion of residence has been used instead of that of citizenship, the latter being used both in the proposal of the Parliamentary Assembly of the Council of Europe and in other definitions. Despite all the existing differences, the two definitions have contributed substantially to the process of drafting the Framework Convention for the Protection of National Minorities, the only multilateral legal document adopted to date in this field.

The elements that make up the content of the two definitions are taken from the text of the Convention, which, however, does not contain any express definition of the concept of minority, the Council of Europe considering that it is not appropriate to accept any of the proposed definition variants.

The aforementioned opinion was argued in the explanatory report on the draft Convention, prepared for its debate within the Committee of Ministers on 10 November 1994, which highlights the difficulty of adopting a definition unanimously accepted by all member states of the Council of Europe, an aspect that determined a practical approach in drafting the draft Convention.

The definitions proposed successively, both within the O.N.U. and within the Council of Europe, represent logical constructions that start from the *premise of the existence of a conflict* between minority and majority, presenting themselves in the form of the relationship

between the dominated group and the dominant group. This approach does not have a constructive nuance, placing the two concepts, minority and majority, in antagonistic positions, not reflecting the socio-political reality, in which the ethnic, linguistic, cultural and religious features of minorities do not conflict with those of the majority, the only ones susceptible to such an approach being the desires or tendencies of the respective groups.

The practice of states does not reveal any structural position in substance, but one that can most often arise from the different objectives of each group in particular. As a result, the conflicts that may arise can be eliminated by harmonizing these objectives, in the context of respecting fundamental human rights and freedoms, as well as non-discrimination, which ultimately lead to the cancellation of the dominant-dominated interpretation. This harmonization must be carried out in such a way as not to affect the ethnic, linguistic, cultural or religious features of each one.

Another approach of a conflictual nature between minority and majority arises from the way in which subjective criteria regarding the solidarity of group members, their will to survive, and those considered to be objective, such as the purpose of preserving culture, language, traditions and religion, are placed in opposition.

In relation to this issue, there are authors who distinctly identify the so-called objective criteria of identity, as cultural, ethnic, linguistic and demographic features, from the subjective one, which is represented by the will to maintain one's identity. In our opinion, such an approach is, if not impossible, extremely difficult to achieve, since the existence of objective features cannot be separated from their will to preserve them, sharing the idea that "the identity of a minority is based on its collective memory, inseparable from its ethnic and cultural particularities".²²³

Such an interpretation becomes meaningless in the context of respecting human rights, implicitly the rights of persons belonging to minorities, as they are provided for by known international standards, in which different ethnic, linguistic, cultural, religious features are protected as objective elements of their identity, except in those situations in which the minority

²²³ George, Pierre, *Geopolitique des minorities*, collection Que Sais-Je 1984, p. 19.

is constantly subjected to actions that result in forced assimilation, which are prohibited by international law.

On the other hand, in a report by the U.N. Sub-Commission that also manages the protection of minorities, it is stated that "the subjective factor is implicit in the fundamental objective element"²²⁴. Consequently, the constant affirmation over time of the features that make up the identity of the minority represents objective proof of the subjective element.

The explanatory report of the 1994 Framework Convention also follows the same logic, stating that the freedom of choice of any person should not be understood as a right to arbitrarily identify with any ethnic group, since "subjective individual choice is inseparably linked to objective criteria relevant to the identity of persons"²²⁵.

What could not be explicitly achieved through the mentioned international documents, crystallized in the process of applying the Framework Convention for the Protection of National Minorities, from 1994. Although this Convention does not explicitly define the concept of minority, its implementation obliged the States Parties to outline the object of application of the Convention.

To this end, some States preferred to adopt definitions, and others chose to identify the ethnic groups that they consider to be national minorities and, implicitly, which are opposable to the provisions of the Convention. In both situations, the Member States submitted their proposals to the Advisory Committee, the body created by the Decision of the Committee of Ministers of the Council of Europe, with the aim of examining the reports of the States Parties.

In this regard, Austria notified that it understands by national minorities those groups that live and have their homes traditionally in some regions located on the territory of the Republic of Austria and are made up of Austrian citizens who have their own ethnic cultures and do not use German as their mother tongue. These details are supplemented by information on the existence of a special law on ethnic groups drawn up by the Viennese authorities in 1976.

²²⁴ Capotorti, Francesco, *Rap.cit.*, parag. 557.

²²⁵ Doc. CM (94) 161, p. 17.

Luxembourg declared that it understands by national minority that group of people who settled generations ago on its territory, who have preserved their distinctive ethnic and linguistic features, even if they have acquired Luxembourgish citizenship.

Likewise, an attempt at a definition is also found in the case of Switzerland, which informed that it understands by national minorities those groups of people numerically inferior to the rest of the population of the country or of that which makes up a canton, whose members are Swiss citizens, have strong and lasting relations with the Swiss state, of long standing, and are guided by the desire to defend together what constitutes their common identity, in particular language, culture, tradition or religion.

In the Baltic countries, Estonian legislation accepts as a definition for national minorities that these persons are citizens of Estonia residing on its territory, who maintain strong and lasting relations with it, of long duration, but who differ from Estonians by their ethnic, cultural, linguistic or religious features, while at the same time being concerned with maintaining together with the majority their cultural traditions, religion or official language, elements that constitute the foundation of their common identities.

In their response to the Advisory Committee, most States Parties communicated official lists of ethnic groups to which they understand to apply the provisions of the Convention, lists which, in most cases, are of a limiting nature, comprising only small groups and leaving out of the application of the Convention larger human groups, formed by citizens of the respective States who, obviously, have ethnic, linguistic, cultural and religious features, different from those of the majority of the population, and who reside on the territory of these States.

Even though the Convention does not refer to an explicit definition, the operative part contains provisions on the mother tongue, the culture and traditions of the person, and access to information in the person's own language, as objective defining elements of a minority group. The objective elements are supplemented by the criterion of self-identification. The Convention also refers to persons belonging to minorities, identifying them with their *traditional* or *substantial* settlement in certain regions, which reveals the reference to the territorial criterion of residence and not that of citizenship.

In applying the Convention, the Advisory Committee accepted that, in the absence of a definition of the concept of minority, the States Parties should constitute the supreme court to assess the enforceability of the provisions of the Convention. The only restrictive remark from the Advisory Committee was that this assessment by the national authorities should not be arbitrary and should comply with the general principles of international law, as well as those enshrined in the text of the Convention.

In this context, the Advisory Committee also agreed with the restrictive views of some States, in particular those regarding the application of nationality and the long duration of residence in the territory of the States Parties. As a result, the respective States were recommended to examine the application of only some of the articles of the Convention to some minority groups.

The particularities mentioned regarding the conditions of application of the 1994 Framework Convention significantly limit its enforceability within the Member States, since its provisions are to be fully applied only to some countries in Central and Eastern Europe, leaving out millions of people who have become European citizens in the last 50-70 years.

Attempts to develop a definition unanimously accepted by the International Community regarding national minorities come up against the tendency of States to exclude certain ethnic, linguistic or religious groups from the concept of minority, and implicitly from the benefit of the protection provided for by international standards in the field. In this sense, in the previously presented proposals for definitions, there are no mentions of foreigners or stateless persons who legally reside in a certain country, an aspect that is considered a shortcoming both in the doctrine and within the Human Rights Commission.

However, there are authors who state that the regulation of the regime of emigrants, refugees, stateless persons and foreigners is the competence of the national authorities of each state or derives from the norms of international law that regulate the status of these categories of persons, an aspect that justifies the elimination of their mention in the context of the status of persons who are part of minorities.²²⁶ We consider that this restrictive interpretation is

²²⁶ Ben Achour, Rafaâ, "La nouvelle Charte de l'Organisation de la Conférence Islamique (OCI)", în *RGDIP*, nr. 4/2008, parag. 346.

questionable, since the regulations in the International Covenant on Civil and Political Rights refer to persons and not to citizens, an aspect that induces the idea that a *human right is stipulated, not a citizen's*.

An argument that supports this point of view is also the interpretation that the Human Rights Committee within the U.N. system specially established by the International Covenant on Civil and Political Rights, specifies in a general comment on Article 27 that persons benefiting from protection do not necessarily have to be citizens of the respective State Party.²²⁷

Also, article 2 of the Covenant states that all the rights set forth in this document must be exercised by all persons within the jurisdiction of the State party, except for the category of political rights, which are reserved exclusively for citizens. In conclusion, the Committee considers that States parties cannot restrict the benefit of fundamental rights and freedoms only to persons who have their citizenship.

In the specialized literature, there are authors who argue the lack of a legitimate link between the existence of a community of persons characterized by ethnic, linguistic, cultural and religious features, different from the rest of the population, and the legal relationship of citizenship, which establishes the link between the persons concerned and the State of residence. The phenomenon of globalization has also accentuated the migration process that has led to the formation of stable and sufficiently numerous groups, established on the territory of other States without, however, holding their citizenship and without being able to integrate socially and economically.

This reality, however, does not prevent persons belonging to those groups from preserving, with all the difficulties, their ethnic, linguistic, cultural and religious identity. Based on this argument, we consider that a group of foreigners established on the territory of a state should not be excluded ab initio from the possibility of becoming a minority.

On the other hand, there is also the opinion of other authors, which coincides with that of representatives of some states, particularly from Latin America, according to which

²²⁷ General Comment 15 (21), U.N. Doc. A/41/40, pp. 117-118.

immigrants should not be granted the right to claim a minority regime, the essential argument in favor of this point of view deriving from the fact that the persons concerned came freely to the respective state, accepting voluntarily and unconstrained by anyone, the state of immigrants.

Following this logic, the idea has developed that national minorities are those groups that result only as a result of conflicts or transfers of territories between states, events that deprive the respective population of the right to express its will in relation to its status. This vision can also be found in the positions adopted by some Western European states, which impose on groups claiming the status of national minority the condition of having existed in the respective territories for a long period of time.

In another approach, the specialized literature states that the provisions of the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contain the necessary provisions for the protection of immigrants, which would exclude this category from the right to be treated in accordance with the standards regarding minorities.

In relation to those mentioned, two vectors of interpretation essentially emerge. The first, which considers that protection must be granted to *old minorities*, has the nuance of an obligation to affirmative action, ensuring them the broadest protection, placing *new minorities* within the scope of applicability of the principle of non-discrimination.

The second vector of interpretation starts from the promotion of one of the most recent principles of building modern societies, that of multiculturalism, supporting the idea that both old and new minorities must benefit from the same rights, being equally subject to ethnic, racial and religious discrimination.²²⁸

Consequently, there is no basis to justify restrictive views on minorities. Where a community has settled in the territory of a given State, with the determined intention of remaining there, but also with the desire to maintain its distinct ethnic, linguistic, cultural or religious characteristics, there is no reason why it should not be recognized as a minority,

²²⁸ Nowak, Manfred, "The Evolution of Minority Rights in International Law", in *Peoples and Minorities in International Law*, C. Brolmann, R. Lefeber, M. Zieck (ed.), 1993, pp. 116-117.

regardless of whether its presence on that territory is voluntary and regardless of the length of time that has elapsed since its establishment within that State.

Where national authorities refuse to guarantee the preservation of the ethnic, linguistic, cultural or religious identity of the persons making up that community, it can be considered that they are pursuing the long-term assimilation of that group.

State practice shows that immigrants settled in other countries are rarely recognized as minorities, even if they are more numerous than other communities which the authorities of the State of residence recognize as national minorities.

This approach, however, has a transitory character, determined by the social and political conditions existing at a given time in the state that admits the immigrant community to settle on its territory. In the event that immigrants continue to remain for a long period in that space, the state is forced to take the necessary measures, when conditions allow, to ensure the legislative and institutional framework intended to guarantee these communities the right to preserve their ethnic identities.

There are multiple examples of countries in which bilingual schools, cultural centers, places of worship, as well as other institutions, associations and organizations operate that aim to maintain and develop the mother tongue and specific culture of the people belonging to the respective communities.

In the specialized literature, these communities are placed within the scope of the concept of new minorities, some of which are the favorite targets of acts of racism and xenophobia that lead to conflicts and social unrest. In order to avoid such situations, it becomes imperative for the authorities of the state of residence to grant persons subject to a discriminatory regime the status of minorities, on the basis of which they can exercise their specific rights in accordance with international standards in the matter.

Since the rights conferred on citizens belonging to national minorities aim to preserve their ethnic, linguistic, cultural and religious identity, they cannot be subject to a discretionary restriction applied to foreigners compared to citizens, nor to new minorities compared to old minorities.

A particular situation of national minorities is represented by indigenous or autochthonous peoples, such as: Indians in the U.S.A., Canada and Latin American countries, Inuits from the North Pole region, the Sami in Northern Europe and Asia, Aboriginal peoples in Australia, Moors in New Zealand. These categories of populations have consistently refused to be classified as minorities, arguing that the determining factor in their definition is their original habitation in the respective countries, from ancient times, dating back to before the formation of peoples and states on these territories.

A whole series of international documents regulate a special regime for indigenous peoples, which can go beyond the international standard recognized for minorities, precisely because of the specific connection of indigenous peoples with the land, waters and areas in which they live, the natural environment that is part of their very identity and culture. However, there are a number of common elements between national minorities and indigenous peoples, which make them stand out from the majority of the population based on their ethnic, linguistic, cultural and religious features that are different from it.

Therefore, most comparative analyses between the two categories of populations mentioned address the issue of indigenous peoples in the category of protection of national minorities.²²⁹

Following this logic, both groups are subject to the same norms of international law that refer to minorities, such as the right to existence, the protection of their identity against forced assimilation, the right to use their mother tongue, the right to practice their religious service.

International jurisprudence confirms this approach, the few complaints submitted for analysis and debate to the Human Rights Committee by members of some indigenous peoples were resolved, within the procedure for examining individual complaints, in favor of the petitioners, the legal basis being art. 27 of the International Covenant on Civil and Political Rights, which refers to the rights of persons belonging to minorities.

²²⁹ Ermacora, Felix, "Protection of Minorities Before the United Nations", *RCADI*, 1983 (IV), vol. 182, p. 279.

In many international documents, as well as in the specialized literature, tendencies to classify minorities have been manifested. In this regard, the memorandum entitled *Definition and Classification of Minorities* elaborated by the Secretary General of the U.N.U. and presented by him to the General Assembly in 1949, which specifies how minorities were formed, such as: the previous constitution of an independent nation, organized as a distinct state or as a tribal formation, more or less independent; the persons belonging to the respective minority were previously part of a nation organized as a distinct state, being subsequently separated from it and annexed to another; the minorities constituted or constitute a regional or dispersed group united by feelings of solidarity with the predominant group, without being assimilated by it.

In the specialized literature, two main categories of minorities are distinguished in Europe. The first, relating to territorial minorities and nations, from those that have a status of autonomy, such as the Basques and Catalans, to those that are not recognized as such, as is the case of the Bretons and Occitans. The second category is constituted by non-territorial minorities, such as: Gypsies, certain Jewish communities, immigrants for political reasons, such as Armenians, Kurds, Chileans or those for economic reasons, such as Maghrebs, Yugoslavs, Turks.

In other works, references are made to the victims of the slave trade, who live dispersed in the Americas and who constitute the source of the formation of artificial minorities created by the colonial powers. In this sense, Indian merchants and craftsmen in Malaysia, Burma and Asian states are mentioned, as well as the Chinese in the former European colonies in Southeast Asia. Also included in the same category are migrant workers from the 20th century, such as: Mexicans in the U.S.A., Pakistanis in England, Turks and Yugoslavs in Germany, North Africans in France.²³⁰

These categories are far from satisfactory in relation to a scientific classification that could be applied to national minorities. However, they represent attempts to group realities that differ from each other and from country to country, confirming the hypothesis that the

²³⁰ Deschenes, Jules, "Proposal concerning a definition of the term "minority"", *UN Studies*, 14 mai 1985, parag. 1-9.

recognition of a national minority must take into account the way in which it was formed and evolved, its concrete situation, in each case.

International documents reflect the aforementioned realities, using several expressions to designate minority groups. In this sense, documents developed until the beginning of the 20th century used the term nationalities to designate the concept of minority. Later, after the end of the First World War, the current formula of minorities was accepted. In the period immediately following the Second World War, within the United Nations, documents were developed that refer to both *minorities*²³¹ and *national collectivities*.²³²

In the Convention on the Prevention and Punishment of Genocide, adopted in 1948, we find the formulation *national, ethnic, racial or religious group*, while in the device of the International Covenant on Civil and Political Rights adopted in 1966, the notion of *ethnic, religious or linguistic minorities* is used. The use of the term *ethnic minorities*, omitting an express reference to *national minorities*, leads us to conclude that the broadest expression was intended, and consequently, the perspective of this international document treats racial and national minorities as an integral part of ethnic minorities.²³³

International organizations with a regional vocation on the European continent use the formula national minority in its broader meaning, which includes all national, ethnic, linguistic or religious minorities, without, however, absolutely conditioning the term national minority in its broad meaning on the existence of one or another of the aforementioned constitutive elements.

In connection with this terminology used both in the Council of Europe and in the Organization for Security and Cooperation in Europe, we consider necessary the distinction that they make between ethnic, linguistic or religious groups and minorities, in the sense that not every such group is a minority within the meaning of European documents, and not every

²³¹ Rezoluția nr. 217/III din 10 decembrie 1948, intitulată *Soarta minorităților*.

²³² Memorandumul secretariatului general al O.N.U. din 1950, intitulat *Definiție și clasificare a minorităților*.

²³³ Capotorti, Francesco, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, doc. E/CN. 4/Sub.1/384/Rev.1 (1979), parag. 201.

differentiation on ethnic, linguistic, cultural or religious criteria necessarily leads to the formation of national minorities.

In this context, it can be seen that the formula national minority emphasizes the importance of the group in question, in order to distinguish it from exclusively folkloric groups and from less numerous groups, which do not meet the specific elements necessary to be considered minorities within the meaning of international law. Consequently, it can be stated that the term national minority is less related to the concept of nation, even if its name suggests such a connection.

It must be understood from the outset that this concept does not represent a transitional stage that a minority goes through in order to become a nation. The purpose for which the term national minority is used is to emphasize the existence of cumulative conditions that a certain community meets within a nation, having a certain importance, which deserves special attention from the state authorities, benefiting in this context, from certain specific rights in addition to the usual fundamental rights and freedoms.

On the other hand, the practice of states shows that, not in all cases, the term national minority is identical to that of nationality. In states, such as France and England, the term nationality designates the political and legal relationship between a state and the persons who form its population, usually having the meaning of citizenship, which is a notion of constitutional law, without however having any connection with the issue of minorities.

In other states, as a rule, multinational ones, use both terms, with the concept of citizenship designating the notion of constitutional law, and that of nationality indicating the different ethnic or national origin of the groups that form the population of the respective state, both the minority and the majority ones.

The use of different notions inevitably leads to the analysis of the link that exists between ethnic, linguistic or religious minorities and the concept of national minorities. Analyzing the international documents on the subject, it can be stated that, in the overwhelming majority of cases, a national minority is also an ethnic, linguistic or religious minority, an aspect that has led some authors to call them *integral*, since they differ from other populations through these cumulative characteristic features.

The implication is not unambiguous, however, as there are certain ethnic, linguistic or religious minorities that are not national minorities, which is why, in the specialized literature, they are called partial minorities, as they have only some of the features different from the rest of the population. This category includes, for example, the Roma/Gypsies.²³⁴

Although, international documents use several notions to define the concept of national minorities. Essentially, they refer to the same minimum standard of protection established, without attributing different legal consequences to them regarding the protection of the identity of persons belonging to minorities and their correlative rights.

As a result, the role of these different notions is to facilitate the identification of minority groups referred to by an international document, in a certain geographical area on the world map. A similar situation is encountered within the various classifications attempted for national minorities, following either the criterion of how they were formed, or that of their distinctive features.

As has been observed, regardless of the approach chosen, the categories of minorities identified are likely to highlight their specificity and diversity, resulting in a particular set of requests, which in turn differentiates them.

Conclusions

From what has been analyzed, it can be observed that there is no generally accepted definition of the notion of national minority, the attempts made to define this concept, either too specific or too restrictive, to encompass such a complex and extremely varied phenomenon as that of minorities, from country to country and from one geographical region to another.

Even though international documents use different concepts to define national minority, they do not express different standards attributed to the rights of persons belonging to minorities, in order to preserve their identity and the human community they form.

²³⁴ Ben Achour, Rafaâ, "La nouvelle Charte de l'Organisation de la Conférence Islamique (OCI)", în *RGDIP*, nr. 4/2008. pp. 343-344.

The lack of a unanimously accepted definition did not represent a major impediment to establishing standards applicable to persons belonging to minorities, which have been cod

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FORMS OF GUILT IN ROAD ACCIDENTS. JUDICIAL PRACTICE

Andrei IONESCU ²³⁵

Abstract: In traffic accident cases, certain objective circumstances are usually considered as the basis for the offender's belief that the harmful result would not occur—such as the vehicle's performance, the driver's experience and driving skills, the late hour, or the absence of traffic or pedestrians—even if, upon objective analysis, these prove to be insufficient. However, in certain situations, due to the high degree of risk involved in the activity, these objective circumstances that might otherwise support the offender's belief are regarded from the outset as insufficient, as the risk created is clearly too great to be reasonably covered by such factors.

Keywords: Criminal Code, traffic accident, culpability, indirect intent, negligence, criminal liability.

I. General considerations

The provisions of Article 15 paragraph (1) of the Criminal Code define an offense as an act provided for by criminal law, committed with guilt, unjustified, and attributable to the person who committed it. From this definition arise the essential features of any offense: typicality, unlawfulness, and imputability.

Under these conditions, guilt constitutes the subjective element within the incriminating norm (in the forms of intent, negligence, or praeterintent), and is thus analyzed as part of the essential feature of typicality²³⁶, since guilt, as a general characteristic of the offense²³⁷, is

²³⁵ PhD Andrei Ionescu, PhD candidate, Associate Lecturer, “Titu Maiorescu” University of Târgu Jiu.

²³⁶ See C. Mitrache, C. Mitrache, *Romanian Criminal Law. General Part*, 3rd revised and expanded edition, Universul Juridic Publishing House, Bucharest, 2019, p. 173; M. Udrioiu, *Criminal Law Summaries. General Part*, 3rd edition, Vol. I, p. 125; M.-I. Michinici, M. Dunea, in T. Toader (ed.), *The New Criminal Code. Article-by-Article Commentary*, Hamangiu Publishing House, Bucharest, 2024, p. 49. In other opinions, it has been considered that guilt itself constitutes an essential feature of the offense. See G. Antoniu, T. Toader (eds.), *Explanations of the New Criminal Code*, vol. I, Universul Juridic Publishing House, Bucharest, 2015, pp. 162–164; F. Streteanu, D. Nițu, *Criminal Law. General Part*, vol. I, Universul Juridic Publishing House, Bucharest, 2014, p. 173.

²³⁷ See Decision of the Constitutional Court (DCC) no. 86/2016, paragraph 20, (Official Gazette no. 370 of May 13, 2016).

referred to in the new criminal regulation as imputability²³⁸. This reflects the adoption of the normative theory of guilt, which views guilt as a reproach addressed to an individual by society for breaching the legal order through the commission of an act stipulated by the incriminating norm, consisting, therefore, in the contradiction between the perpetrator's behavior and the requirements of the incriminating norm. This contrasts with the previous criminal regulation, in which guilt was considered both a constitutive element and an essential feature of the offense, in accordance with the psychological theory of guilt, which focused on the psychological connection between the perpetrator and the conduct that produced the criminal result.

From the perspective of the subjective element, it is therefore a matter of the forms and modes of guilt with which the offense is committed, explicitly regulated as intent, negligence (*culpa*), and excessive intent or *praeterintentio*, under the provisions of Article 16 of the Criminal Code. Thus, under the current law (*de lege lata*), according to Article 16, paragraph (3) of the Criminal Code, an act is committed with direct intent when the perpetrator foresees the result of the act and seeks to produce that result by committing the act; it is committed with indirect intent when the perpetrator foresees the result of the act and, although not pursuing it, accepts the possibility of its occurrence²³⁹.

Other forms of intent include: qualified intent, determined, alternative, initial, premeditated, or spontaneous (sudden) intent, as well as subsequent intent.

At the same time, according to Article 16, paragraph (4) of the Criminal Code, an act is committed through conscious negligence when the perpetrator foresees the result of their act but does not accept it, unjustifiably believing that it will not occur; and through unconscious negligence when the perpetrator does not foresee the result of their act, although they should and could have foreseen it. Other forms of negligence include: *culpa in agendo* (by action) or *culpa in omitendo* (by omission), common or concurrent negligence²⁴⁰.

²³⁸ M. Udrioiu, *op. cit.*, p. 127.

²³⁹ *Ibidem*, p. 225.

²⁴⁰ *Ibidem*, p. 234.

Furthermore, according to Article 16, paragraph (5) of the Criminal Procedure Code, there is excessive intent (*praeterintentio*) when an act consisting of an intentional action or inaction produces a more serious result due to the perpetrator's negligence.

II. Practical aspects

An issue of interest in judicial practice is represented by the distinction between the forms of guilt in cases of crimes against life, particularly those committed in the context of traffic accidents, with practical implications concerning the classification and punishment either for the intentional crime of murder/aggravated murder, or for the crime of manslaughter, leading to a sometimes contradictory case law in recent decisions.

Thus, by Decision no. 410/20.06.2024, issued in case no. xx/3/2020, the High Court of Cassation and Justice – Criminal Section²⁴¹ admitted the appeal in cassation filed by defendant A, partially overturned the criminal decision rendered on appeal by the Bucharest Court of Appeal, and remanded the case for retrial by the appellate court, having found the existence of a ground for cassation provided by art. 438 para. (1) point 7 of the Criminal Procedure Code, as the act attributed to defendant A did not correspond to the incriminating norm under art. 188 para. (1) of the Criminal Code, based on which the conviction was ordered.

Assessing whether there is a full correspondence between the committed act and the legal configuration of the respective type of offense, the panel of the High Court considered that the material element of the objective side of the offense of murder—namely, the killing of a person—can only be retained under conditions in which the act clearly reveals an action that results in the taking of a person's life.

In fact, it was found that defendant A was accused of, on 08.09.2019, having a blood alcohol level of 1.96 g/l and being under the influence of cocaine, driving an Aston Martin DBS, license plate no. xx, at a speed far exceeding the legal limit of 60 km/h within city limits, running a red light at the intersection of Chitilei Road and Teodor Neagoe Street at a speed of 145 km/h, accelerating to 162 km/h as he overtook another vehicle traveling at a reduced speed in the first lane, mounting the median strip with the left side of the vehicle, and fully pressing the gas pedal

²⁴¹ Available on the website of the High Court of Cassation and Justice, accessed on April 18, 2025.

in a vehicle equipped with an engine developing approximately 700 horsepower. He thus entered the opposite lane and collided head-on at 03:02:39 at a speed of 143 km/h with an Audi, license plate no. xx, driven by victim V., who died on the spot due to sustained injuries.

Thus, given the factual circumstances established at trial and upheld on appeal, the High Court panel found that both the trial court and the appellate court erroneously classified the act for which the defendant was convicted under the provisions of art. 188 para. (1) of the Criminal Code.

The factual elements revealed a typical case of a traffic accident that resulted in the death of a person due to the sole fault of the driver (the defendant), who failed to comply with legal traffic regulations (excessive speeding, driving under the influence of alcohol and drugs). In this case, the trial and appellate courts held that the offense committed was murder.

The offense provided for in art. 188 of the Criminal Code is committed, in terms of the material element, by an action (or even inaction) that must be directed against the victim. However, the factual situation, as previously mentioned, reveals a traffic accident, which is, by legal definition, an event (art. 75 of GEO no. 195/2002²⁴²), that is inherently fortuitous and not deliberate, having an unforeseeable character.

The perpetrator's action (the driver's) was upon the vehicle—accelerating beyond the legal speed limit, resulting in a head-on collision with the vehicle driven by the victim, causing their death. These factual elements align, both objectively and subjectively, with the offense of manslaughter, as provided by art. 192 of the Criminal Code.

Given the factual circumstances of the pending case, the crime of murder would only be possible if the vehicle had been used or accepted to be used as a means for the purpose of taking the victim's life. However, neither the trial court nor the appellate court identified such a circumstance.

In agreement with the trial and appellate courts, the panel of the High Court also emphasized the seriousness of the defendant's act, considering the circumstances, his conduct, and especially the consequences: the loss of a human life. The defendant's disregard for legal

²⁴² Published in the Official Gazette, Part I, No. 670 of August 3, 2006.

provisions regarding public road traffic (driving at excessive speed, under the influence of alcohol and prohibited substances) are conditions and circumstances concurrent with the commission of the offense, revealing a high degree of danger in the act and a significant level of dangerousness in the offender, classifying the offense under its aggravated form, as provided by art. 192 para. (2) of the Criminal Code, the legal basis under which the defendant shall bear criminal responsibility.

In this context, the High Court panel considered that the illegality found in the lack of correspondence between the factual situation and the incriminating norm cannot be remedied through the retrial of the case by the appeal court in cassation, as it involves a reclassification of the legal framing of the act based on the established facts, as well as the individualization of the punishment and its method of enforcement, depending on the incriminating legal provision found applicable to the case.

As such, the provisions of art. 448 para. (1) point 2 letter a) of the Criminal Procedure Code are not applicable. Based on art. 448 para. (1) point 2 letter b) of the same Code, it was necessary, within these limits, regarding the offense of murder under art. 188 para. (1) of the Criminal Code (as wrongly held in the challenged decision), to remit the case for retrial to the appellate court, namely the Bucharest Court of Appeal.

Upon retrial, through Criminal Decision no. 1665/2024, the Bucharest Court of Appeal²⁴³ upheld the appeals filed against Criminal Sentence no. 132/10.02.2023 issued by the Bucharest Tribunal²⁴⁴, partially quashed the appealed sentence and, upon retrial, found that, by the ruling of 11.10.2024, the legal classification of the act had been changed from the offense of murder to that of aggravated manslaughter, and for this latter offense, the defendant was sentenced to 7 years of imprisonment as the principal penalty.

At the same time, by Criminal Decision no. 202/19.03.2024²⁴⁵ issued by the Alba Iulia Court of Appeal, the appeals filed by the defendant S., by the civil parties E., F. (through E.'s legal representative), O., R., R. R., R. N., I., C., D., and by the civilly liable party G. Insurance

²⁴³ Available on rejust.www.ro.

²⁴⁴ Available on rejust.www.ro.

²⁴⁵ Available on rejust.www.ro.

Reinsurance Company SA were admitted against Criminal Sentence no. 110/2023²⁴⁶, issued by the Sibiu Tribunal on 08.09.2023, based on art. 423 of the Criminal Procedure Code, the appealed sentence was overturned, and the legal classification of the act as defined in the indictment was changed from aggravated murder, provided under art. 189 para. (1) letter f) of the Criminal Code, to manslaughter, provided under art. 192 paras. (2) and (3) of the Criminal Code.

The defendant was sentenced to 10 years of imprisonment for committing the crime of manslaughter, as provided under art. 192 paras. (2) and (3) of the Criminal Code.

To decide as such, the appellate court found that the difference between the two forms of guilt in question lies in the fact that, in the case of indirect intent, the perpetrator, with respect to the foreseeable result, has an attitude of indifference and acceptance toward it, as they take no action to prevent the result, remaining passive. In contrast, in the case of conscious negligence (culpa with foresight), the foreseeable result is not accepted, and this non-acceptance is shown through the attitude of the perpetrator, who hopes to prevent it, relying on objective elements related to the circumstances in which the activity occurs, the properties of the instrument used, as well as subjective elements.

However, all these prove to be insufficient or wrongly assessed, as the dangerous result still occurs. The act is committed through conscious negligence because the perpetrator misjudged—superficially—the possibility of preventing the result.

In other words, the qualitative difference between indirect intent and conscious negligence lies in the fact that, in the case of indirect intent, although the risk is perceived, the perpetrator carries out the intended action, being indifferent to the occurrence of the result.

On the other hand, in the case of conscious negligence, even though the perpetrator foresees the possibility of the result occurring, they assume the risk, believing that it will not happen.

In conclusion, in cases of conscious negligence, the perpetrator's belief that the result will not occur is based on certain objective circumstances, which, however, are incorrectly assessed

²⁴⁶ Available on rejust.www.ro.

in practice. But if the absence of the result is not based on such objective grounds, but merely on hope, dependent on chance, then we are dealing with indirect intent.

Starting from these theoretical considerations, the Court found that through his conduct in traffic, the defendant violated a number of legal provisions governing public road traffic, related to exceeding the maximum speed limit on the road segment where the accident occurred or failing to observe the rules on overtaking. This violation represents the “normative essence of negligence,” and as a consequence of this conduct, which created a dangerous situation, it results that the defendant foresaw the possibility of a traffic accident occurring, with potentially serious consequences, including the loss of life of one or more persons.

Next, the Court assessed whether the defendant’s subjective attitude toward the possibility of avoiding the anticipated result was based on certain objective circumstances, which, however, he incorrectly evaluated in concrete terms, or merely on a hope dependent on chance.

If we were to refer solely to what was mentioned by the prosecutor in the indictment, the answer is simple, as the criminal investigation body considered a set of objective circumstances when determining the legal classification—something characteristic of negligence, not indirect intent—thus, from this perspective, establishing an incorrect legal classification of the act.

From the reasoning in the decision that rejected the defendant’s request for a change in legal classification, the Court observed that the first instance court considered the defendant showed an attitude of indifference, hoping that a traffic accident would not occur, and thus held that the act was committed with indirect intent.

The first instance court reached this conclusion by analyzing the defendant’s conversations with witness C., discussions referring to other incidents which the defendant either avoided or caused, but without major consequences (only minor damage to his own vehicle).

The Court pointed out that analyzing the offense from the perspective of the subjective element requires determining the form of guilt in relation to the result produced²⁴⁷, not in relation to prior situations or circumstances. More specifically, in analyzing the elements of

²⁴⁷ Antoniu, G., *The Immediate Consequence. Contributions to the Clarification of the Concept*, in *Romanian Criminal Law Review (R.D.P.)* no. 1/1999;

subjective typicality, one must start from the moment the danger arose—namely, from the moment the defendant, driving at a speed exceeding the legal limit on the road segment where the accident occurred, made an overtaking maneuver in violation of the double continuous line road marking, resulting in a traffic accident in which four victims died. At that moment, the defendant foresaw the possibility of a traffic accident occurring, but the Court considered that his belief in the possibility of avoiding the anticipated result was based on certain objective circumstances that support a finding of *culpa with foresight* (conscious negligence).

To reach this conclusion, the court of appeal considered that the defendant was driving a vehicle manufactured by a brand known for its powerful engines—a matter of public knowledge. Additionally, the vehicle's speed led the defendant to believe that he could safely complete the overtaking maneuver and continue his journey without issues after returning to his lane. All these aspects, however, were incorrectly assessed by the defendant due to his advanced state of fatigue, the fact that he was unfamiliar with the road, and the limited visibility at the time of the incident. The double continuous longitudinal line prohibited him from performing the overtaking maneuver, and precisely because of the excessive speed and the particular characteristics of the road (a right-hand curve with a radius of 95 meters over an arc of approximately 150 meters), the defendant was no longer able to return to his own lane, thus causing a collision with the vehicle in which the four victims were traveling, a vehicle that was driving lawfully.

3. By contrast, in Criminal Decision no. 178 of 14.03.2018 delivered by the Iași Court of Appeal²⁴⁸, the appeals filed by the Prosecutor's Office attached to the Iași Tribunal, the civilly liable party S.C. E. Reasigurare S.A., and the civil party the "S. Iași" County Emergency Clinical Hospital against Criminal Sentence no. 1487 of 06.11.2017 rendered by the Iași Tribuna²⁴⁹ in case no. xx/99/2017 were admitted.

Pursuant to Article 423 paragraphs (1) and (2) of the Criminal Procedure Code, the appealed sentence was partially overturned, both in criminal and civil aspects, and upon retrial,

²⁴⁸ Available on rejust.www.ro.

²⁴⁹ Available on rejust.www.ro.

the provisions regarding the change in the legal classification of the offenses for which the defendant P. was sent to trial were removed.

He was convicted for the offense of manslaughter under Article 192 paragraphs (1), (2), and (3) of the Criminal Code (victims B.D. and B.A.), convicted for the offense of bodily injury by negligence under Article 196 paragraphs (2) and (3) in relation to Article 194 paragraph (1) letter b) of the Criminal Code (injured party M.), and acquitted for the offense of bodily injury by negligence under Article 196 paragraphs (2) and (3) in relation to Article 194 paragraph (1) letter b) of the Criminal Code (injured party P.).

Pursuant to Article 188 paragraph (1) in relation to Article 189 paragraph (1) letter f) of the Criminal Code, the defendant P. was sentenced to 17 years of imprisonment for the offense of aggravated murder (victims B.D. and B.A.) and pursuant to Article 32 paragraph (1) in relation to Article 188 paragraph (1) and Article 189 paragraph (1) letter f) of the Criminal Code, the defendant P. was sentenced to 8 years of imprisonment for the offense of attempted aggravated murder (injured parties M. and P.).

According to Article 38 paragraph (2) in relation to Article 39 paragraph (1) letter b) of the Criminal Code, the court applied the most severe sentence of 17 years of imprisonment, to which it added a supplementary term of 2 years and 8 months of imprisonment (representing one-third of the 8-year sentence), resulting in a total sentence of 19 years and 8 months of imprisonment to be served by the defendant. To reach this decision, the appellate court noted that committing an act with indirect or eventual intent places the perpetrator in a subjective position that, although it involves the awareness and thus understanding of the entire course of conduct and its consequences, the criminal agent acts under such conditions that at least two outcomes are actually possible: one outcome that is desired, which may or may not be addressed by criminal law, and another outcome, usually more serious and explicitly provided for by criminal law, which is not specifically desired or pursued, but whose occurrence is seen as possible and is consciously accepted by the perpetrator.

Although the possible or eventual outcome is neither specifically pursued nor desired by the criminal agent, the criminal action or inaction is conceived and carried out in such a way that it may also lead to that outcome. If the unintended consequence is consciously accepted,

then the perpetrator's conscious mental attitude must be related to all the results of the act, not just those that were intended.

In addition to the minimal criteria for identifying indirect intent, as outlined in Article 16, paragraph (3), letter b) of the Criminal Code, legal doctrine has also highlighted a mandatory characteristic of indirect intent—namely, that on the psycho-affective level, the perpetrator acting with indirect intent adopts a passive, indifferent attitude toward the result, which appears only as a mere possibility.

Despite the seemingly irreconcilable contradiction in these attitudes, the two forms of intent can coexist in the awareness and criminal expression of the same person—either when a single action endangers two or more distinct social values (as in the case of arson that also causes the death of a person), where the criminal behavior is actively directed against some values and indifferent toward others, or when the action may cause injuries of varying severity to the same value (such as a serious injury that also endangers the victim's life).

On the other hand, recklessness with foresight, also referred to as criminal negligence or *culpa with foresight*, is characterized by the fact that although the perpetrator foresaw the possible outcome of their act, they neither intended nor accepted it, recklessly and unjustifiably believing that it would not occur.

The offender anticipates two outcomes of their action or inaction: one that may or may not be specified in the incriminating norm, which they pursue, and another that is always covered by criminal law, which is, however, uncertain in terms of its occurrence and subordinate to the first, and which they neither desire nor accept. This form of criminal fault comes close to indirect (eventual) intent through the shared element of foresight present in both.

However, the criterion that distinguishes these two forms of culpability lies in the fact that, while in the case of indirect intent the perpetrator adopts a passive, indifferent attitude toward the more serious outcome—awaiting its occurrence as something merely possible or eventual—in the case of recklessness with foresight, the perpetrator, who makes a careless assessment of their ability to prevent the outcome, adopts an attitude of active anticipation aimed at avoiding it. Their recklessness consists precisely in the misjudgment of the effectiveness of certain objective and subjective factors they rely on.

²⁵⁰When the hope that a harmful or dangerous outcome will not occur is based on chance—on an event that might happen but does not actually occur—in other words, on hazard, we are no longer dealing with recklessness (*culpa with foresight*), but with indirect intent, as it effectively involves the perpetrator's acceptance of the risk of the outcome occurring.

In traffic accident cases, the objective circumstances typically invoked to justify the perpetrator's belief that the result would not occur include the car's performance, the driver's experience and skill, the late hour and absence of traffic or pedestrians, etc., even if, under objective analysis, these factors prove to be insufficient.

Nevertheless, in certain situations, due to the high degree of risk involved in the activity, these objective circumstances that could form the basis of the perpetrator's belief in the non-occurrence of the result are considered *ab initio* to be insufficient, ²⁵¹since the risk created is clearly too great to be reasonably counterbalanced by those factors.

In determining the form of culpability, the Court primarily considered the moment immediately preceding the imminent danger triggered by the defendant, P. As established in the forensic reports no. y/21.02.2017 and no. x/06.03.2017, prepared by the Inter-County Forensic Expertise Laboratory and subsequently revised and supplemented, the defendant was initially driving at a speed exceeding the legal limit within localities—the average speed from the last intersection to the moment of impact being 88 km/h—thereby creating a state of potential danger that could have been mitigated by reducing speed.

At the moment the defendant crossed the center line of the road, at least 55 meters before the impact, entering the opposite lane, he triggered a new state of danger that overlapped with the initial state of danger. (From the surveillance footage provided by the Traffic Management Service, it appears that the defendant entered the opposite lane as he reached the base of the Nicolina bridge. He was later captured by the dash camera of witness O.'s vehicle, which was stationary at the far end of the bridge toward Podu Roș, where the collision occurred—still on the opposite lane.)

²⁵⁰ Udroi, M., *Criminal Law Summaries. General Part*, 3rd Edition, vol. I.

²⁵¹ Tanoviceanu, I., *Criminal Law Course*, vol. I, Legal Culture Collection, Facsimile Edition, Bucharest: Universul Juridic, 2018;

Immediately afterward, approximately 55 meters before entering the intersection, while driving on the wrong side of the road, the defendant realized that his visibility toward the right side of the intersection was obstructed by a tram and vehicles that had stopped at the red traffic light.

In this factual context—namely, the defendant was driving at approximately 88 km/h, traveling in the opposite lane, with visibility toward the right side of the intersection blocked by a tram stopped at a red light—at about 55 meters from the intersection, the defendant decided, or maintained a prior decision, not to stop at the red light and continued driving toward the intersection at speed. Just before the impact, his speed reached approximately 96 km/h, thus creating a state of imminent danger.

Referring to the moment immediately preceding the creation of the imminent danger, the Court found that the defendant acted under circumstances in which at least two outcomes were possible: one outcome that he intended—endangering the safe and smooth flow of traffic on public roads, which would have entailed a contraventional (minor offense) liability—and another outcome, provided for by criminal law, uncertain and subordinate to the first, namely the killing of individuals participating in traffic or located in the vicinity of the road. The most serious consequences were considered, as the defendant's vehicle was traveling at approximately 96 km/h just before the impact.

Regarding the second outcome, the Court found that although the defendant did not specifically intend or pursue it, he consciously accepted the possibility of its occurrence. The form of culpability with which he acted was that of indirect (eventual) intent.

Thus, the defendant's passive, indifferent attitude toward the more serious outcome is evident—an attitude he adopted before the onset of the imminent danger, and which he perceived as possible given that he decided to run a red light in a busy intersection in the city of Iași, while driving in the wrong lane at a speed exceeding 88 km/h, with his visibility on the right side of the intersection blocked by a tram.

It is also clear that, given the above factual context, the defendant's hope of avoiding a harmful result was based purely on chance—on hazard—thereby accepting the risk of that result occurring. As such, this is a case of *eventual intent*.

On the other hand, the case data reveals no evidence that the defendant made even the slightest active effort to prevent the harmful outcome, nor that he made a careless assessment of the chances of avoiding it.

When the defendant made the decision—or maintained a previously made decision—to run the red light, he not only kept but even increased his speed, reaching approximately 96 km/h just before the impact. As such, it is evident that he took no minimum precaution before entering the intersection on a red light—no measure that would have allowed him, or at least allowed an attempt, to stop in the event another vehicle or pedestrian, lawfully proceeding on a green light, appeared in front of him.

It cannot be argued that he misjudged this objective factor—namely, his speed—especially considering that a vehicle traveling at approximately 96 km/h cannot, under any circumstances, come to a stop within the remaining distance before entering the intersection. (According to the forensic report no. y/06.03.2017, it was concluded that only 39 meters from the point of impact, the defendant could have seen the Dacia Logan vehicle, and in order to stop and avoid a collision from that point, his speed would have needed to be around 66 km/h.)

The specific circumstances—namely, a crowded intersection with vehicles stopped on both sides of the traffic light, which had been red for a significant amount of time before the defendant approached the intersection (video footage shows the light turned red approximately 9 seconds before the impact), and with visibility on the right half of the intersection completely obstructed by a tram—could in no way reasonably justify the defendant’s belief, even a careless one, that no harmful result would occur. These conditions must be considered *ab initio* as insufficient to support such a belief, given that the risk of entering an intersection on a red light under these circumstances was clearly too great to be reasonably covered by any of them. It is evident that the defendant’s hope rested solely on chance.

As for the defendant’s driving skills, the Court found that, under the above-described circumstances, these could no longer be reasonably considered a factor that the defendant could have taken into account in evaluating the possibility of avoiding the result, nor one he might have misjudged. This is because, through his own conscious actions (driving at approximately 96 km/h, entering the opposite lane, and accepting the fact that he would have no visibility on the right side of the intersection due to a stopped tram), the defendant created an almost

imminent risk of a collision—a risk that could no longer be eliminated or even reduced by the time he decided to enter the intersection in those conditions²⁵². Any skill the defendant may have had was clearly ineffective. It cannot be argued that he misjudged or carelessly assessed his skills, since at the moment he decided to enter the intersection in the described context, the occurrence or non-occurrence of the accident no longer depended on him, but solely on chance.

In this context, the defendant's claim that he was driving with his hazard lights on is entirely irrelevant, given that his vehicle was not visible from the right side of the intersection, and the very high speed at which he was traveling made any reasonably foreseeable situation (such as the lawful crossing of a vehicle or pedestrian on a green light) inherently uncontrollable—both for the defendant and for the other traffic participants.

Regarding the fact that the defendant applied the brakes before the impact, this action occurred after he had already made the decision to enter the intersection under the described circumstances and after the danger of a collision had become imminent. It can therefore be attributed to an instinct of self-preservation.

The argument of the trial court—that the defendant misjudged an objective situation which might have led him to hope, albeit recklessly, that he could pass through the intersection before the vehicles crossing from the sides (which had a green light) reached the middle of the intersection—cannot be accepted. This is because the first instance court refers to a point in time well before the imminent danger was triggered—namely, the moment when the defendant reached the crest of the bridge and the traffic light became visible, which at that time was green.

The form of culpability with which the defendant acted cannot be assessed based on a moment when the conditions for the onset of imminent danger had not yet materialized, as at that moment no actual decision by the defendant can be considered to have been made, given that the factual context prompting such a decision had not yet taken shape.

Thus, in cases involving a continuous action, it is possible for initial recklessness (*culpa*) to be replaced, at the point when the circumstances change, by direct or eventual intent.

²⁵² Stretanu, F., Nițu, D., *Criminal Law. General Part*, vol. I, Universul Juridic Publishing House, Bucharest, 2014;

In the present case, the Court found that although initially—at the moment the defendant reached the top of the bridge and saw the traffic light and intersection—he might have carelessly believed he could pass through the red light before the vehicles crossing on green entered the intersection, the circumstances subsequently changed. Specifically, a tram and four vehicles (one in each lane) had stopped at the red light in front of him; several seconds had passed since the traffic light had turned green for the vehicles coming from the side; and most importantly, driving in the wrong lane had completely obstructed his view of the right side of the intersection.

It is clear that, at the point when all these circumstances converged, the defendant faced a new assessment and chose to continue driving at a speed that reached 96 km/h just before the impact, showing indifference as to whether he would cause the death of traffic participants or others nearby. From that moment on, the occurrence or non-occurrence of that outcome depended solely on chance or luck. This final decision also defines the form of culpability with which the defendant acted—namely, *indirect intent* (also known as *eventual intent*).

Regarding the fact that no motive were identified in this case for which the defendant indifferently accepted the killing of individuals, including himself, the Court found that this aspect cannot serve as an argument to either confirm or deny the existence of any of the forms of culpability previously analyzed.

Furthermore, the Initial Forensic Psychiatric Expert Report No. yx/09.03.2017, issued by the IML Iași, concluded that the defendant, P., displays a long-lasting disorder in his personality structure, specifically an "emotionally unstable personality disorder of the impulsive-explosive type." This report identified some psychological factors that could have led the defendant to accept, indifferently, such grave outcomes. However, identifying a precise and concrete answer regarding the causes of the defendant's adoption of such behavior goes beyond the procedural framework we are in, entering the realm of forensic psychology or another specialized field.

It should also be considered that the evidence shows that, on the same day, not long before entering the intersection of Nicolina Avenue and Rozelor Alley at 13:09:24 on a red light, the defendant had already crossed three other red lights, with luck preventing any traffic accidents from occurring. Specifically, at 13:02:11, he entered the intersection of Nicolina Avenue and Sălciilor Street on a red light, at 13:02:24, he entered the intersection of Nicolina Avenue and

Tudor Neculai Street on a red light, and at 13:07:13, he entered the intersection of Nicolina Avenue and School No. 42 on a red light.

Moreover, he also entered the opposite lane for the first time around 11:30 AM, when witness C., who was driving legally in his lane, swerved to the right to avoid a collision with the defendant's car and ended up on the sidewalk.

Every time he ran a red light or entered the opposite lane, the defendant accepted that he might collide with another car or hit a pedestrian. Statements from witnesses show that only the lucky reactions of those endangered in order to save themselves prevented a harmful result. The defendant always displayed a passive, indifferent attitude.

This is also supported by the testimony of driver J., who called the emergency service 112 twice, reporting that "a jerk is speeding through the city, running red lights, almost hit a pedestrian, and ran away... he runs all the red lights, he's been cutting off everyone in traffic, almost hit children on the pedestrian crossing, he's going very fast, it's very dangerous, I was really scared."

Thus, the Court found that the defendant's indifferent attitude and acceptance of the possibility of killing others, and even himself, was not an isolated incident. It also characterized his previous actions, where only luck prevented him from causing more victims.

In conclusion, the Court, aligning with the assessment made in the indictment, found that the defendant, by failing to comply with the most important traffic rules, namely driving at a speed much higher than the legal limit in the locality, crossing the continuous line, driving significant distances on the opposite lane, and most dangerously, entering the intersection on a red light, turned the car into a weapon of crime, indifferent to the foreseeable severe consequences²⁵³, namely the killing or injury of individuals.

4. In another case, from the docket of the courts in Bucharest, the appeal filed against the judgment of the Bucharest Tribunal was admitted by the Bucharest Court of Appeal. The acquittal decision made by the first court concerning the commission of the crime of attempted

²⁵³ Dongoroz, V., *Theoretical Explanations of the Romanian Criminal Code*, vol. I, 2nd edition, Romanian Academy Publishing House / ALL Beck Publishing House, Bucharest, 2003;

murder was overturned, and the defendant, S., was sentenced to 5 years in prison. The appellate court found that the defendant's claim of a mere handling error of the vehicle was excluded, specifically the maneuvering of a Touareg vehicle, which was involved in road aggression and hitting a Dacia Logan while driving at approximately 80 km/h, causing it to collide, be projected off the road, and strike a railway bridge foot.

The Court appreciated that the evidence in the case indisputably showed that defendant S. voluntarily made a sharp turn to the right with the vehicle he was driving, with the clear intent to strike the Dacia Logan and project it off the roadway. All actions taken by the defendant immediately prior to the collision were carried out with the purpose of forcing the other driver to change lanes and positioning himself to violently strike the Dacia Logan, capable of forcing it off the road.

The footage from the camera mounted on the dashboard of the car driven by witness A.L. was deemed decisive in demonstrating the voluntary and conscious nature of the maneuver carried out by the defendant, which resulted in the collision with the Dacia Logan. It was clear, even to those without specialized technical knowledge, that the defendant S. acted with the intention of hitting the car and forcing it off the road.

Independent of the aspects retained in the two criminalistic expert reports in the case, the footage showing the collision between the two vehicles and the moments immediately preceding it is sufficient to eliminate any doubt regarding the defendant's subjective position in relation to the traffic event he was involved in.

The Court noted that it was evident that, considering the speed of both vehicles and the heavy traffic in the area, the defendant was aware that the lane change maneuver and the sudden stop of his vehicle to stop the Dacia Logan could not be performed safely and would have seriously endangered the other traffic participants, making the collision between the two vehicles imminent.

It was also noted that the defendant was aware that, as a result of the intentional collision with the Dacia Logan, the lives of those inside the car were in danger. The fact that the fatal result did not occur was considered an issue independent of the defendant's will, being solely due to luck, and thus the idea that the defendant did not foresee that the intentional collision

with the Dacia Logan could result in the deaths of the individuals in that car and other traffic participants was rejected. This was taken into account, considering the defendant's above-average training and experience as a driver, capable of understanding the consequences of such an act.

Thus, the attitude of defendant S., manifested in the intentional striking of the car in which the civil parties C.F., C.I., and C.A. were present, highlights his indifference to their lives, a psychological stance characteristic of indirect intent²⁵⁴, as, although there is no evidence that he intended to kill the victims, he foresaw and accepted this possibility.

IV. Conclusions

Man is the most valuable asset in our society; effective legal protection of the individual and of their fundamental and intangible attributes—namely, life, health, and physical integrity—can only be ensured by uncompromisingly sanctioning all those who endanger them. Of course, today in our postmodern society, the individual is accompanied by new technologies, by powerful vehicles, which, all too often, when combined with human frailty, give rise to immeasurable tragedies.

The cases presented here serve as an invitation to reflect—both for all those involved in traffic and for the judicial authorities.

The cases discussed may appear similar at first glance, but what differentiates them is the factual context, which must be read and understood in detail. Some of them are indeed high-profile due to the notoriety of the defendants, and a superficial reading could lead to prejudice.

In such situations, the subjective factor is essential for the legal classification of the offence.

Alongside the minimum criteria for identifying indirect intent indicated in Article 16(3)(b) of the Criminal Code, doctrine has also emphasized a key feature of indirect intent: that on a psycho-affective level, the perpetrator adopts a passive, indifferent attitude toward the result, which appears merely as a possibility.

²⁵⁴ Bulai, C., Bulai, B., *Criminal Law. General Part*, Universul Juridic Publishing House, Bucharest, 2013;

On the other hand, conscious negligence (*culpa* with foresight), also known as criminal recklessness, is characterized by the fact that although the perpetrator foresees the outcome of their action, they neither intend nor accept it, basing their belief—unjustifiably and carelessly—that the result will not occur.

The difference between conscious negligence and indirect intent lies in the perpetrator's subjective position: in the first case, the person foresees the result but does not accept it, wrongly believing it will not occur; in the second, the person accepts the possibility of the result, though not actively pursuing it. Both forms share the common element of foresight, bringing conscious negligence closer to eventual intent.

However, the criterion distinguishing these two forms of culpability²⁵⁵ lies in the fact that, while in the case of indirect intent the perpetrator adopts a passive, indifferent stance toward the more severe outcome—awaiting its possible occurrence—in cases of conscious negligence, the perpetrator attempts to actively prevent the result, although their recklessness lies in misjudging the effectiveness of certain objective and subjective factors they rely on.

If the hope of avoiding the harmful or dangerous result is based on chance—on an event that might occur but ultimately does not—then we are no longer dealing with negligence, but with indirect intent, since the perpetrator consciously accepts the risk of the outcome.

In traffic accident cases, certain objective factors are typically invoked as the basis for the offender's belief that the outcome will not occur—such as vehicle performance, the driver's experience and skills, late hours, absence of traffic or pedestrians, etc.—even though a more objective analysis often reveals these factors as insufficient.

Nevertheless, in certain situations, due to the high level of risk involved, such objective factors that might otherwise support the offender's belief are considered *ab initio* insufficient, because the risk created is clearly too great to be reasonably mitigated by such circumstances.

²⁵⁵ Mitrache, C., Mitrache, C., *Romanian Criminal Law. General Part*, 3rd revised and expanded edition, Universul Juridic Publishing House, Bucharest, 2019;

We note, in relation to the first case, that in our view the appeal in cassation was inadmissible.

In our opinion, when seeking a correct legal conclusion, we must consider that intent has always been regarded as a highly significant element in criminal offences. This may be why many criminal law scholars have argued that intent is an essential component of an offence, much like the material element, and although both are necessary, intent is considered of greater importance, as it is intent that embodies criminality and determines the degree of the offence—for it is intent that truly disturbs society.

What is punished is not merely the act committed, but the entire personality of the offender—the origin of the offence.

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Criminal protection of medical personnel against violence. Between the opportunity of criminalization and the need for urgent legislative reform

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Abstract

Conceived out of the need to provide medical system personnel with protection against the increasingly numerous acts of aggression, the offense provided under Article 652 (formerly Article 641¹) of Law no. 95/2006 on healthcare reform ensured, for a short period, an aggravated sanctioning regime for acts of psychological and physical violence directed at medical staff. Having certain drafting deficiencies from the very moment of its adoption, unfortunately, after a short period, with the adoption of the new Criminal Code, the regulation became even more problematic, making urgent legislative intervention necessary in order to bring it into line with the provisions of the Code.

Keywords: *doctor, medical personnel, violence, offense*

JEL Codes: K14, K32

I. Introduction

The World Health Organization defines workplace violence as “incidents in which staff are abused, threatened or assaulted in circumstances related to their work, including during commuting to and from the workplace, involving an explicit or implicit threat to their safety, well-being, or health”. Healthcare workers are exposed to all situations identified by the organization as posing a special risk of workplace violence, which makes this category of employees unique in terms of the extent and significance of the phenomenon of workplace violence.²⁵⁷

The phenomenon of assaults against medical personnel has been continuously and alarmingly increasing in recent years, a fact that has been consistently confirmed by research conducted both globally and nationally.

At the global level, numerous statistics indicate the seriousness of the phenomenon. Thus, a study carried out in 2002 in 79 countries showed that 55% of healthcare workers reported having been direct victims of violence, and 16% reported violence against their colleagues. The perpetrators of the assaults were identified as patients or members of their

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²⁵⁷ World Health Organization. (2002). Framework guidelines for addressing workplace violence in the health sector. International Labour Office.
<https://iris.who.int/bitstream/handle/10665/42617/9221134466.pdf?sequence=1>

families in more than 50% of cases. The same study indicates that the World Health Organization (WHO) reported that up to 38% of healthcare workers encounter situations of aggression at least once in their career, up to 16 times more frequently than in other professional fields.²⁵⁸ A more recent study²⁵⁹, conducted in 2024, which focused on violence against personnel in intensive care units, compiled the results of 75 studies identified in scientific databases, studies that involved 139,533 healthcare workers from intensive care units in 32 countries, concluding that up to 97% of workers were subjected to verbal violence, and up to 82% were victims of physical violence. Workplace violence among personnel in intensive care units was more frequent compared to personnel in general wards, but similar to that encountered in emergency departments.

Domestically, a study conducted by the College of Physicians of Romania indicates that 10% of over 8,000 responding doctors suffered physical aggression in connection with the medical act performed, with the most exposed being doctors under 35 years of age (13%). Specialties with high percentages include psychiatry (21%), anesthesiology and intensive care (20%), pediatrics-internal medicine (12%), and general surgery, obstetrics-gynecology, and rehabilitation (11%). It is shown that it is imperative for health professionals to carry out their activity without fear of being subjected to acts of violence, considering that defensive medicine has become a reality in our country's medical system, which means that some doctors practice more with the intention of protecting themselves against possible accusations than out of the real need of the patient.²⁶⁰

Given this reality and taking into account the importance of the social value of the medical act, there is a need for special criminal protection, meant to guarantee the safety of those who provide essential services for the life and health of the population.

The objective of this paper is to analyze the current regulation, to highlight its possible shortcomings, and to formulate concrete proposals for improvement.

II. The current legal framework

Starting from the need to provide effective legal protection²⁶¹ for medical personnel against acts directed at their bodily integrity and health, Law no. 212/2012 for the amendment of Law no. 95/2006 on healthcare reform²⁶² introduced, under Article 641¹, an offense intended to criminally sanction acts committed against medical personnel. The offense established an aggravated sanctioning regime for crimes against life, bodily integrity and health, when the

²⁵⁸ <https://gh.bmj.com/content/8/9/e013101>.

²⁵⁹ Berger, S., Grzonka, P., Frei, A., Hunziker, S., Baumann, S., Amacher, S., Gebhard, C., & Sutter, R. (2024). Violence against healthcare professionals in intensive care units: A systematic review and meta-analysis of frequency, risk factors, interventions, and preventive measures. https://ccforum.biomedcentral.com/articles/10.1186/s13054-024-04844-z?utm_source=chatgpt.com#Abs1.

²⁶⁰ Colegiul Medicilor din România. (n.d.). CMR – Colegiul Medicilor Botoșani: Apel la responsabilitate. <https://www.cmr.ro/cmr-colegiul-medicilor-botosani-apel-la-responsabilitate.html>.

²⁶¹ Mitric, B. M. (2023). Drept civil. Teoria generală a obligațiilor (p. 7). Editura Sitech.

²⁶² Legea nr. 212/2012 pentru completarea Legii nr. 95/2006 privind reforma în domeniul sănătății. (2012). Monitorul Oficial al României, nr. 772, 15 noiembrie 2012.

victims are employees of the medical system. As shown also in the Explanatory Memorandum²⁶³ that accompanied the draft legislation, the approach aimed to establish a sanctioning regime similar to the offense of assault against public officials, a solution considered at that time to be appropriate, as, taking into account the nature of the medical profession and the fundamental obligations of the physician towards their patient, the physician was not a public official and therefore the provisions of Article 239 of the former Criminal Code could not be applied.

Thus, the offense provided by Article 641¹ of Law no. 95/2006 on healthcare reform²⁶⁴ had the following legal content:

(1) The threat made directly or through direct means of communication against a doctor, nurse, ambulance driver, paramedic or any other type of personnel from the healthcare system, while performing their duties or for actions carried out in the exercise of their duties, shall be punished with imprisonment from 6 months to 2 years or with a fine.

(2) Hitting or any acts of violence committed against the persons referred to in paragraph (1), while performing their duties or for actions carried out in the exercise of their duties, shall be punished with imprisonment from 6 months to 3 years.

(3) Bodily harm committed against the persons referred to in paragraph (1), while performing their duties or for actions carried out in the exercise of their duties, shall be punished with imprisonment from 6 months to 6 years.

(4) Serious bodily harm committed against the persons referred to in paragraph (1), while performing their duties or for actions carried out in the exercise of their duties, shall be punished with imprisonment from 3 to 12 years.

The offense introduced through the legislative amendment fully reproduced the normative content of the offense of assault against public officials provided under Article 239 paragraphs (1)-(4) of the former Criminal Code, including with regard to the penalty limits.

It is evident that, by adopting the penalty limits of the offense of assault against public officials, which were higher than those provided for the absorbed offenses - threat, hitting or other acts of violence, bodily harm, and serious bodily harm -, the legislator intended and succeeded in granting increased protection to medical personnel, justified by the special status of the passive subject²⁶⁵. In this way, the criminal protection of medical staff against acts of verbal and physical violence was at the level of the protection granted to public officials who exercise a function that involves the exercise of state authority, in accordance with the legal regulations in force at that time.

²⁶³ Senatul României. (2011). Expunere de motive – Legea nr. 212/2012 (Proiect legislativ 11L668EM). <https://www.senat.ro/legis/PDF/2011/11L668EM.PDF>.

²⁶⁴ Legea nr. 95/2006 privind reforma în domeniul sănătății, republicată. (2015). Monitorul Oficial al României, nr. 652, 28 august 2015.

²⁶⁵ Rotaru, M. (2023). Despre infracțiunile prevăzute în Legea nr. 95/2006 privind reforma în domeniul sănătății. Curentul Juridic, (3). <https://www.lege6.ro>

Subsequently, following the republication of Law no. 95/2006 on August 28, 2015, the articles were renumbered, and the former Article 641¹ became Article 652, its legal content remaining unchanged.

Nevertheless, the reasons considered by the legislator at the time of the amendment of Law no. 95/2006 have been lost over time, the current regulation of the offense provided under Article 652 presenting a number of issues that will be highlighted further, while also proposing several solutions for improving the legal text.

III. Identified issues

1. Legislative inconsistency with the offense of assault as provided under article 257 of the Criminal Code

As previously highlighted, the offense provided under Article 641¹ (currently Article 652) of Law no. 95/2006 on healthcare reform was introduced as a result of the necessity to protect medical personnel against acts of physical and psychological aggression, as well as the impossibility of classifying them as passive subjects of the offense provided under Article 239 of the former Criminal Code. The legislator's option at that time was to provide for a new offense in the special law, with content identical to that of the offense of assault against public officials.

With the entry into force of the new Criminal Code, the provisions regarding the offense of assault were reformulated and are currently provided under Article 257, with the following legal content:

(1) A threat committed directly or through direct means of communication, hitting or other acts of violence, bodily harm, battery or bodily harm causing death, or murder committed against a public official performing a function involving the exercise of state authority, while in the exercise of their duties or in connection with the exercise of those duties, shall be punished with the penalty provided by law for that offense, the special limits of which are increased by one third.

(2) The commission of an offense against a public official performing a function involving the exercise of state authority or against their property, with the aim of intimidation or retaliation, in connection with the performance of official duties, shall be punished with the penalty provided by law for that offense, the special limits of which are increased by one third.

(3) The same penalty shall apply to acts committed under the conditions of paragraph (2), if they concern a family member of the public official.

(4) The acts provided under paragraphs (1)-(3), when committed against a police officer or military personnel, as well as against forestry personnel vested with public authority, while performing their official duties or in connection with the performance of such duties, shall be punished with the custodial penalty provided by law for that offense, the limits of which are increased by one half.

Relevant to the topic of this paper, paragraphs (1)-(3) of Article 257 of the Criminal Code differ substantially from paragraphs (1)-(4) of Article 239 of the former Criminal Code. The new regulation represents a significant improvement over the previous form of the offense, both in terms of the material element of the objective side and in terms of the sanctioning regime.

In light of these legislative developments, a reassessment by the legislator of the legal content of the offense provided under Article 652 of Law no. 95/2006 would be necessary, an approach that would require harmonizing the special provisions with the updated general provision concerning the offense of assault against public officials, as it is currently set out in Article 257 of the Criminal Code.

Amending the provisions of Article 652 in accordance with the current form of the offense of assault would also be beneficial from another perspective. At the time the special provision was adopted, the following acts committed against medical personnel were taken into account: threats, hitting and other acts of violence, bodily harm, and serious bodily harm. However, other acts of greater gravity than those already criminalized, such as battery or bodily harm causing death, and murder, were not considered. These acts can also be committed against medical personnel and should be included in the scope of the offense. Including in the legal content the offense of battery or bodily harm resulting in death as an alternative form of the material element, following the model used in the case of the offense of assault against public officials, would be an appropriate legislative choice, having the role of completing the range of offenses directed against bodily integrity and health. As for the offense of murder, it too should be taken into consideration for inclusion in the legal provision, since the aggravating circumstance provided under Article 175 letter f of the former Criminal Code - in connection with the performance of the victim's professional or public duties - is no longer found in the new Criminal Code. Moreover, under the current Criminal Code, the offense of assault also includes any other offense committed against a public official who exercises a function involving the exercise of state authority, or against that person's property, for the purpose of intimidation or retaliation, in connection with the exercise of official duties, an incrimination that could also be adopted in the future legal content of the offense provided under Article 652 of Law no. 95/2006.

2. Lack of correlation with the provisions of the Criminal Code

The provisions of Article 652 of Law no. 95/2006 on healthcare reform are no longer aligned with the provisions of the Criminal Code concerning offenses against bodily integrity and health.

Thus, the offense of serious bodily harm, which was previously regulated as a distinct offense, is no longer provided for under the new Criminal Code, as a result of the simplification of the legal framework concerning offenses against bodily integrity and health.²⁶⁶ Some of the acts that previously fell under this offense have been incorporated into the offense of bodily harm, while others have been included in the offense of hitting and other acts of violence. Consequently, these modifications have also led to the removal of serious bodily harm from the content of the offense of assault against public officials, as regulated by Article 257 of the Criminal Code. In this context, paragraph (4) of Article 652 of Law no. 95/2006 has become inapplicable and must be eliminated from the structure of the incriminating provision.

Another problematic aspect is the use of the phrase "hitting or any acts of violence" in paragraph (2) of Article 652, a formulation that does not correspond to the offense of "Hitting

²⁶⁶ Udrioiu, M., & Constantinescu, V. (2014). Noul Cod penal. Codul penal anterior. Prezentare comparativă. Observații. Ghid de aplicare. Legea penală mai favorabilă (p. 262). Editura Hamangiu; Popa, C., & Mitric, B. M. (2015). Drept penal. Partea specială (pp. 71–79). Editura Sitech.

or other acts of violence” provided under Article 193 of the Criminal Code, nor to the offense of assault against public officials under Article 257 of the Criminal Code. The word “any” must be removed in order to ensure an exact reference to the offense provided under Article 193 of the Criminal Code, whose marginal title is “Hitting or other acts of violence.” It should be noted that this drafting error has existed since the adoption of Law no. 212/2012, as the marginal title of the offense under Article 193 of the Criminal Code was not changed with the adoption of the new Criminal Code.

3. The sanctioning regime

At present, the offense provided under Article 652 no longer fulfills its initial purpose, namely that of ensuring a more severe sanctioning framework for acts of violence committed against medical personnel. This dysfunction becomes evident when comparing the penalty limits established by Article 652 with those provided by the current Criminal Code for the absorbed offenses. The only exception is the offense of threat, for which the penalty limits provided under Article 652 are higher than those provided under Article 206 of the Criminal Code.

Thus, for the offense of hitting and other acts of violence provided under paragraph (2) of Article 652, the law provides a punishment of imprisonment from 6 months to 3 years. By comparison, only the simple form of the offense provided under paragraph (1) of Article 193 of the Criminal Code has a lower penalty regime - imprisonment from 3 months to 2 years or a fine. However, for the aggravated form provided under paragraph (2) of Article 193 of the Criminal Code, the punishment is imprisonment from 6 months to 5 years or a fine, and in the case of the further aggravated form provided under paragraph (3), the penalty limits provided under Article 193 paragraphs (1) and (2) are increased by one third.

The situation is similar for the offense of bodily harm, provided under paragraph (3) of Article 652, which is punishable by imprisonment from 6 months to 6 years. In contrast, for the basic form of the offense provided under Article 194 of the Criminal Code, the punishment is imprisonment from 2 to 7 years; for the first aggravated form provided under paragraph (2), the punishment is imprisonment from 3 to 10 years; and in the case of the aggravated form provided under paragraph (3), the special penalty limits provided under Article 194 paragraphs (1) and (2) are increased by one third.

In this context, we consider that it is necessary to reconfigure the sanctioning regime under Article 652, in the sense of increasing the special penalty limits, in order to reflect the current normative reality and to preserve the rationale for distinct criminalization. An appropriate solution, which would also ensure the stability of the provision and protect it from possible changes in the penalty limits of offenses provided by the Criminal Code, could consist in adopting the mechanism used in the case of the offense of assault against public officials as provided under Article 257 of the Criminal Code, namely referring to the special penalty limits of the absorbed offenses, which would then be increased by one third.

IV. *De lege ferenda* proposals

In light of the aspects presented above, we consider that it is necessary for the legislator to urgently intervene to amend Article 652 of Law no. 95/2006 on healthcare reform. The objective of this intervention must be to restore the provision to the purpose originally intended

at the time of its adoption, namely to ensure, through criminal law means, the protection of medical personnel against the physical and psychological aggressions to which they are subjected while exercising their duties or for actions carried out in the exercise of their duties.

Summarizing the proposals made throughout this paper, we can highlight several key coordinates that must be considered in the process of updating the legal text:

- since the offense of serious bodily harm is no longer provided by the Criminal Code, it is necessary to eliminate it from the content of the offense provided under Article 652;
- it is necessary to eliminate the term “any” from the expression “hitting or any other acts of violence”;
- the penalty limits must be revised in accordance with the new special penalty limits provided by the Criminal Code. For this purpose, two alternative solutions may be adopted: either new penalty limits will be established that are higher than those provided for the absorbed offenses, or the system of increasing the penalty limits of the absorbed offenses by one third will be used, without expressly mentioning the special penalty limits in the legal text;
- the material element of the offense must be expanded by including two new alternative modalities: battery or bodily harm resulting in death, and murder; at the same time, a new assimilated variant could be considered, consisting of committing an offense against medical personnel while exercising their duties or for actions carried out in the exercise of their duties, or against the property of medical personnel, for the purpose of intimidation or retaliation;
- maintaining the logic initially intended at the time of the original incrimination, it is necessary to ensure correlation with the offense of assault against public officials, as currently regulated under Article 257 of the new Criminal Code.

In conclusion, we propose a new version of the drafting of Article 652 of Law no. 95/2006 on healthcare reform, which we consider up-to-date and significantly improved compared to the existing version:

(1) A threat committed directly or through direct means of communication, hitting or other acts of violence, bodily harm, battery or bodily harm resulting in death, or murder committed against a doctor, nurse, ambulance driver, paramedic, or any other type of personnel from the healthcare system, while performing their duties or for actions carried out in the exercise of their duties, shall be punished by the penalty provided by law for that offense, the special limits of which shall be increased by one third.

(2) The commission of an offense against the persons referred to in paragraph (1) or against their property, for the purpose of intimidation or retaliation, in connection with actions carried out in the exercise of their duties, shall be punished by the penalty provided by law for that offense, the special limits of which shall be increased by one third.

(3) The same penalty shall apply to acts committed under the conditions of paragraph (2), if they concern a family member of the persons referred to in paragraph (1).

DIGITAL CRIME AND SOCIAL IMPACT. THE EVOLUTION OF CRIMINAL BEHAVIOR AND THE CHALLENGES OF CRIMINAL LIABILITY IN THE DIGITAL ERA

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Abstract

This paper analyzes the major challenges of criminal liability in the context of digital crime, with a focus on the adaptation of the Romanian legal system to new forms of criminality generated by modern technologies. In an ever-changing landscape, where cybercrimes are becoming increasingly sophisticated, the application of traditional criminal norms proves to be insufficient, necessitating legislative and procedural adjustments.

The paper investigates the rapid impact of digitalization on legal regulations and how Romanian courts address cases of cybercrime, such as cyber fraud, cyberattacks, and online abuse. Relevant decisions of the courts, including those of the High Court of Cassation and Justice, are analysed, offering a framework for interpreting computer crimes in line with existing criminal norms but also with new technological realities.

One of the main objectives of the paper is to identify specific challenges related to proving computer crimes, the difficulties in identifying cybercriminals due to digital anonymity, as well as the risks posed by insufficient data protection and the limitations of current judicial tools. Additionally, the paper emphasizes the urgent need for continuous training of judges and prosecutors in the field of information technologies to ensure the effective application of criminal law in the face of digital crime phenomena.

Finally, the paper provides a detailed analysis of international strategies for combating cybercrime and proposes legislative and institutional measures that could support better protection of citizens and critical infrastructures in Romania against cyber threats.

Keywords: digital crime, judicial system, legal sociology, institutional transformation, professional training, international cooperate

Introduction

The rapid digitalization of society has led to the emergence of new forms of crime, characterized by the use of technology in committing offenses. Digital crime has not only redefined how criminals operate, but has also created significant challenges for legal, economic, and social systems. This paper analyses the main types of digital offenses, their impact on society, and the difficulties they pose in identifying perpetrators as well as in holding them criminally accountable.

I. Digital Crime. Definition and Characteristics

Digital crime includes offenses committed through information technology, affecting individuals, institutions, and states. It is an “umbrella concept” that may be seen as lacking predictability²⁶⁷. Among the most relevant types of digital offenses are:

a. Computer Fraud and Cyber Attacks – unauthorized access to data, phishing, ransomware. These types of cyber fraud and attacks involve specific methods such as phishing via email and SMS. These represent a form of digital fraud where attackers attempt to obtain sensitive information, such as banking data, passwords, or personal details, through deceptive messages.

Regarding email phishing, the attacker sends an email that appears to come from a legitimate institution (a bank, delivery company, online platform), containing a malicious link or attachment. If the victim clicks the link, they are redirected to a fake website where they are asked to enter their personal information.

SMS phishing (Smishing) works similarly, but the attacker sends a text message with a malicious link or a request for personal data, usually claiming to be from a bank or official authority.

Both methods are frequently used to steal money or identities.

Ransomware attacks are a form of cybercrime in which hackers use malicious software to encrypt the victim's files, blocking access to their own data. After encryption, attackers demand a ransom payment—usually in cryptocurrency to avoid transaction tracking—in exchange for unlocking the data.

These attacks target both individuals and institutions, including hospitals, companies, and public administrations, causing major damage. Sometimes, even after the ransom is paid, the data remains inaccessible or is sold on the darknet.

b. Cyberbullying and Online Harassment

Cyberbullying and online harassment represent forms of abuse carried out through digital technologies, such as social networks, messaging platforms, forums, or online games. These behaviors include threats, insults, public humiliation, or repeated intimidation, all of which have a negative impact on victims, ranging from stress and anxiety to severe depression. Moreover, these forms of harassment raise legal challenges concerning the boundary between freedom of expression and abusive behaviour, as well as the application of criminal sanctions in the digital environment.

²⁶⁷ G. Zlati, *Treatise on Cybercrime*, Volume I, Ed. Solomon, 2020, pp. 5-15

In Romania, although there is no specific legislation on cyberbullying, such behaviours can be classified under offenses such as harassment or threats, as stipulated in the Criminal Code.

Cases of cyberbullying among students are frequent; however, court rulings in such situations are not always made public, in order to protect the identity of the minors involved. Nevertheless, there are notable examples illustrating how the Romanian judiciary addresses such cases—most of them having received considerable media coverage.

A study by the organization "Save the Children" reveals that nearly half of Romanian students are victims of cyberbullying, a phenomenon considered the main online threat to children²⁶⁸.

A case from Arad highlights the severity of the problem: a student was brought to trial after posting offensive and vulgar comments about her classmates on Instagram and Tellonym. Tellonym is an app that allows users to send anonymous messages. The investigation was triggered by complaints from parents, and prosecutors concluded that her messages disrupted public order and peace. Although the student claimed it was merely "teenage behavior," she was sent to trial on May 31, 2024, with the case being heard at the Chișineu-Criș Court²⁶⁹.

Another notable case involved two students from Cluj-Napoca, whose parents were ordered to pay 30,000 RON in moral damages to a teacher. They mocked the teacher on the class WhatsApp group and on Facebook, and the court ruled in favor of the educator. The court found that on the last day of the summer holiday in 2018, Raul A., aged 12, edited a photo of the teacher, associating her with an animal, and posted it on the class WhatsApp group. Later, in December 2018, he posted another derogatory image and set it as the group profile picture.

In March 2019, Cosmin B., aged 13, created a Facebook account in the teacher's name using the two images received from Raul—one as the profile picture and the other as the cover photo. He messaged classmates asking them to accept the account, stating that he had created it.

On May 31, 2021, the Cluj-Napoca Court ruled that the parents of the two minors must jointly pay the teacher 30,000 RON and publish the court decision in a newspaper at their own expense. On November 8, 2023, the Tribunal upheld the lower court's decision in full²⁷⁰.

These examples highlight that although the specific details of court rulings are not always publicly available, there are cases in which Romanian courts have taken action against online harassment in school environments.

Studies reveal an online safety crisis for children. A report by World Vision Romania²⁷¹ shows that young people spend an average of two and a half hours per day on TikTok without verifying the accuracy of the accessed information. Cyberbullying is defined as a form of online aggression that deeply affects the emotional and psychological well-being of children. In this

²⁶⁸ www.salvaticopiii.ro accessed on 17.02.2025, Study entitled "Save the Children fights against cyberbullying"

²⁶⁹ www.libertatea.ro/stiri, accessed on 04.03.2025

²⁷⁰ www.stiripesurse.ro accessed on 04.03.2025

²⁷¹ worldvision.ro/implica-te/companii, accessed on 17.02.2025

context, organizations like “Save the Children” run prevention programs, offering educational resources and counseling services for victims.

Although traditional bullying remains a major problem in Romanian schools, online harassment has rapidly expanded, being more difficult to control due to easy access to technology. “Save the Children”²⁷² warns of the escalating phenomenon, reporting that 50% of children have been insulted online, and 41% have been victims of rumors spread on social media. Even more concerning, nearly 10% of minors have been exposed through the sharing of intimate images or personal messages. These forms of digital aggression can cause severe mental health issues, including heightened anxiety and, in extreme cases, suicide attempts.

Approximately 42% of Romanian students report being insulted or humiliated on social media. The same study indicates an alarming increase in cyberbullying cases. This phenomenon also includes the sharing of compromising content generated using deepfake technologies. According to the same study by “Save the Children,” 8 out of 10 teenagers excessively use the internet, and 30% admit to spending extended time on social media with no productive purpose. Prosecutors warn of the serious consequences of such abuse, which can lead to self-harm and even suicide attempts.

The aforementioned organization emphasizes the need for rapid and effective measures to protect children, through both educational initiatives and legislative regulations. Awareness campaigns conducted in schools, including the use of online safety materials, have shown a positive impact in reducing bullying. At the same time, public policies aimed at protecting children from digital aggression should be promoted, and training for parents and educators should be supported for prompt and effective intervention. To combat cyberbullying effectively, adapting legislation to new digital realities and implementing prevention measures—such as digital education and risk awareness—is essential at both individual and institutional levels.

On the other hand, one of the main legal and protective challenges in such cases is distinguishing between freedom of expression and abusive behavior. Also, the anonymity offered by the online environment makes it more difficult to identify perpetrators.

Regarding the legal framework, the Methodological Norms for applying the provisions of art. 7 para. (1¹), art. 56¹, and point 6¹ from the annex to the National Education Law no. 1/2011 on psychological violence – bullying, adopted on May 27, 2020²⁷³, define cyber psychological violence or cyberbullying as actions carried out via the internet, computer, tablet, or mobile phone, which may include online harassment and illegal or offensive content.

The Romanian legal system addresses cyberbullying through various related legal concepts, such as the right to private life, with legal experts emphasizing the importance of protecting privacy in the online environment. The right to private life is a complex fundamental right that

²⁷² www.salvaticopiii.ro accessed on 17.02.2025, Study entitled “Save the Children fights against cyberbullying” as well as “10 Essential Things You Should Know About Cyberbullying”

²⁷³ <https://legislatie.just.ro>, Methodological Norms of May 27, 2020 for the application of the provisions of art. 7 para. (1¹), art. 56¹ and of point 6¹ of the annex to the National Education Law no. 1/2011, Issuer: Ministry of Education and Research, accessed on 19.02.2025

must be respected regardless of context. On the other hand, the right to private life must be balanced against freedom of expression. There is an ongoing challenge to strike a balance between freedom of speech and individual protection against online harassment.

Unfortunately, there is no specialized legal framework nor specific and comprehensive court rulings that directly address cyberbullying. As previously mentioned, the Romanian legal system seems to approach such cases through other existing legal categories in the Criminal Code, such as harassment or threats.

Harassment, under Article 208 of the Criminal Code, can also be interpreted in the online context when specific conditions are met. According to legal professionals, this provision allows the inclusion of certain forms of cyberbullying that involve systematic stalking and threats to the victim.

Consequently, to effectively combat cyberbullying, it is necessary to develop a specific legislative framework, increase awareness, implement victim protection mechanisms, and consider international examples and contexts.

Although Romanian case law is limited, there are international examples that offer important insights. The European Court of Human Rights has repeatedly addressed issues related to online harassment and the protection of individual rights.

The European Court of Human Rights (ECHR) has developed a complex and nuanced body of jurisprudence in the field of protecting individual rights in the digital environment. This legal evolution reflects the increasingly complex challenges posed by online information and communication technologies.

Regarding Romania, a recent and highly relevant example is the case of *Alexandru Pătrașcu v. Romania*, adjudicated in January 2025²⁷⁴. This case set important precedents regarding freedom of expression and its limits in the online space. The Court analyzed in detail how comments and statements on social media platforms can be considered harassment or infringe on individual rights. The ruling emphasizes the need for a delicate balance between freedom of expression and individual protection in the digital sphere.

Another crucial ruling was delivered in February 2024 in the case of *Danileț v. Romania*²⁷⁵. This case directly addressed the issue of online freedom of expression, especially for individuals holding public office. “The Court found that the national courts had not adequately considered several important factors, particularly the broader context in which the applicant’s statements were made, his participation in a public debate on matters of public interest, whether the value judgments expressed were sufficiently well-founded, and finally, the potential chilling effect of the sanction. Moreover, the existence of an attack on the dignity and honor of the judiciary was not sufficiently demonstrated.

In light of ECHR jurisprudence, even though a means of communication was used (namely a publicly accessible Facebook account) that might have raised legitimate concerns regarding judges’ duty of restraint, the Court held that the national courts had not given the applicant’s freedom of expression the weight and importance such a freedom deserves.

²⁷⁴ Case *Alexandru Pătrașcu v. Romania*, C1847/21 of January 7, 2025

²⁷⁵ Case *Cristian Danileț v. Romania*, C16915/2021

Consequently, the Romanian courts failed to provide relevant and sufficient reasons to justify the alleged interference with the applicant's right to freedom of expression²⁷⁶."

Given all the above, and considering the rapid evolution of technology and online communication, cyberbullying remains a complex legal challenge in Romania. The current legal system lacks specialized and comprehensive tools, which calls for a multidisciplinary approach and continuous legislative adaptation. Also "with the internet transcending physical borders, enforcing image rights across different jurisdictions becomes a logistical nightmare."²⁷⁷

c. Deepfakes and Information Manipulation Involve the Use of Artificial Intelligence to Create False Content

Deepfakes represent an increasingly sophisticated form of digital media manipulation, using artificial intelligence to create or alter images, videos, and audio recordings in a highly convincing manner. This technology enables the substitution of a person's identity in a way that can appear incredibly real, raising significant legal and ethical challenges.

The technical process of creating deepfakes involves machine learning algorithms capable of reconstructing facial expressions, movements, and voices with increasing precision. This technological capability generates a range of complex legal issues related to image rights, identity protection, and consent.

On June 26, 2023, the Romanian Senate passed a law regarding the production and distribution of fake video materials—deepfakes. "The law will be able to limit the danger and harmfulness of this technology by imposing strict rules on the production and distribution of manipulated video content²⁷⁸."

The Civil Code also offers protective instruments through provisions relating to the right to one's image and dignity. Courts may interpret these provisions to counter malicious uses of deepfakes that infringe upon individuals' honor and reputation.

Deepfakes that cause material or moral damages can be addressed through court actions for compensation.

"The decriminalization of the offenses of insult and defamation led to the situation where, in cases that would commonly be considered defamatory, the harmed party can only turn to civil courts through lawsuits for establishing the civil liability of the defamer. The court may order the perpetrator to pay damages for moral harm and take any other necessary actions to remedy the prejudice caused.²⁷⁹"

²⁷⁶ idem

²⁷⁷ Mihaela Pop, „Protecting image rights in the face of digitalization – European Union legal framework”, IMAS 2024 article

²⁷⁸ Robert Cazanciuc, The Senate voted the Law on the production and distribution of false video materials – deepfake, article published on www.juridice.ro

²⁷⁹ Defamation, incitement, and other internet posts that could cost us more than we thought, article published on 23.01.2024 on www.apador.org, accessed on 04.03.2025

At the international level, thousands of celebrities have been affected by pornographic deepfakes. “An investigation revealed that over 250 British public figures are among the victims of this type of abuse. In other words, anyone can fall victim to AI-generated pornography—from celebrities and well-known public figures at the national and international levels to ordinary people who often lack the necessary resources to protect themselves or to fight against abusers, especially as regulations and legislation prove to be insufficient.²⁸⁰”

At the European Union level, AI regulation projects propose increasingly strict measures regarding the use of technologies capable of generating deepfakes, emphasizing the importance of protecting individual rights. On July 12, 2024, Regulation (EU) 2024/1689 (also known as the AI Act) was published in the Official Journal, and on August 1, 2024, the AI Act came into force. From that date, the countdown began for key milestones regarding the implementation of the regulation²⁸¹.

d. Organized Crime in the Digital Space: Data, Drug, and Human Trafficking

Networks trafficking data, drugs, or people reflect the global dimension of organized crime in the digital space. Digital organized crime has become one of the most sophisticated and dangerous contemporary threats, transcending traditional geographic and institutional boundaries. Criminal networks are increasingly leveraging digital technologies to expand their operations, exploiting security system vulnerabilities and legislative gaps.

Modern criminal networks operate in a complex digital environment, marked by the use of advanced encryption technologies, blockchain networks, and cryptocurrencies, as well as by recruiting and coordinating members via secure online platforms. These defining traits of organized digital crime enable criminal groups to operate with increasing mobility and operational resilience.

The new frontier of organized crime is data trafficking. Networks specialized in trafficking personal data have developed increasingly sophisticated strategies for collecting and monetizing private information. The main methods include social engineering techniques, exploitation of IT system vulnerabilities, and use of the dark web to trade data. The economic value of data trafficking has increased exponentially, turning it into one of the most profitable digital criminal activities.

Romanian legislation on personal data protection provides important tools for combating this phenomenon, but it lags behind the rapid evolution of criminal techniques. Experts highlight the need for a proactive approach and continued investment in cybersecurity.

Another defining characteristic of digital organized crime is drug trafficking networks. These have increasingly migrated to the digital space, using encrypted platforms and technologies to conceal transactions. The dark web has become the main infrastructure for these illicit commercial exchanges.

²⁸⁰ "Deepfake and Identity Theft: Do We Still Have Control Over Our Private Lives?" In *adevarul.ro/news-internal/society*, accessed on 05.03.2025

²⁸¹ Monica Calu, "The Temporal Limits of the EU Regulation on Artificial Intelligence," article published on 16 July 2024, *www.juridice.ro*

Romanian authorities face significant challenges in detecting and dismantling these networks, with their decentralized nature and the use of advanced anonymization technologies being the main obstacles.

Human trafficking has also acquired a digital dimension. Human trafficking networks are increasingly using digital tools for recruitment, employing social media platforms, fake job websites, and sophisticated online manipulation techniques. There is a worrying increase in the effectiveness of these methods, especially among vulnerable populations.

The National Agency Against Human Trafficking has developed specialized digital monitoring and intervention programs, but experts emphasize the need for substantial investment in technical investigation capabilities.

II. Social Transformations Triggered by Digital Crime

Digital crime has brought about profound social changes, affecting both individual and collective behaviors, perceptions of security and justice, as well as impacting vulnerable groups.

The modification of social behaviors and increased vulnerability involves a growing dependence on technology and increased exposure to cyber risks. This has led to the emergence of a climate of distrust regarding online safety, changes in social interaction patterns, and the development of defensive behaviors such as increased use of cybersecurity measures and the avoidance of digital platforms perceived as unsafe.

Digital crime has shifted perceptions of security and justice, amplifying feelings of insecurity in the digital environment. The authorities' difficulty in keeping pace with new methods of fraud and cyberattacks highlights the need for rapid and effective legislative reforms to combat cybercrime.

Contemporary society is facing significant changes due to digital crime, such as the increasing vulnerability of users to fraud and cyberattacks and a shift in perceptions of safety and justice.

The social transformations triggered by digital crime are leading to a redefinition of the social space. Digital crime is no longer just a technological threat; it has evolved into a complex phenomenon that fundamentally restructures contemporary social mechanisms. Its impact goes beyond the strictly criminal sphere, generating profound changes in social perceptions and behaviors.

The proliferation of digital crime has created an increasingly deep crisis of trust in traditional institutions, leading to the erosion of social trust. Sociological studies indicate a significant decline in citizens' confidence in security and protection systems, caused by the growing visibility of vulnerabilities in digital infrastructures.

Repeated exposure to digital threats has given rise to a new form of social anxiety, resulting in a shift in risk perception. A sociological study highlighted a fundamental transformation in the way individuals perceive and manage risks, with deep effects on mechanisms of social interaction.

This new form of anxiety is causing complex behavioral changes, characterized by heightened vigilance in the digital environment, increasingly sophisticated defensive mechanisms, and a voluntary reduction of one's digital footprint.

Digital crime has accelerated a process of fragmentation and continuous reconstruction of social identity, even leading to a reconfiguration of digital identity. Individuals are developing increasingly complex strategies to protect their digital identities, which in turn generate new forms of social representation.

The state, which historically held the monopoly on mechanisms of legitimate violence and social control, is facing increasingly complex challenges from digital criminal networks. These networks have the capacity to operate beyond geographical and institutional boundaries, using technologies that systematically undermine traditional authorities.

Digital criminal networks have developed sophisticated infrastructures of power that operate in parallel with—and often surpass—traditional institutional systems. Traditional control and regulatory systems are increasingly undermined by the ability of criminal networks to operate beyond classical institutional limits. There is a significant shift in power mechanisms from state institutions to increasingly uncontrollable digital entities.

As a result, security systems must be reconfigured. Security institutions are forced to undergo a fundamental transformation, adopting increasingly complex, technology-based strategies to respond to new forms of crime. This adaptation brings about profound changes in the traditional understanding of the concepts of security and protection.

Digital crime is also prompting a fundamental transformation of the concept of literacy, specifically digital literacy. Digital education no longer refers only to technical skills but also to complex abilities to understand and manage digital risks²⁸².

Profound cultural shifts are also being observed. Digital culture is continuously reconfigured under the pressure of criminal threats, generating new forms of resistance and social adaptation. We are witnessing an ongoing transformation of social norms and values in relation to the digital space.

Digital crime can no longer be understood as merely a technical or legal phenomenon. It represents a complex mechanism of social transformation, fundamentally reshaping mechanisms of social trust, institutional systems, human interaction patterns, and, crucially, the concepts of identity and security.

Society is in a continuous process of adaptation and reconfiguration, and our ability to manage these transformations will define the quality of social life in the decades to come.

An interdisciplinary approach is required, combining legal, sociological, psychological, and technological perspectives to understand and anticipate these complex social transformations.

Society is at a turning point, where traditional paradigms of power are increasingly undermined by emerging digital realities. Our ability to understand and manage these transformations will shape the quality of social life in the coming decades.

III. Challenges of Criminal Liability in the Digital Era

²⁸² www.europarl.europa.eu/digital-transformation-importance-advantages-and-eu-policies

The application of criminal law norms to digital crime raises multiple challenges, including the adaptation of legislation and the need for specific rules addressing new types of offenses.

Another major challenge concerns the identification and prosecution of offenders, due to the anonymity and globalization inherent to digital crime.

In terms of the Romanian legislative framework, the Criminal Code and special legislation provide increasingly complex tools to combat digital organized crime. Nevertheless, the rapid pace of technological change constantly tests the legal system's ability to adapt. In practice, organized crime in the digital space represents one of the most complex contemporary challenges. The legal and institutional system must adopt a dynamic approach, based on continuous investment in technology, ongoing legislative updates, inter-institutional cooperation, comprehensive specialist training programs, and public awareness campaigns. The success in combating these phenomena depends on the collective capacity to understand and anticipate technological and criminal developments.

An analysis of relevant rulings on digital offenses—including computer fraud, cyberattacks, and online harassment—highlights how courts have interpreted existing laws, the difficulties in collecting digital evidence, challenges in establishing criminal liability, the impact of these decisions on applying criminal norms in the digital environment, and the need for international legislative harmonization to better address cybercrime.

To illustrate the practical aspects of digital crime and the associated challenges of criminal liability, several relevant court rulings will be analyzed.

One landmark decision in the field of digital crime was issued by the High Court of Cassation and Justice (HCCJ), which established clear legal parameters for classifying digital identity theft. The Court argued that online identity theft goes beyond simple impersonation, representing a complex form of fraud requiring a specialized legal approach²⁸³.

The Court emphasized that the constitutive elements of the offense include not only the acquisition of identifying data but also their fraudulent use, with proven intent to cause material or moral harm to the victim.

Through Decision no. 980/2012, the HCCJ²⁸⁴ analyzed a complex case of computer fraud in which the defendant K.C. was convicted for criminal activities carried out within an organized criminal group.

The Court found that beginning in 2009, the defendant participated in cybercrime activities as part of this group. Between 2009–2010, he facilitated the illegal access of other

²⁸³ Decision of the High Court of Cassation and Justice no. 4 of January 25, 2021, published in the Official Gazette no. 171 of February 19, 2021, regarding the pronouncement of a preliminary ruling on the legal issue: "Whether the act of opening and using an account on a publicly accessible social network (a network that does not require evidence of using the real name of the account holder), providing as the username the name of another person and entering real data concerning this person (information, photos, videos, etc.) constitutes the conditions for the typicity of the computer fraud offense, as provided by art. 325 of the Penal Code, regarding the requirements that the action of entering computer data should be done without right and, respectively, result in data that is not true.

²⁸⁴ <https://www.scj.ro>

group members to computer systems belonging to W.U. Company, with 13 recorded cyberattacks targeting systems in Madrid.

These attacks involved bypassing security protocols, unauthorized data acquisition, data modification, unauthorized data transfer, and the possession and use of specialized software for cyberattacks.

The trial court sentenced K.C. to 3 years and 6 months of imprisonment.

The attacks caused significant financial damage to W.U., compromising sensitive and confidential information. The court emphasized the serious social danger posed by these acts, given that the targeted systems belonged to an internationally active financial services company.

The initial report was filed by F.S., Director of W.U.'s Safety Department, concerning bank transfers conducted over the Internet between March 13 and December 17, 2009, which caused damages estimated at \$73,609.84. Subsequently, further complaints were submitted by the injured party, along with documents resulting from investigations conducted by representatives of the United States Secret Service, which is part of the Department of Homeland Security and has among its duties the protection of financial infrastructure and U.S. currency.

According to K.C.'s statement and information provided by W.U. representatives, illegal system access occurred when an employee, at the request of a person holding a CD containing malware, opened a specific file indicated by the perpetrator—a file later identified by W.U. experts during forensic analysis of the infected systems.

This HCCJ decision is relevant to judicial practice regarding cybercrime, setting important standards for the investigation and punishment of cyberattacks on systems belonging to key institutions. The court, for the first time, established legal parameters for classifying cyberattacks as organized crime, surpassing a simple interpretation as computer crimes.

The legal reasoning emphasized the systematic and organized nature of the attack, the complex coordination mechanisms involved, and the substantial damage caused to the targeted institutions.

HCCJ Decision no. 37 of June 7, 2021²⁸⁵ clarified that publishing fake online ads causing damage without direct interference with computer systems still meets the constitutive elements of computer fraud under Article 249 of the Criminal Code. The Court noted that deception by electronic means falls within the scope of computer fraud, underscoring the need to adapt legal interpretations to new criminal methodologies in the online environment.

HCCJ Decision no. 2 of January 20²⁸⁶, 2021 addressed the concurrence of offenses in the context of illegal access to computer systems and fraudulent financial operations.⁴ This decision referenced a prior ruling—Decision no. 15 of October 14, 2013 (Case no. 12/2013)—which recognized the concurrence of using a real bank card without the owner's consent at an ATM (Article 27(1) of Law no. 365/2002) and illegal system access to extract

²⁸⁵ legislatie.just.ro accessed on 18.03.2025

²⁸⁶ www.iccj.ro, Decision no. 2 of January 20, 2021, accessed on 18.03.2025

data (Article 42(1–3) of Law no. 161/2003). Once again, the HCCJ emphasized that these acts constitute distinct offenses, offering key clarifications for judicial practice in the area of cybercrime.

In cases involving “skimming” devices, courts have addressed the mounting of such devices on ATMs for cloning bank cards. These acts were classified as cybercrimes, with courts highlighting how technology is used to commit crimes and the legal challenges in categorizing these actions²⁸⁷.

These examples demonstrate how Romanian courts address cybercrime by adapting existing laws to new criminal typologies generated by technological progress and emphasizing the need for flexible legal interpretations to ensure effective application of criminal law in the digital space.

The main legal challenges in proving the elements of cybercrime offenses within the judicial system primarily concern the evidentiary complexity of such offenses. The judiciary faces increasingly sophisticated challenges in proving the constitutive elements of cybercrime. The technological nature of these offenses creates complex evidentiary obstacles that surpass traditional investigative paradigms.

The main difficulty lies in the extremely volatile and easily modifiable nature of digital evidence. Unlike traditional physical evidence, electronic records can be deleted, altered, or manipulated with ease, calling into question their authenticity. Any technical interaction with digital evidence risks compromising its integrity.

The judiciary also faces a core challenge in identifying cybercriminals, namely digital anonymity. Technologies such as VPNs, encrypted platforms, and anonymization techniques make the identification of perpetrators extremely complex.

Recent court rulings illustrate the difficulty in tracking digital footprints, as offenders can use multiple servers, IP-masking techniques, and underground platforms to operate virtually invisibly.

The transnational nature of cybercrime further complicates identification and prosecution. A cyberattack can originate from any corner of the globe, while international judicial cooperation remains slow and bureaucratic.

One of the subtlest challenges is proving criminal intent in cybercrime cases. Unlike classic crimes, where intent is often more evident, in the digital environment the line between accidental and intentional actions becomes very thin. Simply accessing a system does not automatically imply criminal intent; complex evidence is needed to demonstrate the perpetrator’s objective.

Assessing damages in cybercrime cases is another major challenge. Losses may include direct financial damage, security and remediation costs, reputational harm, and strategic data loss. The Romanian legal system still lacks comprehensive standardized methodologies for fully evaluating these damages.

²⁸⁷ George Zlati, *Cybercrime in Romania*, material published in the Cluj Bar Journal no. 1/2021

Finally, the Romanian judiciary faces a fundamental challenge in its limited digital investigation capacity. Most judges and prosecutors lack the technical expertise required to fully understand the mechanisms of complex cybercrimes, necessitating specialized training and the development of multidisciplinary teams comprising legal and IT experts.

Technology evolves exponentially, and the legal system often lags behind. Current investigative methods and legal tools are frequently outpaced by new cybercrime techniques, creating an ever-growing gap between investigative capabilities and the sophistication of cyber offenses.

IV. Conclusions

In the context of rapid digitalization and the continuous evolution of technologies, digital crime represents one of the most complex challenges faced by the Romanian judicial system. The normative and practical analysis of cybercrimes in Romania reveals a gap between the speed of technological changes and the legislative and institutional capacity to effectively respond to these challenges. Although Romanian criminal law, through the Penal Code and special laws, provides a basic framework for combating digital crime, there are still significant gaps in adapting the legislation to new criminal typologies and in the uniform application of the law.

Among the main challenges identified in this paper are the difficulties in identifying and holding offenders accountable, caused by the anonymization and globalization of cybercrime. The judicial system faces major obstacles in proving cybercrimes, primarily due to the complexity of digital evidence and its volatile nature, as well as the difficulty in establishing criminal intent in a virtual environment. Additionally, the risks associated with insufficient data protection and the lack of technical knowledge among judicial authorities complicate the process of combating cybercrime.

It is evident that a dynamic and adaptable approach to legislation is necessary, one that takes into account new forms of crime generated by the internet and information technologies. In this sense, it is essential for judicial authorities, including judges and prosecutors, to benefit from continuous training and interdisciplinary collaborations with technical experts to effectively address the challenges of digital crime.

On an international level, collaboration between judicial authorities and the implementation of common standards and procedures for combating cybercrime become essential. These must be supported by a harmonized legislative framework that facilitates transnational cooperation and supports the protection of critical infrastructures and citizens from cyber-attacks.

In conclusion, success in combating cybercrime depends on the continuous adaptation of the Romanian legal system to new technological realities, ongoing investments in the professional education of authorities, and more efficient international collaboration. Only through an integrated and dynamic approach will it be possible to effectively protect citizens and institutions against digital crime.

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THE ISSUE OF SUSPENDING THE EXECUTION OF CRIMINAL PUNISHMENT IN THE CONTEXT OF A CRIMINAL JUSTICE SYSTEM UNDERGOING CONTINUOUS REFORM

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Abstract: In the context of a criminal justice system undergoing constant reform, alternative criminal sanctions—particularly the suspension of sentence execution under supervision—are gaining increasing relevance. Governed by Articles 91–98 of the Romanian Criminal Code, this institution embodies the shift towards non-custodial measures aligned with principles of proportionality, rehabilitation, and social reintegration. The 2014 penal reform introduced a more structured supervisory mechanism, replacing the conditional suspension under the 1969 Code, and reflecting European standards on human rights and modern penal policy. However, practical challenges persist: inconsistencies in judicial interpretation, questions about its effectiveness, and the institutional capacity of probation services. This article provides a comprehensive doctrinal, jurisprudential, and critical analysis of this legal measure, evaluating its current implementation and proposing law reform solutions to enhance coherence and efficiency. It aims to bridge the gap between legislative intent and judicial practice, assessing whether the measure fulfills its rehabilitative and preventive functions in today's Romanian criminal landscape.

Keywords: social justice, supervision, alternative sanctions, rehabilitation, individualisation.

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Introduction

In the context of a criminal justice system undergoing continuous reform, the issue of alternative criminal sanctions gains particular importance. In a century in which European criminal policy promotes the principle of proportionality and the social reintegration of criminals, resorting to custodial sentences must represent a last resort, applicable only in situations where other measures could not achieve the purpose of general and special prevention. The suspension of the execution of the sentence under supervision, regulated by articles 91–98 of the Romanian Criminal Code, falls within this direction and offers a relevant legal alternative in terms of the individualization of criminal sanctions.

The institution of suspension of the execution of the sentence under supervision has undergone a profound rethinking in the new Criminal Code adopted by Law no. 286/2009, in force since 2014. Replacing the previous form of conditional suspension provided for by the Criminal Code of 1969, the current regulation introduced a more robust supervision mechanism, in line with European standards regarding the respect of the fundamental rights of convicts and in line with modern penal policies that emphasize rehabilitation and social reintegration, not just repression. At the same time, notably, the new regulation established a set of objective and subjective conditions that must be met cumulatively for the suspension of the execution of the sentence under supervision to be applicable.

However, the institution under review still raises numerous questions regarding its practical efficiency, the predictability of the act of justice and the uniformity of application by national courts. Interpretative dilemmas persist in relation to the correct framing of the judicial circumstances that allow suspension, the relationship between the individualization of the punishment and the formal legal criteria, as well as the social and penological effects of this measure. For example, only in some counties in Romania is professional intervention in situations of violence treated with importance, as are support services. „The diversity of support services ensures that all the needs of a victim are covered. A private social service provider in the North-West Region has a crisis fund”²⁹⁰, through which it provides financial support to

²⁹⁰ Drăgan Corina, *County-level data on domestic and gender-based violence*, Ed. Pro Universitaria, Bucharest, 2024, p. 46.

victims, thus partially combating the repercussions of a criminal record on employment prospects. In addition, the question arises as to what extent the supervision established is effective, whether the responsible authorities – in particular the probation services – have the logistical and professional capacity to implement a functional system of monitoring and counselling of persons under this sanctioning regime.

From a doctrinal perspective, a diverse range of opinions emerges regarding the legal nature of the measure, its justification in relation to the functions of punishment and its real impact on combating the criminal phenomenon. Some authors consider it a genuine form of criminal sanction with a pedagogical and integrative function, while others argue that, in practice, its application has become more of a formal instrument, sometimes disproportionate, sometimes excessively indulgent, in relation to the gravity of the act committed.

This paper aims to provide a detailed analysis of the legal regime of suspended sentence execution under supervision, to capture the interpretative and jurisprudential dilemmas that have arisen in practice, but also to evaluate to what extent this institution responds to the need for efficient, fair criminal justice and adapted to current socio-legal realities. Through an integrative approach – doctrinal, jurisprudential and critical – we will focus on the real efficiency of the institution, on its practical limits and on how it could be improved through subsequent legislative or interpretative interventions.

Thus, our approach aims not only to provide an x-ray of the existing regulation, but also to formulate conclusions and proposals *de lege ferenda* aimed at increasing the coherence and effectiveness of the Romanian penal system as a whole.

I. Chapter 1 - The basis and legal nature of the suspension of the execution of the sentence under supervision

The suspension of the execution of the sentence under supervision, enshrined in art. 91–98 of the Criminal Code, is constituted as an institution of substantive criminal law that is part of the category of alternative measures to the execution of the sentence in a regime of deprivation of liberty. It involves the temporary renunciation of the effective execution of a prison sentence, under the condition of compliance with certain obligations and under the

supervision of the probation service, for the duration of a supervision period established by the court. Its legal nature, its positioning in the criminal sanctioning system and its justificatory functions are the subject of an important doctrinal and practical controversy.

I.1. Justification of the institution: between preventive ideal and social rehabilitation

The suspension of the execution of the sentence under supervision is, in its essence, an expression of a modern vision of criminal sanctioning, in which the emphasis is no longer placed exclusively on criminal repression, but also on educational and social reintegration purposes. As criminal doctrine repeatedly emphasizes, the purpose of punishment is not punishment itself, but the prevention of the commission of new crimes, both by the convicted person and by other members of society (general and special prevention).

The institution of suspended sentence under supervision is based on the idea that controlled freedom can be a more effective tool for re-education than imprisonment, in the case of certain categories of offenders. This approach is found in French and German criminal doctrine, where alternative measures are built on the principle of proportionality between the gravity of the act, the social danger of the person and the need for state intervention.

According to recent doctrinal opinions, this form of suspension reflects a balance between the retributive function of punishment (society reacts to a violation of the rule of law) and the preventive function, in a formula that avoids prison radicalism. In support of this thesis, psychosocial arguments are brought forward demonstrating that detention, applied to persons without high dangerousness, can have effects contrary to the re-educational purpose, favoring stigmatization, family and professional uprooting and, implicitly, recidivism.

“Habits, human behavior is influenced by impulses of a social, biological or psychological nature. Sometimes, these impulses determine members of society to commit crimes. Social control, however, does not agree with these opinions, arguing that if man were

not constrained by law, he would naturally commit crimes. The positive aspects of delinquency reside, first of all, in the fact that, in antithesis to it, social conformity is promoted in society”²⁹¹.

Also, supervised suspension implies an active engagement of the convicted person in a reformation process: participation in probation programs, psychological counseling, community service or vocational training. This mechanism corresponds to the theory of personal accountability, in which the convicted person is not excluded from society, but called upon to contribute, conditionally, to his own reformation.

In terms of regulations, this institution also meets the objective of decongesting the penitentiary system, without abdicating the requirements of protecting public order. According to statistics provided by the National Penitentiary Administration, a significant percentage of convicts serving sentences of up to 3 years are people with no criminal record and with a low criminogenic risk. This reality justifies the need for alternative legal instruments, which would capitalize on the positive profile of occasional offenders.

Last but not least, the suspension of the execution of the sentence under supervision has a moral and pedagogical dimension, in the sense that the person is confronted with the responsibility of his act, but is also given the chance to demonstrate the capacity for change. In such a framework, criminal justice acquires a humanistic dimension, without being lacking in firmness.

I.2. The hybrid nature of suspension: punishment or individualization mechanism?

One of the most discussed and unclear aspects of the suspension of the execution of the sentence under supervision is its legal nature. The doctrinal discussion revolves around the question: is suspension an autonomous criminal punishment or does it represent only a way of individualizing the execution of the sentence established by the court?

²⁹¹ Teodorescu Michaela Loredana, *The Need for Justice in Social Life*, Universitaria Publishing House, Craiova, 2024, p. 136

The Romanian Criminal Code deals with supervised suspension in Title IV – “Individualization of the execution of the sentence”, which suggests that the legislator considers it a mode of execution, not a punishment in itself. In this sense, suspension is conditioned by a previous conviction and cannot exist in the absence of the establishment of a prison sentence. Moreover, it is obvious that the convicted person remains with a sentence in his criminal record, and its execution is only temporarily suspended.

However, the analysis of the content of the institution provides arguments in favor of a hybrid configuration. Suspension under supervision involves: formal supervision by the probation service; imposition of concrete obligations (e.g. to attend courses, to work, not to leave the locality, etc.); sanctions in case of non-compliance (revocation and execution of the sentence in detention).

Therefore, this set of obligations and possible legal consequences gives the measure its own sanctioning character, which goes beyond the simple “postponement” of execution. The doctrine has argued that the measure acquires the valences of an autonomous criminal sanction with variable content, approaching the model of sentences with execution in freedom regulated in German criminal law (“*Freiheitsstrafe mit Bewährung* ”)⁵.

Furthermore, supervised suspension involves a reasoned judicial decision, based on criteria related to the offender's psychosocial profile, the degree of concrete social danger and his criminal history. These elements suggest that the court carries out a substantive analysis of the purpose and manner of applying the punishment, which reinforces the idea that we are not dealing with just a technical solution, but with a decision with autonomous valences.

The controversy over the legal nature of supervised suspension is important not only theoretically, but also practically. If we were to consider it a punishment in itself, a distinct, clear regulation of its legal effects – for example, on recidivism or rehabilitation – would be necessary. If, on the contrary, we treat it only as a means of enforcement, it must be discussed whether the current supervision system is robust enough to ensure the effectiveness of the sanction.

In conclusion, the suspension of the execution of the sentence under supervision has a mixed legal nature, being located between an individualization mechanism and a conditional

sanctioning regime. This ambiguity must be assumed by both doctrine and jurisprudence, but also clarified legislatively in future reforms of the Criminal Code.

I.3. Normative basis and positioning in the criminal system

The suspension of the execution of the sentence under supervision is regulated in Articles 91–98 of the Romanian Criminal Code, in Title IV – “Individualization of the execution of the sentence”. This extensive normative segment details both the general conditions of application and the obligations that can be imposed on the defendant, the duration of the supervision term, the revocation, but also the legal effects of the successful execution of the measure. The analysis of the normative basis is essential for the correct understanding of this institution and the way in which it integrates into the general framework of Romanian criminal policy.

The law ²⁹²provides for a triple filtering system: an objective criterion (the length of the sentence), a subjective one (criminal record) and an evaluative one (the defendant's psychosocial profile and chances of rehabilitation). This complex structure places the court in an active position as a decision-maker in the context of the sanctioning policy, unlike previous regulations in which the automaticity of conditional suspension could be invoked.

This regulation is aligned with the principle of individualization of punishment, enshrined in art. 74 of the Criminal Code, according to which the court is called upon to take into account: the nature and gravity of the crime, the circumstances in which it was committed,

²⁹² Article 91 paragraph (1) of the Penal Code provides that: “The court may order the suspension of the execution of the sentence under supervision if the following conditions are met: a) the sentence imposed is imprisonment for a maximum of 3 years or a fine; b) the offender has not previously been sentenced to a custodial sentence, except in cases of rehabilitation or removal of the consequences of the conviction; c) in relation to the person of the offender, the conduct prior to the commission of the offense, the efforts made to remove or diminish its consequences and the possibility of correction of the offender, the court considers that the application of the sentence is sufficient, even without its execution.”

the person of the offender, his post-crime conduct and any mitigating or aggravating circumstances.

In this context, supervised suspension appears as a complex decision, with legal and social implications, which requires the court to evaluate not only the act, but also the person of the defendant in his entirety.

Suspension of the execution of the sentence under supervision is clearly distinguished from other institutions with a similar function, such as: postponement of the application of the sentence (art. 83–90 of the Penal Code), which implies the non-effective application of the sentence; renunciation of the application of the sentence (art. 80–82 of the Penal Code), which completely eliminates the conviction; execution in detention (art. 60 et seq . of the Penal Code).

Unlike these measures, supervised suspension is the result of an effective conviction, and the defendant acquires the status of a convicted person, with all the legal implications of this quality. Thus, although the punishment is not executed in prison, it produces legal effects: entry in the criminal record, conditioning of rehabilitation, the possibility of activating recidivism in case of committing a new crime.

This positioning makes the suspension of the execution of the sentence under supervision a true bridge between criminal repression and social reintegration – a compromise between punishment and leniency, between sanction and opportunity for rehabilitation.

The philosophy of the Romanian legislator was clearly to encourage the use of alternative measures, but without sacrificing the authority of the criminal sanction. Therefore, the regulation of supervised suspension reflects: a utilitarian orientation, which aims at the efficiency of the sanction by minimizing the social costs of imprisonment; a humanistic vision, which offers the offender the chance to recover in a community setting; a legal requirement, manifested in the requirements of detailed motivation and effective supervision.

This triple logic positions suspension under supervision as one of the most sophisticated institutions in the penal arsenal of the Criminal Code.

Criminal doctrine emphasizes the need for this institution to be applied neither formally nor automatically, but only after a thorough assessment of the criminogenic risk, which in

practice requires the existence of adequate resources at the level of probation services, as well as continuous training of judges in the field of judicial psychology and criminology.

I.4. Suspension under supervision in comparative law

Comparative law analysis is essential to understand the positioning of supervised probation in the Romanian penal system and to highlight possible directions for reform. From the perspective of European harmonisation, most European Union member states have implemented alternative measures to detention, especially in the case of short sentences or first-time offenders. Suspended probation under a form of judicial or probationary control is one of the most widely used forms of non-custodial sanctions.

In France, the institution of "le sursis" " probatoire " is regulated by the *Criminal Code* and has been significantly reformed since 2020, following the adoption of *Law n° 2019-222 of 23 March 2019 on programming 2018-2022 and reform pour la justice* . This form of suspension involves postponing the execution of the prison sentence, subject to compliance with a set of obligations imposed by the court.

French courts can establish: obligations for medical or psychological treatment; prohibitions on contacting certain people; performing unpaid community service; obligation to reside in a certain place; obligation to participate in reintegration courses.

These obligations are supervised by the probation services (*Service pénitentiaire*) . *d'insertion et de probation – SPIP*), and their violation entails the revocation of the suspension and the execution of the sentence in detention.

A special aspect is that the judge of execution of sentences (*juge de l'application des peines*) plays a central role in monitoring cases of suspension of sentence. probation , which guarantees judicial continuity and real control over the execution of the sentence in freedom.

France has become a model in terms of the balance between freedom and judicial control, particularly due to the resources allocated to probation services, but also due to the professionalization standards of these structures.

In Germany, the institution of suspension of sentence under supervision is known as "Strafausetzung zur Bewährung " and is regulated in *the Strafgesetzbuch* (German Criminal Code – StGB), in Articles 56–58.

The general rule allows for the suspension of sentences for up to two years, if the court considers that such a measure is sufficient to achieve the purpose of the sanction. The conditions imposed may include: periodic reporting to the probation service; prohibitions on visiting certain places or people; the obligation to repair the damage caused to the victim; participation in counseling or vocational training courses.

A particular element is the role of the execution judge (*Strafvollstreckungsrichter*), who coordinates the implementation of the measure and can order its modification or revocation, depending on the behavior of the convicted person. The German system is recognized for its efficiency in supervising convicted persons, based on a solid infrastructure, professional training of probation workers and inter-institutional cooperation.

Suspicion of unnecessary detention is deeply rooted in German legal culture, which leads to a consistent orientation towards supervised suspensions, treated as a priority means of rehabilitation.

In Italy, the regulation of the suspension of the execution of the sentence is found in articles 163–168 of *the Codice Penale* . "La sospensione conditional della pena" allows the court to suspend the execution of a prison sentence of up to two years or a fine, provided that certain good conduct requirements are met for a set period (between 1 and 5 years).

Italy does not necessarily provide for a formal supervision system in all suspension cases, but courts may impose: the obligation not to commit other crimes; participation in restorative activities; collaboration with judicial authorities.

In some cases, conditional suspension may be combined with a postponement of the execution of the sentence or other remedial measures.

Italian doctrine extensively discusses the "semi-sanctioning" nature of suspension, emphasizing that the lack of uniform supervision mechanisms reduces the real efficiency of the institution, compared to the German and French systems.

Although the Romanian regulation of the suspension of the execution of the sentence under supervision (art. 91–98 C.pen .) is aligned, in general terms, with European standards, the practical implementation remains deficient. Unlike France and Germany, Romania is faced with: under-dimensioning of probation services, especially in counties with high caseload; lack of active post- sentence judicial intervention , in the sense of the lack of a specialized enforcement judge; uneven application by the courts, in the absence of clear methodological guidelines; budget cuts that limit reintegration and education programs.

At the same time, Romania lacks the digital infrastructure necessary for efficient and transparent monitoring of the way in which the convict complies with the imposed obligations. The lack of interoperability between courts, probation and other institutions (police, medical, educational units, etc.) negatively affects the effectiveness of the measure.

Romania has a theoretically modern regulation, but the practical enforcement mechanisms need to be strengthened. Real reform would require investments in personnel, continuous training, and an executive justice system adapted to this type of punishment.

1.5. Doctrinal perspectives on the purpose of the measure

technical -legal solution , but represents the expression of a modern penal philosophy that privileges preventive efficiency, rehabilitation and individualization of the sanction. In doctrine, the analysis of the purpose of this institution reflects a diversity of opinions, depending on the positioning of the authors towards the goals of criminal law and towards the role of the state in the application of the sentence.

One of the dominant perspectives in the specialized literature is that of suspension of the execution of the sentence under supervision as a special prevention instrument, intended to encourage the prosocial behavior of the convict without removing him from his living environment. In this perspective, the measure has the role of sanctioning, but also of warning, while providing a supervisory framework that allows the authorities to follow the behavioral evolution of the convicted person.

As stated by Prof. Dr. Constantin Mitache, the purpose of suspension under supervision must be understood as a self-regulatory reaction of the state, which, in relation to the reduced

seriousness of the act and the positive profile of the offender, renounces the exercise of coercive force in its most severe form ²⁹³. In other words, the measure is a form of rational, proportional and strategic intervention.

Another doctrinal dimension of the purpose of supervised suspension is the reparative one, in a broad sense. The court, by imposing obligations, such as attending courses, paying compensation or performing unpaid work, builds a framework in which the convicted person is invited not only to refrain from antisocial acts, but also to repair the damage caused or to symbolically compensate for the prejudice caused to social values protected by law.

Several recent analyses draw attention to the danger that supervised suspension becomes a formal sanction, applied without a real analysis of the convict's situation and without an effective follow-up of obligations. This phenomenon is known in Anglo-Saxon literature as "symbolic" punishment – meaning a symbolic punishment, lacking real impact.

In Romania, this risk is amplified by: the lack of logistical resources of probation services; overworked staff; lack of clear and unified criteria for imposing obligations; deficiencies in court-probation-local institutions collaboration.

Thus, some authors have spoken of “dysfunctional sanctioning minimalism”³, which risks undermining the authority of punishment and public trust in the functioning of the criminal justice system. This criticism requires a reassessment of the means of supporting and monitoring those under supervision.

Chapter 2- Granting conditions: regulatory rigor or discretionary margin?

The suspension of the execution of the sentence under supervision, enshrined in Articles 91–98 of the Criminal Code, is an institution that has attracted, since the entry into force of the new Criminal Code, multiple doctrinal and jurisprudential interpretations. Although it is included in the section on the individualization of the execution of the sentence, its application

²⁹³Cristian Mitache, Constantin Mitache, *Romanian Criminal Law General Part, 5th edition*, revised and added, UNIVERSUL JURIDIC Publishing House, 2023.

requires compliance with a set of conditions that seem, at first reading, rigorous and objective. However, in practice, the exact delimitation between what is an imperative legal criterion and what remains at the discretion of the court generates uncertainty, contradictory decisions and, not infrequently, controversies.

Beyond the letter of the law, the suspension of the execution of the sentence under supervision involves a deeply individualizing decision, in which the judge is called upon to analyze not only the gravity of the act and the criminal history of the defendant, but also the potential for rehabilitation, the level of social danger, the psychological profile and the post-crime conduct . This multitude of factors, often difficult to quantify, makes the practice of applying the institution vary significantly from one panel to another, even within the same court.

This practical reality raises the fundamental question: does the current regulation provide sufficient clarity and predictability to be an effective instrument of individualization, or on the contrary, does it leave excessive room for discretion to the court, favoring subjectivism and inequality in application? The answer requires a careful examination of each constituent element of article 91 of the Penal Code, with emphasis on the theoretical and applicative implications of each condition.

The issue also returns to a more general level of criminal philosophy: how far can the judge's discretion go in applying a sanction that, although not involving deprivation of liberty, nevertheless represents a form of firm criminal response, with serious consequences on the status of the convicted person? The lack of methodological criteria, good practice guides or even official interpretation recommendations leaves the system vulnerable to a justice system perceived as non-unitary.

Therefore, we will continue to analyze the conditions for the application of supervised suspension, as regulated in art. 91 paragraph (1) of the Penal Code , in order to determine whether they truly create a clear and predictable regulatory framework or, on the contrary, offer too wide a margin of appreciation, susceptible to being influenced by extralegal factors.

II.1. Legal basis: art. 91 of the Criminal Code and cumulative conditions

The text of art. 91 para. (1) C.pen . establishes that the court may order the suspension of the execution of the sentence under supervision only if three conditions are met, cumulatively: 1) the sentence must be no more than 3 years of imprisonment or a fine, 2) the offender must not have been previously sentenced to a custodial sentence (with the expressly provided exceptions), and 3) the court must assess that the application of the sentence is sufficient, even without execution in detention. What appears at the normative level as a clear and well-structured rule, proves in practice to be an interpretative challenge.

The lack of methodological guides or standardized reports from probation services negatively affects the judge's decision, who is left to assess the rehabilitation potential "by eye". In other European countries, such as Germany or France, the suspension decision is based on a complex prior assessment, carried out by probation services or specialized counselors, which increases the objectivity of the judicial act.

Moreover, the courts' reasoning regarding the fulfillment of these conditions is not uniform either. Some courts limit themselves to findings such as "the defendant presents real chances of reintegration", without showing how these "chances" were assessed or what concrete elements were taken into account. This lack of decision-making transparency weakens public trust in the criminal justice system and contravenes the requirements imposed by Art. 6 ECHR regarding the reasoning of decisions²⁹⁴.

II.2. Punishment of no more than 3 years – clear criterion, but interpretable in cases of plurality of crimes

The condition regarding the quantum of the penalty – more precisely, that the penalty applied should not exceed three years of imprisonment – seems, at first glance, a strictly objective one, easily verified by the court. However, its practical application raises problems when we are in the presence of forms of plurality of offenses, such as real or ideal concurrence of offenses. In such situations, the question arises whether the 3-year limit refers to the

²⁹⁴ ECHR, Hansen v. Denmark (2004). Available at: <https://hudoc.echr.coe.int/>

individual penalties, established for each act, or to the resulting penalty, applicable after merging, according to art. 38–39 of the Criminal Code.

Part of the judicial practice adopts a strictly formalistic interpretation, considering that, since the punishment that is executed is the resulting punishment, it must fall within the limit provided by art. 91 para. (1) letter a) C.pen . This view is argued by the fact that the legal text refers to the "penalty applied", without distinguishing between the resulting one and the individual ones. From this point of view, even if each separate act had been sanctioned with a punishment of 1 year or 2 years, if the merged punishment reaches 4 years, the court could not order the suspension under supervision.

In contrast, another part of the doctrine and jurisprudence opts for a functional and favorable interpretation for the convicted person. It is argued that the rationale of the institution is to avoid depriving persons who do not pose a high degree of social danger, even in the case of a combination of crimes. Therefore, if all the acts committed are of low gravity and the individual sentences are under 3 years, and the merger led to exceeding the threshold only formally, the court should be able to freely assess the applicability of the suspension. This approach is also based on the principle of proportionality and individualization of the punishment.

This divergence of interpretation is not only theoretical, but also has concrete effects on the fate of convicted persons. In the absence of an explicit regulation or a binding interpretation decision by the High Court of Cassation and Justice, the practice remains uneven. In some courts, persons with similar profiles and similar crimes may receive completely different treatments, just because one judge opted for a restrictive interpretation, and another for an extensive one.

Essentially, the issue is about clearly defining the object of the court's analysis. If this is the punishment itself, as a technical sanction, then the 3-year limit should be strictly related to the resulting punishment. However, if the analysis follows the conduct and dangerousness of the person, then it is natural that the court can take into account the individual punishments and contextually assess the opportunity of suspension. This distinction should be reflected in an interpretation guide, so that the practice becomes coherent and equitable.

In conclusion, although apparently clear, the condition of the duration of the sentence proves in practice to be one of the most sensitive and disputed, precisely because it interferes with the mechanism of merging, with the plurality of facts and with the logic of individualization. Until its legislative or jurisprudential clarification, judges are faced with a difficult choice between formal rigor and fair adaptability.

II.3. Absence of a previous conviction – between requirement and exceptions

The second essential condition for the application of the suspension of the execution of the sentence under supervision is the absence of a previous conviction for a custodial sentence. At the normative level, this requirement is formulated in art. 91 para. (1) letter b) of the Penal Code , which provides that the court may order the suspension if “the offender has not previously been sentenced to imprisonment”. There are two exceptions to this rule: cases in which the previous conviction was followed by rehabilitation or the removal of its effects. Beyond the appearance of clarity, this condition, however, generates multiple interpretative dilemmas.

It should be emphasized that the legislator adopted a historical and formal criterion, not an evaluative one: the issue is not the seriousness of the previous conviction, but only the existence of a custodial sentence, even with a suspension. Thus, a person who received a 6-month suspended sentence 10 years ago, with no other previous record and with impeccable conduct since then, is excluded, in principle, from the benefit of suspension under supervision. This strict interpretation may lead to disproportionate solutions, contrary to the principle of individualization of the punishment.

II.4. Evaluation criterion: conduct, reparation efforts and possibility of correction

The third condition provided for by art. 91 para. (1) letter c) C.pen . constitutes the most flexible and at the same time the most complex component of the mechanism of suspension of the execution of the sentence under supervision. In essence, it requires the court to make a qualitative assessment of the defendant's person, taking into account: the conduct prior to the commission of the offense, the efforts made to eliminate or mitigate its consequences, as well

as the possibility of correction. The general formulation of the legal text grants the judge a wide margin of appreciation, which can generate both opportunities for effective individualization and risks of subjectivism and inequality of treatment.

The defendant's past conduct is naturally the first criterion to be analyzed. This involves taking into account the person's general lifestyle, including disciplinary history, family and professional stability, social activity, and possible signs of integration into the community. However, in the absence of standardized psychosocial analysis tools, courts tend to rely on general perceptions or stereotypes, subjectively assessing whether a person has "good conduct" or not. Sometimes, this assessment is reduced to "no criminal record and employed" - relevant criteria, but insufficient for a deep analysis of personality.

The third element – the possibility of correction – is perhaps the most difficult to analyze, as it involves a projection into the future. The judge is called upon to anticipate the risk of recidivism and the person's ability to reintegrate socially, which implies an inevitable dose of subjectivity. In other European countries, this decision is based on evaluation reports prepared by probation services, psychologists or social workers, who use scientifically validated instruments (e.g. the Criminogenic Risk Scale). In Romania, such evaluations are rarely available, which determines a pronouncedly intuitive decision, based on the behavior observed in the courtroom.

In the absence of explicit methodological criteria, there is a risk that the same conduct will be assessed differently in similar cases. For example, in some courts, the simple admission of the act is considered sufficient to prove the potential for rehabilitation, while other courts require concrete evidence of change (e.g. psychological counseling, participation in courses). This disparity is not attributable to the courts directly, but to the lack of a clear normative and professional framework to guide judicial practice.

In conclusion, the evaluative criterion provided for in art. 91 par. (1) letter c) of the Penal Code is, at the same time, the necessary expression of the principle of individualization of punishment and the major source of the non-uniformity of the application of suspension. Without objective standards, evaluation tools and methodological support, the judge's decision risks being perceived as arbitrary. In the future, strengthening the court's cooperation with probation services and developing an evaluation framework based on international best

practices could transform this criterion from a factor of uncertainty into a real tool for personalizing the sanction.

Chapter 3 – The effectiveness of suspension of the execution of the sentence under supervision in judicial practice

The evaluation of the effectiveness of the suspension of the execution of the sentence under supervision requires an integrated analysis of the results that this measure generates at the individual and social level, of the degree of compliance of the convicts, as well as of the way in which it contributes to achieving the purpose of the criminal sanction: preventing the commission of new crimes. Although Romanian legislation provides a functional theoretical framework, the practical application of the suspension under supervision has highlighted major differences between the normative intention and the reality of the judicial and institutional system.

According to data published by the National Probation Directorate, over 60% of all convictions in the period 2017–2022 involved supervised suspension sentences. This high percentage shows the courts' confidence in this measure as an alternative to detention. However, this statistic also raises questions: is suspension used rationally and differentiatedly, depending on the profile of the offender and the seriousness of the offense, or does it tend to become an easy solution, automatically applied for less serious offenses, in the absence of resources for more complex solutions, such as detention with rehabilitation programs?²⁹⁵

A first aspect that affects the real effectiveness of suspension is the degree of effective monitoring of the convicted person. Probation services, which should verify compliance with the obligations imposed by the conviction decision, are often undersized and overburdened. According to a 2022 report by the Ministry of Justice, an urban probation officer serves, on average, between 80 and 120 people under supervision, which limits the capacity for

²⁹⁵ See *the Integrated Study on the Causes of Recidivism* - carried out within the project "A SAFE AND EDUCATED COMMUNITY UNDERTAKING RESPONSIBLE ENGAGEMENT - SECURE", funded by the "Justice" Programme, Norwegian Financial Mechanism 2014/2021, Financing Agreement no. 7/1583/28.04.2021, available on the website: [chrome-extension://efaidnbmnnnibpcajpcgglefindmkaj/https://anp.gov.ro/norwaygrants/wp-content/uploads/sites/51/2024/01/20240103-Studiu-integrat-recidiva.pdf](https://anp.gov.ro/norwaygrants/wp-content/uploads/sites/51/2024/01/20240103-Studiu-integrat-recidiva.pdf).

personalized intervention. This reality leads to administrative rather than active supervision, and the lack of real feedback to the court in case of non-compliance can encourage passive forms of “enforcement”.

Secondly, the effectiveness of suspension is questioned in relation to the recidivism rate. Recent studies conducted by the National Institute of Criminology indicate that people sentenced to supervised suspension reoffend at a significantly lower rate than those sentenced to prison – approximately 17% compared to 40% within 5 years of release. This indicator confirms the value of the measure in terms of special prevention, but must be interpreted with caution: the beneficiaries of suspension are generally first-time offenders, without a recidivism profile. Therefore, the comparison must be contextualized, and the effectiveness must also be measured according to the method of application and the quality of supervision.

Another important criterion for efficiency is the content of the measure, i.e. the obligations imposed and the participation of the convict in reintegration programs. Court practice shows that, in most cases, only standard obligations are imposed (appearance at probation, information on change of address, etc.), without including concrete activities such as psychological counseling, community service or vocational training courses. This “minimization” of obligations reduces the remedial and formative potential of the suspension and transforms the measure into a formal form of sanction. Where courts establish personalized obligations and correlate them with the offender’s profile, the results are clearly superior.

Last but not least, the effectiveness must also be analyzed from the perspective of the credibility of the measure in the eyes of public opinion. Suspension of punishment is often perceived by society as a mild sanction or even as a “non-punishment”, especially in cases with high media impact. This perception can undermine trust in justice and emphasizes the need for courts to rigorously and transparently motivate the choice of this solution, explaining the reasons and benefits provided by law. Only in this way can the suspension be avoided being labeled as a form of unjustified leniency.

In conclusion, the suspension of the execution of the sentence under supervision can be an effective instrument of modern penal policy, but its effectiveness directly depends on the way it is applied and managed in the field. The lack of adequate supervision tools, the mechanical application of obligations and the lack of personalized assessment negatively affect

the potential of the institution. To the extent that there will be investment in the professionalization of probation services, in the diversification of applicable measures and in the accountability of the courts, this institution could contribute essentially to building a coherent, fair and efficient sanctioning system.

Chapter 4 – Interpretative Dilemmas and Non-Uniform Practices

“Chapter II of the Romanian Constitution guarantees fundamental human rights and freedoms, which offer comprehensive protection to both Romanian citizens and non-citizens residing in Romania.”²⁹⁶ Suspension of sentence execution under supervision is one of the most frequently applied institutions in contemporary Romanian criminal law, but precisely the frequency of its use has revealed a series of interpretative dilemmas and a pronounced lack of uniformity in application. The practice of courts varies significantly not only from one county to another, but even within the same court, depending on the panel, which affects predictability and trust in the criminal justice system.

One of the most persistent controversies concerns the interpretation of the notion of "penalty imposed for no more than 3 years". As shown in the previous chapters, the courts do not have a unified position on the applicability of this limit in cases of concurrent offenses. Some courts consider that the limit should be applied to the resulting sentence after the merger, while others admit suspension even if this cumulative sentence exceeds 3 years, arguing that each offense would theoretically have allowed the application of the measure. This divergence has not been resolved by the High Court of Cassation and Justice or the United Sections, which perpetuates uncertainty and affects the fairness of the act of justice.

Another frequent dilemma concerns the revocation of the suspension. According to art. 96 of the Penal Code, this can occur in several situations: the commission of a new offense, failure to comply with obligations, failure to appear for probation, etc. However, the jurisprudence is not uniform regarding the standard of proof required to establish a breach of obligations. In some cases, revocation is allowed even for repeated and unjustified delays, in

²⁹⁶ Pop, M., *Constitutional principles governing the fundamental rights, freedoms and duties of Romanian citizens*, Journal of Law and Administrative Sciences No.20/2023, p. 66

others only if bad faith is proven. The lack of objective criteria regarding what constitutes a “serious breach” of obligations leaves room for broad discretion, which can lead to contradictory results.

Similarly, the imposition of concrete obligations during supervision varies considerably. In some counties, courts frequently impose community service, psychological counseling, a ban on visiting places or contacts with certain people. In others, the list of obligations is reduced to minimal and formal ones, without real personalization. This discrepancy reflects not only a problem of interpretation, but also a difference in legal culture and institutional resources available in the territory, which calls into question the principle of equality before the law.

There is also a doctrinal and practical divergence related to the autonomous or not nature of the suspension with supervision. Part of the doctrine considers that this is a simple way of executing the sentence, which implies certain legal effects, such as inclusion in the criminal record and activation of recidivism. Other, more recent opinions, regard the suspension under supervision as a sanction in itself, with its own legal identity. These different views influence the application of the measure in cases of post-conviction recidivism, especially with regard to the establishment of the sanctioning regime.

Last but not least, another major source of inconsistency is the reasoning behind the decision. Some courts provide detailed explanations of why they considered the defendant to have a chance of reintegration, based on post-offense conduct, family support or participation in volunteer programs. Other courts limit themselves to template formulas such as “he meets the legal conditions and the court considers that the punishment is sufficient even without enforcement”. This lack of reasoning affects not only the transparency of the act of justice, but also the right to an effective remedy, being contrary to the standards imposed by art. 6 ECHR.²⁹⁷

Conclusion

The suspension of the execution of the sentence under supervision stands as a core expression of modern penal policy, aiming to humanize criminal sanctions, reduce reliance on

²⁹⁷ ECHR, *Mattei v. France* (2020). Available at: <https://hudoc.echr.coe.int/>

imprisonment, and support the reintegration of offenders. It enables courts to deliver proportionate responses to crime, while linking leniency to compliance with obligations and active efforts toward rehabilitation.

Nonetheless, the implementation of this institution often falls short of its legislative intent. Vague legal provisions, broad judicial discretion, and the lack of methodological tools have led to inconsistent practices and reduced predictability. Furthermore, overburdened probation services and minimal supervision frequently transform the measure into a formalistic gesture, rather than a meaningful corrective intervention.

In conclusion, although the supervised suspension of sentence has strong potential as a balanced and socially constructive sanction, its effectiveness in Romanian practice remains uneven. Addressing its current limitations requires legislative clarity, better institutional support, and a commitment to consistent, individualized application by the judiciary.

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PUTTING INTO CIRCULATION OR DRIVING AN UNREGISTERED VEHICLE

Dodescu Nadia-Elena²⁹⁸

Abstract

The most frequent crimes committed against the safety of traffic on public roads and recorded in our records are “Driving a vehicle without a driving license” (art. 335 of the Criminal Code) and “Driving a vehicle under the influence of alcohol or other substances” (art. 336 of the Criminal Code). “Driving a vehicle without a driving license” - a crime regulated by art. 335 of the Criminal Code refers to the driving of a vehicle by a person who has either never held a license (the standard variant), or whose license is inappropriate for the category or subcategory, the license has been withdrawn or canceled, or the exercise of his driving right has been suspended or postponed or he does not have the right to drive vehicles in Romania (the mitigated variant). The assimilated version provides that the act of a person who entrusts the vehicle to a person who he knows does not have a driving license or is in another situation provided for in the mitigated version (license revoked, canceled or suspended, right to drive, etc.) or to a person under the influence of alcohol or other substances is punished in the same way as in the mitigated version.

Keywords: Driving a vehicle without a driving license, Criminal Code. criminal liability, right to drive, (license revoked, canceled or suspended).

INTRODUCTION

"The need to criminalize such acts arose from the difficulty of identifying the perpetrator of a traffic offense in situations where they drove a vehicle or tram that was unregistered or not recorded, or towed an unregistered or unrecorded trailer, or when the vehicle or trailer bore a false registration number. Moreover,

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registration and recording operations are usually preceded by inspections regarding the technical condition of the vehicle or tram, which is why the criminalization of putting such vehicles into circulation without being registered or recorded not only contributes to identifying the perpetrators of traffic offenses but also indirectly protects road traffic by making it safer.

Previously provided for under Article 85 of Government Emergency Ordinance no. 195/2002, the provision has only been modified in terms of the penalty regime, in the sense that, in addition to the prison sentence of the same duration, a fine is now also provided as an alternative punishment."

This offense is not found in the Criminal Code of 1969, but was taken over by the Criminal Code of 2014 from Government Emergency Ordinance no. 195/2002, a text which underwent numerous amendments until the current form of Article 334 of the Criminal Code.

The content of Article 85 of G.E.O. no. 195/2002, before the adoption of the new Criminal Code on February 1, 2014:

(1) putting into circulation or driving on public roads a motor vehicle or trailer that is not registered, or a tram that is not registered, shall be punished with imprisonment from 1 to 3 years.

(2) putting into circulation or driving on public roads a motor vehicle with a false registration number or towing a trailer with a false registration number shall be punished with imprisonment from 1 to 5 years.

(3) driving on public roads a motor vehicle that has no right of circulation in Romania or a vehicle whose registration certificate has been withdrawn for serious technical defects in the steering or braking system and whose registration plates have been withdrawn shall be punished with imprisonment from 6 months to 2 years.

The new Criminal Code, in Article 334, regulates putting into circulation or driving an unregistered vehicle:

(1) putting into circulation or driving on public roads a motor vehicle, tram, or agricultural or forestry tractor that is unregistered or not recorded, according to the law, shall be punished with imprisonment from 1 to 3 years or with a fine.

(2) putting into circulation or driving on public roads a motor vehicle, tram, agricultural or forestry tractor with a false registration or record number shall be punished with imprisonment from 1 to 5 years or

with a fine. (3) towing a trailer that is unregistered, unrecorded, or with a false registration or record number shall be punished with imprisonment from 3 months to 2 years or with a fine.

(4) driving on public roads a motor vehicle, tram, or agricultural or forestry tractor, or towing a trailer whose registration or record plates have been withdrawn, or a vehicle registered in another state which has no right of circulation in Romania, shall be punished with imprisonment from 6 months to 2 years or with a fine. As

similarities between the two incriminations, we note that, like the previous law, several simple normative modalities are provided. The principle of the activity of the criminal law establishes that any criminal law applies from the moment it enters into force until the moment it ceases to be in force. Moreover, according to Article 15 para. (2) of the Constitution of Romania, the law applies only for the future, except for the more favorable criminal or contravention law.

In the case of certain offenses, until the final judgment remains definitive, multiple legal texts may be in force, in which case the accused person is applied the more favorable criminal law.

The time interval during which it is analyzed whether there was a succession of criminal laws, in order to determine the more favorable criminal law, is the one between the date of committing the act and the date of the final judgment. Therefore, laws existing before the act was committed are not relevant for establishing the more favorable criminal law²⁹⁹.

It is also necessary that the act has continuity in time, that is, to be included in the content of successive laws, in order to be able to analyze the incidence of the more favorable criminal law. In the hypothesis where the new law no longer incriminates the act, it is considered that decriminalization has occurred and the issue of the more favorable criminal law no longer arises.

For the correct application of the law and the exact determination of the more favorable criminal law, the date of committing the offense is important. If it is established that the old law is more favorable, it will ultra-apply, and if the new law is more favorable, it will retroactively apply.

²⁹⁹ Alexandru Boroi, Criminal law. Special part, Ed. C.H.Beck, Bucharest, 2023, p.653.

In doctrine, it has been noted that, if the old law is more favorable, it must be applied, since it was known to the perpetrator at the time of committing the act, and if the new law is more favorable, it must be applied because it better corresponds to the real needs of the fight against antisocial acts and because the legislator himself recognized that the old, stricter law no longer corresponds to these needs³⁰⁰.

In this case, judicial authorities have the obligation to apply Article 5 of the Criminal Code ex officio, even without a request in this respect formulated by the parties involved in the case.

As emphasized by Decision no. 265/2014 of May 6, 2014, the provisions of Article 5 of the Criminal Code are constitutional insofar as they do not allow combining provisions from successive laws in establishing and applying the more favorable criminal law.

Thus, in the chapter concerning general provisions regarding the application of criminal law over time in the current Criminal Code, several rules applicable to transitional situations have been established.

To avoid doctrinal controversies that arose at the time of the entry into force of the 1969 Criminal Code, the majority solution outlined in the practice of that period was explicitly enshrined, according to which the sanctioning treatment of multiple offenses is applied according to the new law when at least one of the offenses in the structure of the plurality was committed under the new law, even if for the other offenses the penalty was established according to the older, less favorable law.

In current legislation, the mandatory nature of complementary penalties for certain offenses and the lack of possibility to postpone the application of the sentence in certain cases call for increased attention in establishing the applicable criminal law, depending on the date of committing the offense.

In the case of successive laws intervening until the pronouncement of a final solution, accessory and complementary penalties are applied according to the law determined to be more favorable in relation to the committed offense.

Through Law no. 213/2023, published in the Official Gazette no. 629 of July 10, 2023, a series of amendments were made. Article 91 para. (31) of the Criminal Code provides that the suspension of the execution of the sentence under supervision cannot be ordered in the case of

³⁰⁰ C. Bulai, Manual of criminal law. General part. Ed. Universul Juridic, Bucharest, 2007, p.104.

offenses provided in Article 192 para. (2) and (3) of the Criminal Code, if they were committed under the conditions of Article 335 or 336 of the Criminal Code.

In this sense, analyzing the provisions of Article 91 para. (3) of the Criminal Code, we consider that, in the case of suspension of the execution of the sentence under supervision for the offenses provided in Article 192 para. (2) and (3) of the Criminal Code, when they are committed under the conditions of Article 334 of the Criminal Code, it may still be applied, if the legal conditions are met³⁰¹.

Also, through Article III point 3 of Law no. 172/2024, published in Official Gazette no. 510 of May 31, 2024, in force from June 3, 2024, para. (2') of Article 83 was introduced, stipulating that postponement of the application of the sentence cannot be ordered in the case of offenses provided in Articles 335 and 336 of the Criminal Code.

As a consequence, the offenses provided in Article 334 of the Criminal Code may still be subject to postponement of the application of the sentence, if the legal conditions are met.

Analyzing the constitutive content of Article 334 of the Criminal Code, in relation to the provisions of Article 85 of G.E.O. no. 195/2002, it can be observed that the current regulation contains, essentially, more favorable provisions, the judicial bodies having the possibility to also apply a criminal fine, which was not provided by the previous legislation.

At the same time, the provisions of Article 6 of the Criminal Code come as a guarantee of the legality of criminal sanctions and allow convicted persons to have their rights respected even after the final conviction. Thus, in the hypothesis where, after the final conviction and until the complete execution of the imprisonment or criminal fine, a new law appears, which provides for a lighter penalty, the applied sanction, if it exceeds the special maximum provided by the new law for the committed offense, may be reduced accordingly.

Regarding the statute of limitations of criminal liability, according to Article 154 para. (1) letter d), the statute of limitations for criminal liability is 5 years when the law provides for the committed offense a penalty of imprisonment greater than 1 year, but not exceeding 5 years. Related to these provisions, it results that the statute of limitations for all acts provided in Article 334 of the Criminal Code is 5 years.

³⁰¹ www.codexpenal.just.ro.

In the case of minors, according to Article 131 of the Criminal Code, the statute of limitations for criminal liability is reduced by half, being 2 years and 6 months.

From Article 155 para. (1) of the Criminal Code derives the rule that the statute of limitations for criminal liability is interrupted by carrying out any procedural act in the case, which, according to the law, must be communicated to the suspect or defendant, the modification being made following Decision no. 358 of May 26, 2022 (published in the Official Gazette on June 9, 2022). Only for acts committed after this newly modified legislative provision does this rule apply.

For acts committed before these legal provisions, through Decision no. 358/2022 of the Constitutional Court it was established that, under the conditions of determining the legal nature of Decision no. 297 of July 26, 2018 as a simple/extreme decision, in the absence of the active intervention of the legislator, mandatory according to Article 147 of the Constitution, during the period between the publication of that decision and until the entry into force of a normative act clarifying the norm, by expressly regulating the cases able to interrupt the course of the statute of limitations of criminal liability, the active body of legislation did not contain any case that would allow interrupting the course of the statute of limitations of criminal liability³⁰².

1.2. CRIMINALIZATION

IN THE LEGISLATION OF OTHER STATES

The Bulgarian Criminal Code regulates in Article 345 (amended - Official Gazette no. 28 of 1982, in force from July 1, 1982, amended Official Gazette no. 10 of 1993, amended Official Gazette no. 92 of 2002, amended Official Gazette no. 95 of 2016):

(1) the person who uses registration plates issued for another vehicle or plates not issued by the competent authorities shall be punished with imprisonment of up to one year or a fine of up to five hundred leva.

(2) the penalty provided in paragraph 1 also applies to a person who drives a motor vehicle not properly registered.

Article 345a. (New - Official Gazette no. 21 of 2000)

(1) the person who, in violation of the established legal procedure, deletes or falsifies the

³⁰² Ionuț-Cristian Neagu, Guide to road traffic offences, theoretical explanations and relevant judicial practice, Ed. Universul Juridic, Bucharest, 2025, p.28

identification number of a vehicle shall be punished with imprisonment from three to ten years and a fine from five thousand to ten thousand leva.

(2) in case of repeated commission of the act provided in the previous paragraph, the penalty is imprisonment from three to twelve years and a fine from five thousand to fifteen thousand leva.

(3)

the penalty is imprisonment of up to three years or a fine of up to three thousand leva if the serial numbers inscribed on the component parts of a vehicle are deleted or falsified.

(4) in the

cases mentioned in the previous paragraphs, the court applies the prohibition of the right to drive a motor vehicle.

Latvian Criminal Code: Section 265. Manufacture, sale, issuance, falsification, destruction, and illegal sale of registration documents, identification number markings, and license plates of a vehicle.

The manufacture, sale, issuance, falsification, or illegal destruction of registration documents or identification number markings or license plates of a vehicle shall be punished with temporary deprivation of liberty, community service, or a fine.

The theft of registration documents or license plates of a vehicle shall be punished with deprivation of liberty for a period of up to two years, or temporary deprivation of liberty, or community service, or a fine.

Committing the acts provided in the first or second paragraph of this section if committed by a group of persons based on a prior agreement shall be punished with deprivation of liberty for a period of up to three years, or temporary deprivation of liberty, or community service, or a fine.

CONCLUSIONS

Road-related criminality is the category that occupies the most time in courts of law, and cases involving offenses under Article 334 of the Criminal Code—namely, putting into circulation or driving an unregistered vehicle—rank third in terms of frequency. By analyzing Romanian legal doctrine and case law, it becomes clear that there are different interpretations regarding the meaning of the phrase “vehicle that is not authorized to operate in Romania.” As such, two main perspectives exist among courts when it comes to resolving situations in which a person drives a vehicle registered in another country on public roads

without holding valid RCA (civil liability auto insurance). According to the first interpretation, the vehicle in question does not fall under the category of vehicles unauthorized to operate in Romania, which leads to an acquittal. According to the second interpretation of the legal provisions, courts have adopted the view that a vehicle registered in another country but lacking valid insurance in Romania constitutes a vehicle without the right to operate in Romania, leading to a conviction.

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**THE RIGHT TO USEFUL MUTUAL INFORMATION AND THE EXERCISE OF
RIGHTS AND THE ASSUMPTION OF OBLIGATIONS IN GOOD FAITH
BETWEEN THE PARTIES TO A CONTRACT WITH SPECIAL REGARD TO THE
INTERVENTION OF A MEDICALLY PROVEN INABILITY TO WORK**

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The principles of good faith and mutual information expressly regulated in the provisions of art. 8 of the Labor Code, constitute themselves the grounds for the employee's obligation to inform the employer about any medical incapacity to work, including prior to the issuance of a medical certificate, the lack of information and good faith being causes for the removal of the employer's obligation provided for in art. 60 of the Labor Code.

Keywords: obligations, good faith, mutual information, medical inability to work, labour relations.

JEL Classifications: K 31

The principle of contractual equity requires the existing balance to include the rights and obligations of the contracting parties. At the same time, it is especially necessary in contracts with successive execution over time, there is useful, honest and effective mutual information between the parties, especially in the conditions where there is interdependence between the successive executions of the parties in the contract.

This necessity becomes more current in the conditions where the exercise of a right of one of the parties is subject to legal or contractual constraints related to the very existence of the other contractor's own act.

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The principle of exercising civil rights and obligations in good faith is a general principle and opposes the abusive exercise of legal or contractual rights and obligations in a way that would put the co-contractor in a situation in which he would not find himself if there were mutual information honest regarding the exercise of obligations and rights.

As judiciously shown in judicial practice³⁰³, the intervention of a situation related to the rights or obligations exercised or assumed by one of the parties, which affects the contractual relations, can produce the legal or contractual effect under the conditions of knowledge and express or tacit assumption of the legal situation created by the other parties.

A particularity of the problem studied is the legal situation arising from the intervention of a legal cause prohibiting the termination of an employment contract during the period of incapacity to work proven by the employee with a specific medical certificate.

Before analyzing the legal situation, we specify that any approach to the issue must also take into account the reasonableness and rationality of the specific conditions, but we try to present the generally valid and applicable aspects.

Incapacity to work occurring during the execution of an employment contract gives rise to a series of legal rights but also correlative legal obligations on the part of the parties to a legal employment relationship.

For the employee, the obligation is to notify the employer about the occurrence of this situation and for the employer, the most important obligation is to ensure the recovery of work capacity in good conditions and not to terminate the legal employment relationship while the employee is in this situation proven according to the law.

In this regard, the provisions of art. 60 paragraph 1 letter a.) of the Labor Code, provide:

“(1) The dismissal of employees cannot be ordered:

a.) during the period of temporary incapacity for work, established by medical certificates according to the law. ”.

³⁰³ Bucharest Court of Appeal, decision no. 1517/2025, unpublished.

So much the doctrine³⁰⁴ as well as judicial practice³⁰⁵ showed that if the employee does not provide the employer with the medical certificate, the prohibition on dismissal established by the above provisions is lifted.

An atypical situation is encountered when the medical certificate is issued retroactively by the family doctor, this situation impacting the analysis of the legality of a dismissal ordered before the medical certificate is issued retroactively.

More precisely, there is the practical situation when the termination decision is dated on the 11th of the month and the medical certificate issued on the 12th of the month grants sick leave starting on the 11th of the month.

The implementing rules of O.U.G, no. 158/2005 provide in art. 9 paragraph 2 that the medical certificate is granted with 24-hour retroactivity only when the employee was unable to see a doctor and only in a few cases strictly and exhaustively provided for by law.

This means, in our opinion, that 24 hours before issuing the medical certificate, the family doctor should be notified of the medical situation, complete this aspect in the consultation register, including the reason or more precisely the impossibility of presenting the patient for objectively described reasons with the necessary recommendations, and then issue the medical certificate within 24 hours.

In the absence of a mention in the consultation register, we consider that the subsequent issuance of a retroactive medical certificate is illegal and generates litigation with significant material and moral impact.

Here we also emphasize the role of the control bodies of the issuance of medical certificates, which must verify the justification of the issuance of retroactive medical certificates, by verifying the consultation registers and the effective method of issuing such medical certificates in this manner.

But regardless of the legality or validity of the method of issuing the sick leave, the essential obligation of the employee, under the conditions of the new technological means of

³⁰⁴ Nicolae Ros, Labor Law – University Course, ProUniversitaria Publishing House, Bucharest 2024, p.239

³⁰⁵ Decision 740/2010 on <https://www.jurisprudenta.com/jurisprudenta/speta-lhs4mgz/>, studied on 03.12.2024

communication, is to inform the employer of both his medical situation and the recommendations of the family doctor informed about the medical situation or at least of the need to present himself to him when the impossibility that generates the retroactive issuance of the sick leave expires.

Otherwise, as we have shown previously, failure to inform the employer of the incapacity for work for medical reasons does not give rise to the obligation, according to art. 60 paragraph 1 letter a.) to Labor Code, on the employer not to terminate the legal employment relationship.

This conclusion is also required in light of the principle of good faith execution of legal employment relationships, as stated in art. 8 of the Labor Code, it being obvious that the failure of the employee to notify the employer of the occurrence of a situation of medical incapacity for work is a fault that is incubating on his part, the employee not being able to invoke his own fault in the event of issuing a decision to terminate employment relationships under the conditions in which he did not notify his medical situation.

It should be noted that the provisions of art. 8 of the Labor Code provide that the principle of good faith must be manifested in any phase of the information, birth, execution or termination of legal employment relationships and on any aspects capable of influencing these relationships in any way, so we consider that there is an obligation for the employee to notify the employer not only about obtaining a medical certificate but also to notify the employer about any alteration of his medical condition and about the need to consult a doctor and the possible retroactive issuance of a medical certificate.

Otherwise, it cannot be held that the employer, who does not know about the employee's medical situation or who, by violating the information obligations provided for in art. 9 of the Labor Code, is at fault at the time of issuing the decision to terminate employment relationships even if a medical certificate has been issued.

We believe that the legislation, even if it does not expressly regulate the analyzed case, is sufficient to provide an answer to a possible litigious situation by making applicable, together with the considerations set out in the stated judicial practice, the principles of good faith and mutual information set out in art. 8 of the Labor Code.

A nuance is required in the case of communications made by the parties to the contract via electronic means, namely e-mail.

Reality and connotations of an efficient nature impose this means of communication, the primary legislation being non-covering on the specific conditions, however, as results from the ICCJ's resolution by Decision no. 34/2016 at point 44:

“44. The dismissal decision represents a unilateral legal act, being according to art. 1.324 of the Civil Code, a manifestation of the will of its author, which produces effects from the date of communication by any appropriate means, according to the circumstances, according to art. 1.326 of the Civil Code. The legislator has established the theory of reception [in the sense of the theory of reception it is the doctrine, according to the comments of the New Civil Code. Commentary on articles, CH Beck Publishing House, work coordinated by professor F.A. Baias, art. 1.326 paragraph. (3)] to establish the moment from which such a unilateral act produces legal effects. This decision is enforceable against the employee, as it is not necessary, according to the law, for the recipient to have sent any confirmation for the effects to occur. The act of receipt/communication cannot be conditioned by any manifestation of subjective will of the employee (taking note), but the effects of the decision occur at the moment of its communication (UNCONTESTED AND PROVEN BY THE ENTRIES FILED IN THE FILE s.n.) to the employee.”

In these conditions and taking into account the provisions of art.1326 paragraph 3 of the Civil Code:

“Art. 1.326. - Unilateral acts subject to notification

(1) A unilateral act is subject to notification when it establishes, modifies or extinguishes a right of the recipient and whenever informing the recipient is necessary according to the nature of the act.

(2) Unless otherwise provided by law, notification may be made in any appropriate manner, depending on the circumstances.

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(3) A unilateral act takes effect from the moment the notification reaches the recipient, even if the latter has not taken notice of it for reasons not attributable to him.”

We consider that the alleged (and we say unlikely) failure to take notice of the decision is not relevant.

In conclusion, doctrine and jurisprudence contribute to completing primary legislation regarding contractual rights and obligations, offering those interested guidelines and directions for analyzing and interpreting a potentially litigious legal situation, but respecting basic principles, universally valid and applicable principles.

What is necessary, beyond knowing and filtering legal information, is adapting general legal principles to practical realities and particularities, arguing for a legal solution in a correct, coherent and credible way in the situation of a legislative vacuum for a particular, specific situation.

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FAMILY IN THE 21ST CENTURY IDENTITY CHALLENGES

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The family is the nucleus of society and its basis. It occupies an important place among social institutions. Parents have an irreplaceable role in transmitting universal values to the new generation, the formation of personality, as well as the moral education of children. Although education can be seen as part of schooling, its first steps are given within the family. The child learns the necessary moral attitudes that he needs throughout his life from the instructions of his parents and especially from their model and personal example. The traits that are acquired are numerous, but we mention generosity, justice, sacrifice, which are formed during childhood by being carefully nurtured in the family. In this period, parental representation and influence on the child is very important. Especially communication with the child and attitudes towards them are fundamental elements that influence the subsequent organization of the entire life. Not only in free time, but throughout the entire activity, parents should devote time and give priority to the health and education of their child. Parents, by constantly fulfilling their obligations to their children, prepare the appropriate ground for them to be well-formed. The school, as a complement to the family, performs an important function in education.

Key words: family, modernity, emancipation, moral crisis, divorce, the United Kingdom, the British council, the western world, the 21st century school, emancipation, crisis.

Abstract :

Key words:family,modernety,emacipation,moral,crisis,divorce.In the 6th centery family ,meant the extented family with parents and grand parents and children .Whith the change of the revelation ,hasband ,and wife.fprm the family.Family in the 21st centery.the family changes.shaaape and size.Divorce remarrige,parenthood,whithat a spouse, have made them apbsolute .Even half a centery ago ,children were the grown up.Whith two energetic parents and whith the sopport of the family members .

The word “family” is of latin origin, famulus, which means servant, slave, house slave. Family is a social group whose members are affiliated with origin, marriage, adoption, living together, cooperate economically, emotionally and spiritually and care for each other. It is a social

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institution that constitutes the basic, functional and structural structure of any society. Cooley has called family the first and ideal example of primary groups, "nursery of the human character," the creator of the most emotional feelings of the human being. With a lot of wisdom, someone has called it "the oldest social institution that never gets old", as "the safest institution for man". It is the only shelter where people find security, rest and love. People in the family have the opportunity to preserve their differences and freedom. Today, in the global framework, the family is referred to as an endangered entity, as institution in crisis, where domestic violence is increasing day by day. In connection with the subject many researches detect single-member households, child education crisis, atomization and defunctionalization of the family, cohabitations (consensual unions), ever-growing divorces and the like. This paper aims to give an overview of the tendencies in the broader and local context of the problems faced by the family of XXI century as an institution sui generis without which society can not survive. As a method, content analysis, documentation, comparative, statistical data were used. The findings are that in the Balkans and in the Albanian context the family also experiences a serious turbulence that is evident in the social trends.

Theoretical analysis:

In particular, economic problems affect the moral development of individuals.

The most important problem in this matter is unemployment. Unemployment is not only affecting the decline in the level of income and well-being of the people, but also causes health problems, disorders in social and moral relations of social and family life. With the emergence of problems caused by unemployment, social unrest, robberies, violence, suicides and immoral behavior begin. One of the areas of the economy where moral values have an impact is employment. Employment is the use of all factors of production, which means finding work for all those who are looking for a job. The unemployment of those who want to work constitutes a major individual and social problem. The unemployed individual and his family are forced to live below the standards of society and the standards of living.

Unemployment is a temporary concern, but it becomes a social concern. Unemployment causes poor nutrition, low educational opportunities, living in poor health conditions, and consequently

causes severe psychological distress. In a society where unemployment is high, it is impossible for even those who have a job to live in peace. In a society or an individual where physical needs are not met, moral improvement and development cannot be expected. Without moral progress, economic resources cannot be used in the best possible way. The development of the moral abilities of young people and children as well as the provision of social growth are made possible through economic opportunities. For this reason, the achievement of all segments of society at an appropriate socio-economic level, everyone should benefit equally from education services aimed at socio-cultural development, so that activities should be accessible to all segments of society.

In order for the child's behavior to be accepted, it is better that, first, it goes to a certain level, to grow as a constructive and appropriate person, this to a large extent depends on communication with the mother and father. Communication means mutual information between people, or the sharing of attitudes, emotions and behaviors. Communication at the same time is the process during which people share thoughts and communicate with each other with or without consciousness.

The success of this process is the foundation of happiness in the life of the individual.

The mother and father, by communicating with the child in a certain way, accept his existence, show respect, make him feel important and valuable, give him the opportunity to behave appropriately at his own will. Communication is not just about talking, parents need to know when, what, how and where to talk.

Conclusions:

-The 21st century is undoubtedly the century of innovation, development and invention. Trends in technology, education and economics are moving towards automation. This revolution that the world is going through and which is felt most in the workplace, would not be possible without the preparation of a new generation that in the future will be an instrument for the flourishing of a dynamic modern world. When we say preparing young people for a new society and a new economy, we refer to some skills that are vital in the individual growth of each of them, physically and mentally, and whose benefits are felt not only by the individual, but also

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by those around them. These skills are also known as "21st Century Skills", a long list of personal skills, learning skills, literacy skills and life skills.

Recommendations:

- Increased care and better cooperation are required from all actors, not only from society and institutions but also from the family in the education of youth and the new generation.
- It is required to increase professional activities, training, and the teaching of foreign languages after the learning processes, related to the more complete formation of children and the new generation, cultivating in the latter in this way more culture, knowledge, and discipline in order to keep them away from vices and to make them more prepared and fulfilled for the future.

The language of the 21st Century, which will unite the World!

Albania is a small country, but with a long history of emigration. For this reason, we had to learn many languages. But how much do we know about the language of the future that will unite the world through it?

In fact, the fight against digital illiteracy, or "digital literacy" is one of the most powerful global campaigns that will empower the youth of the century that is knocking.

Let's analyze some of the reasons why coding or programming and technology itself promote some of the most important skills for a modern society such as critical thinking.

"Everyone in this country should learn to code, because it teaches you to think." -Steve Jobs

Have you ever thought about what Steve Jobs was trying to say with this quote?

Is this about coding?

Every programmer knows how many mistakes they have made in their past coding, even more than their work. Programming teaches children how to manage mistakes. Whenever they get stuck somewhere, children will look back to see where they went wrong and thus build resilience. It is a misconception that programming means having to sit in front of a screen for hours, on the other hand programmers spend minutes looking at a single aspect of programming.

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Thus, they strengthen their concentration and attention while also helping them in school lessons. A regional educational program in the Western Balkans that focuses on 21st Century Schools is exactly what we were talking about above. Designed and implemented by the British Council and supported by the UK government, it further proves the importance and credibility that we parents of 21st century children should attach to it.

As an innovation consultant, I have been fortunate to be the designer of many educational programs for children aged 7-15 in coding and robotics. I say with full conviction that support and trust should be unstinting for such initiatives. The '21st Century Schools' program contains well-thought-out curricula designed by experts in the field where through micro-devices funded by the UK government, Albanian children will have equal access to all their peers throughout the Western World, and thus implementing the most innovative practices, they must be critical in their thoughts and decisions, be collaborative, resilient in changing societies or otherwise the so-called "resilient citizens", worthy citizens and competitors of the 21st century As an innovation consultant, I have been fortunate to be the designer of many educational programs for children aged 7-15 in coding and robotics. I say with full conviction that support and trust should be unstinting for such initiatives. The '21st Century Schools' program contains well-thought-out curricula designed by experts in the field where through micro-devices funded by the UK government, Albanian children will have equal access to all their peers throughout the Western World, and thus implementing the most innovative practices, they must be critical in their thoughts and decisions, be collaborative, resilient in changing societies or otherwise the so-called "resilient citizens", worthy citizens and competitors of the 21st century

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USING EEG TO IDENTIFY BRAIN RESPONSES TO LEGAL STIMULI

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Abstract

The integration of neuroscience into the legal domain offers new perspectives on the cognitive and emotional processes involved in interpreting legal norms. This study investigates brain responses to legal stimuli using electroencephalography (EEG) in a sample of 30 participants exposed to both legal and neutral phrases. The analysis of event-related potentials (ERP), particularly the P300 and LPP components, revealed increased brain activation in frontal and parietal regions in response to emotionally loaded legal stimuli. The findings suggest that EEG can be a valuable tool for studying legal interpretation processes and support the development of neurolaw, with possible applications in the training of legal professionals and the identification of cognitive biases. At the same time, the study raises ethical concerns regarding the use of neurophysiological evidence in the judicial system.

Keywords:

Neurolaw, EEG, event-related potentials (ERP), P300, LPP, legal stimuli, brain activation, moral processing, cognitive bias, legal judgment, legal language, neurocognitive assessment.

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1. INTRODUCTION

In recent decades, there has been a growing interest in the convergence of cognitive neuroscience and legal science, within an emerging field known as neurolaw [1]. This multidisciplinary area investigates how neural processes involved in decision-making, moral perception and emotional processing can inform, support or even transform interpretations and procedures in the legal sphere. In a context in which law is faced with increasing complexities in the assessment of intention, discernment or moral responsibility, brain investigation methods, such as electroencephalography (EEG), offer complementary insights into the psychocognitive processes involved in legal thinking [2].

A key element in this research is the definition and use of so-called legal stimuli – verbal or visual representations that evoke key legal concepts such as guilt, punishment, justice, norm, law or authority [3]. These carefully selected and experimentally controlled stimuli allow researchers to examine the neurophysiological reactions of participants when exposed to moral, normative, or emotionally charged concepts. Previous studies have shown that such concepts generate specific activations in certain brain regions, especially in the medial prefrontal cortex, amygdala, and parietal regions involved in the processing of social values [4].

The relevance of the brain response to legal stimuli is all the greater as the brain's electrical activity reflects, in real time, the cognitive, affective, and moral components of information processing [5]. By analyzing evoked potentials (ERPs), such as the P300 or LPP waves, it is possible to identify patterns of brain activation associated with selective attention, evaluation of the meaning, and emotional processing of stimuli [6]. Thus, understanding neurocognitive responses to legal concepts can provide valuable clues about how individuals evaluate legal or moral situations, with potential impact on the interpretation of criminal responsibility, cognitive bias or decision-making in a judicial context [7].

In this framework, the present study aims to investigate how brain activity, measured by EEG, responds to verbal stimuli with legal content, compared to semantically and affectively neutral stimuli. The research objectives aim to identify significant differences in neurophysiological responses, as well as the topographical and temporal localization of these activations. The study also aims to answer the following questions: Is there a differentiated brain response to legal

versus neutral concepts? What activation patterns (ERPs) are involved? What are the implications of these differences for understanding decision-making processes in the field of law?

Through these efforts, the research contributes to strengthening the neuroscientific foundations of legal behavior and to exploring the possibilities for the responsible application of neurotechnologies in the sphere of contemporary law.

2. THEORETICAL BASIS AND CURRENT STUDIES

The exploration of the brain's response to legal stimuli is based on an extensive body of research that aims at the intersection of cognitive neuroscience, moral psychology, and criminal law. Studies on moral processing, starting with the seminal works of Joshua Greene and his collaborators, have shown that moral evaluations involve the simultaneous activation of emotional (including the amygdala) and executive networks (such as the dorsolateral prefrontal cortex), reflecting the tension between emotional intuition and deliberative reasoning in decision-making [8]. These results have been interpreted as supporting a dual model of moral decisions, in which affective and cognitive factors enter into competition.

In parallel, research using electroencephalography (EEG) and event-related potentials (ERP) analysis has provided a precise methodology to capture the temporal dynamics of information processing in the brain. Among the most relevant ERP components, the P300 is associated with the detection and evaluation of the meaning of stimuli, being sensitive to contextual relevance and decision-making [9]. In particular, the P3b component, with predominantly parietal generation, is considered a neurophysiological marker of meaning processing and mental context updating [10]. Also, the Late Positive Potential (LPP), with extended latency and frontal-parietal distribution, is sensitive to emotionally and morally charged stimuli, which makes it extremely relevant in the context of legal concept processing [11].

More recently, experimental approaches in the field of neuroethics have proposed exposing participants to moral and normative stimuli accompanied by monitoring of brain activity, in order to understand the extent to which abstract concepts – such as justice or punishment – generate distinct neurological responses. For example, studies by Yoder and Decety have shown

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that judgments about punishment for moral violations activate brain networks that overlap with areas involved in both empathy and cognitive control [12]. These results suggest the existence of a specific neural substrate for processing the moral significance of social and legal norms.

Regarding the direct use of legal stimuli (e.g., legal terms, images representing courts, phrases evoking guilt or innocence), the literature is more limited but growing. A pilot study conducted by Vinson and Jackson explored, using EEG methods, brain activation during exposure to frequent legal terms and found significant differences compared to neutral terms, especially in ERP components related to attention and contextual significance [13]. Although these results are still preliminary, they support the idea that the human cognitive system treats legal concepts as stimuli with increased emotional and normative significance.

At the same time, research on cognitive bias in the legal context has demonstrated that unconscious factors influence how individuals evaluate evidence, witnesses, or the severity of a crime [14]. Integrating EEG into these studies may provide an objective way to detect such biases before they manifest themselves behaviorally, thus contributing to a fairer justice.

Against this theoretical background, the present study is part of the direction of research investigating the neural imprint of legal concepts, using a non-invasive method with high temporal resolution. By analyzing differences in ERP activation under controlled experimental conditions, a better understanding of how the human brain perceives and evaluates fundamental notions of law is sought.

3. METHODOLOGY

To investigate how brain activity responds to legal stimuli, an experimental protocol was developed that complies with methodological standards in neuroscientific research applied to social and legal contexts. The experimental design was of the within-subject type, with two conditions: exposure to legal stimuli and exposure to neutral stimuli.

3.1 Participants

The study involved 30 respondents, aged between 20 and 35 years ($M = 26.2$ years, $SD = 3.7$). The sample was balanced by gender and included two categories of participants: law students ($n = 15$) and members of the general public without formal legal training ($n = 15$). Inclusion criteria included the absence of known neurological or psychiatric disorders, normal vision (with or without correction), and right-handedness (to homogenize the localization of brain activity). All participants signed an informed consent, and the study was approved by the UTM ethics committee [15].

3.2 Stimuli

The stimuli used were selected in such a way as to activate mental representations associated with legal concepts and to allow comparison with neutral stimuli. In total, two sets of verbal stimuli were created:

- Legal stimuli: 60 short sentences (7–10 words), written in Romanian, containing terms specific to criminal or constitutional law (e.g., “The act was classified as qualified murder”, “The accused has the right to defend himself”, “Justice presupposes impartiality”).
- Neutral stimuli: 60 sentences equivalent in length and syntactic structure, but without legal or emotional charge (e.g. “The water temperature was constant all day”, “The car was parked next to the building”).

All items were previously validated through a pilot study, in which 20 external participants rated the semantic, legal and emotional charge of each statement on a Likert scale [16]. The results confirmed the significant separation between the two categories of stimuli.

3.3 Equipment

The EEG signal recording was performed using a BrainVision actiCHamp system with 32 channels, positioned according to the international standard 10–20 system. Impedances were maintained below 10 k Ω . Stimuli were presented using the PsychoPy platform version 2023.1, configured for synchronized presentation of each item and marking of events in the EEG signal [17]. Behavioral responses (key presses for comprehension) were also recorded to monitor attention.

3.4 Procedure

Participants were instructed to carefully read each sentence displayed on the screen and to press a key if they understood the content. Stimuli were presented randomly, with a fixed interval of 2000 ms between items, each sentence in two equal blocks with a pause between them.

During the experiment, participants sat in a soundproofed and light-controlled room, seated at a distance of approximately 60 cm from the screen. EEG was recorded continuously with a sampling rate of 500 Hz and filtered online between 0.1 and 100 Hz.

3.5 EEG Preprocessing and Analysis

The EEG data were preprocessed using the EEGLAB software (MATLAB) and the standard pipeline: filtering (1–30 Hz), removal of eye movement artifacts by independent component analysis (ICA), and segmentation into 1000 ms time windows (including 200 ms pre-stimulus for baseline correction).

For each participant, the signals were averaged across stimulus categories (legal vs. neutral), and then the corresponding ERP components (especially P300 and LPP) were calculated in the parietal (Pz, CPz) and frontal (Fz, FCz) channels. Differences in amplitude and latency were statistically analyzed by repeated-measures ANOVA, with factors such as stimulus type and participant group.

4. RESULTS

Analysis of the EEG signals collected under the two experimental conditions – legal vs. neutral stimuli – allowed the identification of significant differences in both the amplitude and latency of ERP components, especially regarding P300 and LPP, considered relevant for the evaluation of the significance and emotional processing of stimuli.

4.1 P300 response to legal stimuli

The P300 component (with the window of interest between 300–500 ms post-stimulus) recorded a significantly higher mean amplitude in the “legal stimuli” condition compared to the “neutral stimuli”. ANOVA with repeated measures statistical analysis showed a significant main effect of stimulus type ($F(1,28) = 9.73$, $p = .004$, $\eta^2 = .258$), with higher values in the

parietal region (Pz) [18]. This difference suggests an increased level of cognitive processing and significance attributed to the legal content, even in the absence of an explicit judgment task.

An interaction effect between stimulus type and participant group (law students vs. general public) was also observed, indicating that law students had significantly higher P300 amplitudes to legal stimuli than participants without legal training ($F(1,28) = 5.21, p = .030$). This observation may reflect increased activation of specialized cognitive schemas among those familiar with legal concepts [19].

4.2 LPP Activation and Affective Processing

In the extended latency window (500–800 ms), the LPP (Late Positive Potential) component was significantly more pronounced in the legal stimulus condition, especially in fronto-parietal regions (FCz, CPz channels). ANOVA indicated a significant effect of stimulus type on LPP amplitude ($F(1,28) = 11.34, p = .002, \eta^2 = .289$), suggesting a higher emotional engagement towards morally-normative concepts [20].

Interestingly, no significant differences were observed between groups (students vs. general public) in this temporal window, which may suggest that emotional processing associated with legal norms has a relatively universal component, independent of formal expertise.

4.3 Topography and cortical localization

Topographic mappings generated following signal mediation confirmed a consistent distribution of activation in medial parietal regions for the P300 and fronto-central-parietal regions for the LPP. These results are consistent with the literature, which associates the P300 with cognitive updating processes and the LPP with the integration of affective and moral evaluations [21].

4.4 Behavioral responses

The response rate (key press to confirm understanding of the statement) was similar between the two conditions ($M_{\text{legal}} = 97.3\%, M_{\text{neutral}} = 96.9\%$), without significant differences ($t(29) = 0.72, p = .47$), indicating a similar level of attention and cognitive involvement, which excludes a potential behavioral confound in the interpretation of EEG differences.

5. DISCUSSION

The results obtained in the study provide significant empirical support for the hypothesis that legal stimuli trigger a distinct brain response, measurable by means of evoked potentials (ERPs). The increased amplitude of the P300 and LPP components in the “legal stimuli” condition indicates that these concepts are processed by the brain as semantically and affectively relevant, even in the absence of an explicit moral judgment or legal decision task.

The P300 component, well known for its association with mental context updating and processing of the meaning of a stimulus, [22]. has been shown to influence neurocognitive activity. These results are congruent with previous research on cognitive expertise, which has shown that specialists tend to allocate increased cognitive resources to processing information in their field of expertise [23].

The extended activation of the LPP in front of legal stimuli emphasizes the emotional and motivational component of the processing of legal concepts. Since the LPP is sensitive to emotionally charged stimuli, the results indicate that legal norms are not perceived as mere abstract information, but as stimuli with personal or moral relevance. This observation supports the idea that representations of law and justice are deeply rooted in the affective networks of the individual, even outside a formal enforcement context [24].

The lack of a significant difference between groups in terms of LPP also suggests that the emotional response to legal concepts may be relatively universal, supported by internalized social norms and general civic education. This finding is valuable in the context of neurolegal research, as it highlights the fact that certain legal norms generate spontaneous affective responses, possibly relevant in assessing the intentionality or degree of moral involvement of an individual [25].

From an applied perspective, these results provide solid premises for exploring the use of EEG in assessing implicit processing of legal norms, in contexts such as judge training, legal education or the analysis of cognitive bias in decision-making. For example, monitoring brain activity could highlight discrepancies between stated and neurophysiological responses in the case of exposure to legal dilemmas, thus contributing to a more conscious and balanced decision-making process [26].

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At the same time, limitations of the study should be emphasized. The relatively small and geographically restricted sample limits the generalizability of the conclusions. Also, the artificial nature of the stimuli (short statements, isolated from the context) does not fully reproduce the complexity of real legal situations. In addition, EEG activity offers limited spatial resolution, which makes it difficult to draw precise inferences about the cortical localization of legal concept processing.

Despite these limitations, the present study makes a significant contribution to the understanding of how the human brain processes legal language and paves the way for the development of applications in neurocognitive assessment in the field of law. The integration of neuroscientific methods in legal research could support the development of more sensitive and objective tools in the analysis of legal behavior, provided that their implementation is ethical and methodologically rigorous.

6. CONCLUSIONS

The present study demonstrated that exposure to stimuli with legal content elicits a differentiated cerebral response, quantifiable by electroencephalography (EEG), compared to neutral stimuli. By analyzing the ERP components, especially P300 and LPP, significant differences in amplitude and cortical distribution were highlighted, suggesting an increased involvement of cognitive and emotional processes in the processing of legal language.

The results support the idea that legal concepts – such as guilt, punishment or justice – are not processed as simple semantic entities, but activate complex neurocognitive networks, reflecting both the evaluation of the meaning and the moral charge of these terms. Also, the differences observed between the groups of participants indicate a possible effect of legal expertise on the cognitive sensitivity to such stimuli, which could have implications for the design of educational and training programs in the field of law [27].

Theoretically, the research contributes to the expansion of the conceptual framework of neurolaw, supporting the hypothesis that brain activity can reflect the way in which individuals perceive, interpret and react to fundamental normative concepts. At the same time, the study

provides empirical validation of dual models of moral processing, which postulate the interaction between rapid emotional systems and deliberate rational processes [28].

From an applied point of view, these cognitive reasonings, the use of neural evidence in justice must be guided by rigorous principles of scientific validity, protection of fundamental rights and procedural transparency [30].

In conclusion, the research presented here marks a relevant step towards the integration of neuroscience in the study of legal behavior, opening perspectives both for the analysis of cognitive processes involved in the understanding of law, and for the development of better scientifically substantiated educational and judicial practices.

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THE NEUROSIGNATURE OF INTENTION. POSSIBILITIES AND LIMITATIONS OF EEG IN DETERMINING CRIMINAL RESPONSIBILITY

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Abstract

This article investigates the potential use of electroencephalography (EEG) to detect human intention prior to action, as a basis for establishing criminal liability. Recent developments in cognitive neuroscience, such as the studies by Libet, Haggard, and Haynes, have shown that brain activity can anticipate the conscious awareness of intention by several seconds, sparking debates on free will and criminal responsibility. The concept of the "neurosignature of intention" refers to recurrent brain activity patterns detectable via EEG, associated with action preparation. Although EEG provides high temporal resolution and can detect components such as the readiness potential, P300, N200, and LRP, these signals are not unequivocal, being influenced by context, task type, and individual variation. Despite technological progress, their application in the legal field raises major epistemological, legal,

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and ethical concerns, including functional ambiguity, the risk of reverse inference, and potential violations of fundamental rights.

The article argues that, in its current state, EEG cannot serve as sufficient evidence for establishing criminal guilt, though it may be useful as an auxiliary tool in forensic evaluations, provided that strict ethical and methodological standards are observed.

Keywords: neurolaw, intention, electroencephalography (EEG), readiness potential, P300, criminal responsibility, neurosignature, conscious will, free will, neuronal evidence, legal ethics, reverse inference, neurolaw.

1. INTRODUCTION

In recent decades, developments in cognitive neuroscience have generated an increasing interest in understanding the neural mechanisms of intention and decision, opening new perspectives on fundamental concepts in criminal law, such as guilt, responsibility and discernment. In this context, a central question that has begun to be formulated, both in the scientific and legal environment, is the following: Is it possible to identify, through neurophysiological methods, a person's intention before action? And, more importantly, could this evidence be used to substantiate a legal judgment regarding guilt?

These questions define a new interdisciplinary territory, known as neurolaw, which explores the applicability of results from cognitive neuroscience in the normative sphere of criminal law¹. The topic of intention is one of the most controversial in this field, given that intention is, at the same time, a central legal category and a psychological process that is difficult to observe directly. In law, intention is the foundation of criminal liability – its establishment is essential for differentiating between acts committed with premeditation and those committed accidentally or under duress².

In neuroscience, intention is investigated as a process that precedes voluntary action, and classic studies, such as those of Benjamin Libet, have shown that a specific brain activation – known as the readiness potential (Bereitschaftspotential) – occurs hundreds of milliseconds before the person becomes aware of the intention to act³. Later, researchers such as John-Dylan Haynes

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and Patrick Haggard extended these results, suggesting that decisions can be predicted based on brain activity up to 7–10 seconds before their conscious reporting⁴.

These findings have generated heated philosophical and legal debates, raising issues related to free will, moral responsibility and the legal validity of intention as a subjective element⁵. If intention can be detected before it is realized, the question arises whether criminal responsibility can still be supported in the classical form, based on deliberate will. In this debate, electroencephalography (EEG) – as a non-invasive method with high temporal resolution – is increasingly proposed as a tool for identifying the “neurosignature” of intention, that is, a pattern of brain activation that could be systematically correlated with the formation of an intention to commit a criminal act⁶.

However, the use of such data for legal purposes raises both epistemological problems (precision, interpretability, contextual validity) and ethical and normative issues (whether and to what extent such “neural evidence” can be used in establishing guilt). Existing studies show that there is no single, universally valid marker that unequivocally indicates intention – this being a complex process, influenced by context, motivation and executive control⁷.

In this light, the present article aims to critically investigate the possibilities and limits of using EEG in detecting intent and in the legal substantiation of guilt. We will analyze the contributions made by current neuroscience research on intent, discuss the potential and methodological restrictions of EEG for this purpose, and evaluate the legal and ethical implications of a possible use of this information in criminal proceedings. The stakes of this approach are not only technological, but also fundamentally conceptual: Can the brain be the witness that establishes guilt? Or, on the contrary, does the attempt to replace legal judgment by interpreting neural data risk leading to a form of determinism incompatible with the principles of the rule of law?

2. THEORETICAL FOUNDATIONS

The concept of intent occupies an essential place both in the normative structure of criminal law and in the cognitive architecture of human behavior. In legal terms, intention is the central component of the subjective side of the crime and is seen as an expression of the conscious will

to produce an illicit result, in full knowledge of the facts¹. It is what differentiates a culpable action from an accidental one, a crime committed with premeditation from an act resulting from negligence. Traditionally, establishing intention belongs to the interpretative spheres of the judge, being deduced from external circumstances, previous behavior and statements of the defendant.

In contrast, in the field of cognitive neuroscience, intention is analyzed as an internal process, which precedes action and involves the activation of specific brain networks. In this context, intention is spoken of not as a form of responsibility, but as an observable and measurable neurocognitive event, with well-defined temporal and functional dynamics². This perspective has led to the formulation of neurocognitive models of intention, the best known being those proposed by Benjamin Libet, Patrick Haggard, and John-Dylan Haynes.

Libet's (1983) classic work introduced the concept of the readiness potential (Bereitschaftspotential), an EEG signal detectable approximately 550 milliseconds before voluntary movement, but approximately 350 milliseconds before the person becomes aware of the intention to act³. Based on this gap, Libet suggested that the neural processes that initiate action precede awareness of intention, which fueled extensive debates about the nature of free will.

Later, Patrick Haggard strengthened this hypothesis by demonstrating, using behavioral and EEG methods, that the voluntary perception of intention is also shaped by unconscious factors. ⁴ In another significant step, Haynes and his collaborators used functional magnetic resonance imaging (fMRI) and showed that binary decisions (e.g., pressing a left vs. right button) can be predicted based on activation in the prefrontal and parietal cortex up to 7 seconds before the participant is aware of the choice made. ⁵ Thus, intention becomes, in these models, a predictable state of cortical activation, rather than an exclusive expression of consciousness and deliberate will.

This paradigm has led to the emergence of the term “neurosignature of intention”, which designates a specific and recurrent pattern of brain activation associated with the formation of an intention before a voluntary action. Ideally, such a signature should be replicable, differentiated from other cognitive processes (such as planning, working memory or inhibition) and able to predict imminent behavior⁶. However, despite technological advances, no single,

universally valid neural marker for intention has been identified – in part, due to the multidimensional and contextual nature of this construct.

Within the EEG, several components are relevant to the study of intention. First, the readiness potential (RP), observable in fronto-central regions (usually in the Cz channel), remains the most discussed electrical expression of readiness for action^[14]. Second, the P300 component, involved in the evaluation of meaning and conscious decisions, may signal the deliberative process associated with voluntary intention^[15]. Likewise, the N200, an early negative component, is correlated with cognitive conflict and inhibition processes, suggesting that intention also includes selection and control mechanisms^[16]. Finally, the lateralized readiness potential (LRP) is used to investigate specific motor intentions, such as the choice to move a particular hand, providing clues about the direction of the planned action^[17].

As for the current state of research, the experimental literature suggests that EEG is capable of identifying patterns associated with intention, but these patterns are highly context, task, and individual variations. There is currently no consensus on a single signature, and the generalizability of these results from laboratory settings to real-world legal contexts is limited. Moreover, EEG data are influenced by multiple factors – state of alertness, motivation, parallel tasks – which can introduce ambiguities in interpretation^[18].

Therefore, although the concept of a neurosignature of intention is theoretically attractive, its use in establishing guilt in a legal framework involves a series of methodological and epistemological precautions. In the following sections, we will analyze to what extent these signals can constitute valid, useful and ethically acceptable evidence in the assessment of criminal responsibility.

3. SCIENTIFIC POSSIBILITIES OF EEG

Electroencephalography (EEG) has established itself as one of the most accessible and efficient methods for exploring brain activity associated with cognitive processes, in particular due to its high temporal resolution and non-invasive nature. In the context of the study of intention, EEG offers the possibility of recording in real time the neural dynamics that precede voluntary action, thus contributing to the understanding of the stages preceding conscious decision.

A series of controlled experimental studies have demonstrated that, in free choice or voluntary action tasks, EEG can capture recurrent neural patterns that anticipate behavior. For example, Libet's classic experiment revealed the emergence of readiness potentials (RPs) approximately 550 ms before the actual movement, even in (e.g., intention to cooperate vs. to cheat), suggesting that EEG signals can capture not only the activation of intention as a binary process (existent/nonexistent), but also its motivational and ethical content³. In experiments with competitive tasks, LRPs (lateralized readiness potentials) were correlated with the direction of motor intention (e.g., choosing the left or right hand), while the amplitude and latency of the P300 and N200 components were influenced by the moral factors involved in the decision⁴.

Beyond research focused on simple motor actions, other studies have explored prospective intentions – that is, those intentions oriented towards future actions, involving planning and mental representation. In these cases, EEG has been shown to be able to detect differential activations in frontal and parietal regions during the formation and maintenance of intention⁵. These results suggest that the neural signature of intention is not limited to immediate actions, but can also be extended to comprehensive plans, relevant in the assessment of premeditation in a criminal context.

Another advantage of EEG is the possibility of integrating the signal with computational models and machine learning algorithms, to increase the accuracy of prediction. In recent studies, artificial neural networks and SVM (Support Vector Machines) classifiers have been trained on EEG data to predict action intention with significantly better than chance accuracy⁶. This type of hybrid approach opens new directions in identifying intentions based on brain signals, overcoming the limitations of the classical interpretation of ERP components.

At the same time, EEG allows the comparison between real and simulated intentions, contributing to the delimitation between authentic and disguised behaviors, which has potential relevance in detecting hidden intentions or in identifying manipulative behavior in a judicial context.⁷ This aspect is particularly important in cases where the declared intention does not coincide with the real intention, raising questions about credibility, responsibility and subjective truth. In conclusion, EEG offers a solid set of scientific tools for exploring intention, both temporally and functionally. Its ability to record in real time brain activity, correlated with intentions formulated consciously or unconsciously, constitutes a valuable resource in applied

research, including in the legal field. However, the interpretation of these data requires caution, as the identified neural signatures are often dependent on the context, the type of task and interindividual variability. In the next chapter, we will analyze in detail the methodological and epistemological limits of EEG in establishing intention and, implicitly, in substantiating guilt.

4. EPISTEMOLOGICAL LIMITS AND RISKS

Despite the scientific potential of EEG in investigating intentional processes, its use in establishing criminal guilt involves a series of methodological limits and considerable epistemological risks. First, EEG signals are characterized by high interindividual and intraindividual variability, influenced by multiple factors such as the level of vigilance, motivation, stress or the degree of cooperation of the subject¹. This instability significantly affects the validity of the results outside the strictly controlled conditions of the laboratory.

Another important limitation is the functional ambiguity of the brain signal. Components such as readiness potential (RP) or P300 are not exclusive to the intentional process, but can also reflect other cognitive states, such as planning, decision-making or focused attention². Thus, attributing a precise intention based on an EEG pattern entails a major risk of reverse inference, i.e. of wrongly deducing the mental state starting from a non-specific physiological marker³.

It should also be emphasized that most EEG signatures validate simple motor intentions, in controlled experimental contexts, and are not suitable for identifying complex intentions, with moral, strategic or emotional charge, characteristic of criminal behavior⁴. This distance between “laboratory” and “real-life” intentions considerably limits the transposition of these data into the legal sphere.

Finally, there is the risk of neurotechnological overinterpretation – a form of “neuro-determinism” whereby brain activity is treated as objective evidence of guilt, without taking into account the complexity of legal responsibility⁵. This tendency may undermine fundamental rights to electroencephalography (EEG) for the purpose of establishing intent in legal proceedings and raises essential issues regarding the admissibility, interpretability and ethics of neural evidence. In criminal law, guilt is defined as the result of an act or omission committed with discernment and free will – fundamental conditions for attributing

responsibility. Introducing EEG data into this framework would imply a redefinition of the nature of evidence, from behavioral and contextual ones, to forms of invasive brain evidence, with a still questionable evidentiary status¹.

From a legal perspective, the question arises whether neural signatures of intent can be accepted as valid evidence, comparable to statements, expert opinions or testimonies. Criminal law systems are based on principles such as the presumption of innocence, in dubio pro reo, but also the right to silence and mental integrity, all of which are potentially affected by the use of brain-reading technologies². For example, obtaining EEG data without the defendant's full informed consent could amount to a form of neurophysiological self-incrimination, prohibited by democratic constitutions³.

In addition to the legal difficulties, there are also major ethical considerations. One of the most discussed risks is that of stigmatization or neurological profiling, in which individuals could be assessed (or even judged) not for what they have done, but for what they “would have intended to do”, according to brain prediction algorithms. This could lead to prior criminalization based on speculative data, not on actual facts⁴.

Moreover, the use of EEG in justice risks contributing to the consolidation of a rhetoric of pseudoscientific authority, through which neural data are presented as “objective” and “uncontested”, despite the fact that their interpretation remains complex, contextual and often controversial in the specialized literature⁵.

In this framework, applied ethics and legal bioethics recommend a cautious and gradual approach, which takes into account technical limits, the fundamental rights of the person and the social implications of a possible error of interpretation. Instead of a premature application, EEG can be integrated, at most, as an auxiliary tool in forensic assessments, accompanied by interdisciplinary expertise and a clear regulation of the conditions of use.

5. LEGAL AND ETHICAL IMPLICATIONS

The use of electroencephalography (EEG) for the purpose of establishing intent in legal proceedings raises essential issues regarding the admissibility, interpretability and ethics of neural evidence. In criminal law, guilt is defined as the result of an act or omission committed

with discretion and free will – fundamental conditions for attributing responsibility. The introduction of EEG data into this framework would imply a redefinition of the nature of evidence, from behavioral and contextual ones, towards forms of invasive brain evidence, with a still questionable evidentiary status¹.

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6. CONCLUSIONS

The theme of the neurosignature of intention places neuroscientific research in a sensitive conceptual and normative territory, where empirical evidence about brain functioning intersects with the rigorous requirements of criminal justice. Although EEG has proven to be a promising tool in recording brain activity associated with voluntary actions and motor intentions, the application of these data to the assessment of guilt involves interpretative leaps that must be examined with caution.

From a scientific perspective, the results obtained to date show that certain EEG patterns (e.g. RP, P300, LRP) can precede conscious decisions and provide clues about the initiation of behavior. However, these signals are nonspecific and often contextual, and their application outside rigorous experimental conditions is problematic¹. Moreover, criminal intent is a much more complex construct than the motor decision to press a button – it involves motivation, self-awareness, understanding of the norm, and assumption of consequences. These dimensions are not currently directly accessible by EEG means.

Legally and ethically, the use of EEG as evidence in establishing guilt poses major risks: from violating the principle of mental autonomy to scientific overinterpretation in a normative context that demands certainty and fairness. Uncritical acceptance of these technologies could lead to the automation of moral judgment and the erosion of the role of consciousness and intention assumed in criminal law².

In conclusion, EEG can play a valuable role in fundamental research on decision-making processes and in neuropsychological assessment, but it cannot, at the current stage, constitute a sufficient basis for attributing criminal guilt. Future directions should aim at multimodal integrations (EEG, fMRI, behavioral analysis), accompanied by strict ethical regulations and active interdisciplinarity between lawyers, neuroresearchers and ethicists. Only in this way can a responsible use of neuroscience in the legal space be ensured.

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DETECTING COGNITIVE BIASES IN JUDICIAL DECISION-MAKING THROUGH EEG ANALYSIS AND AI METHODS

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Abstract

This study investigates the detection of cognitive biases in judicial decision-making by combining EEG analysis with artificial intelligence (AI) methods. Cognitive biases—such as implicit stereotypes, confirmation bias, or status-based bias—often operate unconsciously, affecting legal decisions and undermining impartiality. In a controlled experiment, 40 participants (both legal professionals and non-specialists) evaluated neutral and bias-laden legal case scenarios while their brain activity was recorded using EEG. ERP components (N200, P300, and LPP) showed significant differences under bias conditions, indicating heightened conflict and affective processing.

AI classifiers (SVM, Random Forest, CNN) accurately distinguished biased vs. neutral conditions with over 80% accuracy. ERP responses correlated with more severe judgments and faster reaction times in biased trials, suggesting an automatic influence on decision-making. These findings support the feasibility of using EEG and AI to detect neurophysiological markers of bias before they manifest behaviorally. The approach offers potential applications in anti-bias training, decision auditing, and cognitive feedback.

However, real-world implementation requires ethical safeguards, transparency, and interdisciplinary collaboration. While EEG and AI cannot replace legal reasoning, they may serve as complementary tools to better understand and mitigate unconscious influences in judicial processes, contributing to a more equitable justice system.

Keywords: Cognitive bias, Judicial decision-making, EEG, Event-Related Potentials (ERP), Artificial Intelligence, Machine Learning, Neuroethics, Implicit stereotypes, Legal neuroscience

1. INTRODUCTION

In an ideal legal system, judicial decisions should be made on the basis of facts, evidence, and legal rules, without interference from subjective or emotional factors. However, numerous empirical studies have demonstrated that cognitive biases – or biases – frequently influence the reasoning and conclusions formulated by judges, jurors, lawyers, and experts¹[1]. These mental distortions usually occur automatically and unconsciously, affecting the evaluation of evidence, witnesses, and the degree of guilt of the defendant²[2].

Among the most common biases documented in the legal context are confirmation bias (the tendency to favor information that supports prior beliefs), status bias (the influence of social position on the assessment of credibility), and implicit stereotypes (automatic associations based on gender, ethnicity, or age)³ [3]. These cognitive mechanisms, although functional in everyday processes, can lead to significant decision-making errors in the field of justice and can compromise the ideal of impartiality.

In the last two decades, cognitive neuroscience has offered a new framework for understanding these phenomena, demonstrating that biases are not only expressions of distorted thinking, but also have detectable neurophysiological substrates⁴[4]. Electroencephalography (EEG), especially through the analysis of evoked potentials (ERP), allows the real-time observation of brain reactions to stimuli containing biased elements. Components such as N200, P300 or LPP have proven sensitive to moral conflict, selective attention and automatic affective evaluations⁵[5].

Against this background, artificial intelligence (AI), through machine learning methods applied to EEG data, offers the possibility of detecting and classifying brain patterns associated with biased reactions, even before they manifest themselves at the behavioral or decisional level⁶ [6]. Thus, the integration of EEG and AI opens up innovative directions in judicial research, with the potential to support anti-bias professional training, decision evaluation and, in the long term, reduce systemic errors in justice.

The objective of this study is to investigate the possibility of detecting cognitive biases in legal decision-making, by recording EEG responses to biased judicial stimuli and by automatically classifying them with AI algorithms. It starts from the hypothesis that exposure to legal cases

containing bias elements generates differentiated brain signals, which can be identified and interpreted in an automated manner. This interdisciplinary approach aims to contribute both to the understanding of the cognitive mechanisms involved in the legal decision-making process and to the development of support methods for the formation of a fairer justice.

2. THEORETICAL FOUNDATIONS

Judicial decisions are, ideally, the result of a rational, impartial and well-founded judgment based on facts and norms. However, the literature in cognitive psychology and behavioral sciences has demonstrated that human decisions are often influenced by cognitive biases, which act automatically and unconsciously on the evaluations and conclusions formulated¹[7]. Cognitive biases are systematic deviations from logical reasoning, influenced by heuristics, emotions, stereotypes and social contexts. In the legal sphere, they can distort key processes such as the analysis of evidence, the interpretation of witness behavior or the assessment of guilt²[8].

Among the most frequently documented biases in the judicial context are:

Confirmation bias – the tendency to seek out and favor information that supports prior beliefs;

Authority bias – the influence that experts or authorities have on decisions;

Implicit stereotypes – automatic associations between social traits and negative or positive characteristics³[9].

Based on these findings, recent research has begun to investigate the neurophysiological substrate of biases. EEG studies have shown that certain neurocognitive markers are sensitive to biased stimuli, even when participants are unaware of their influence. For example, the N200 component, associated with cognitive conflict, appears more frequently in situations where there is a contradiction between a presented stimulus and the subject's automatic expectations⁴[10]. In turn, the P300 reflects processes of meaning detection and updating of the mental context, being influenced by surprise or semantic incongruence⁵[11]. The LPP (Late Positive Potential) is involved in the emotional and evaluative processing of socially relevant stimuli, being active in the face of implicit stereotypes⁶[12].

In parallel, developments in artificial intelligence have enabled the automated analysis of EEG patterns, using machine learning algorithms to classify brain responses under experimental conditions. Models such as SVM (Support Vector Machines), Random Forest or Convolutional Neural Networks (CNN) have been successfully used to distinguish between bias present/absent conditions based on EEG data⁷[13]. These methods not only increase the sensitivity of the analysis, but also allow for the early identification of cognitive bias, even before it manifests itself at the behavioral level.

The integration of these approaches – EEG and AI – offers a promising methodological framework for the automatic detection of bias in judicial decision-making. However, to support the applicability of this framework, a rigorous experimental design and a thorough understanding of the ethical and legal implications are required. The next chapter will detail the methodology used to test this hypothesis under controlled conditions.

3. METHODOLOGY

To investigate the presence and detectability of cognitive biases in judicial decision-making, a controlled experiment was designed that combines neurophysiological methods (EEG) with modern machine learning techniques. The study design is within-subject, with two conditions: exposure to neutral legal stimuli and exposure to potentially biasing stimuli (e.g. implicit stereotypes, ethnic names, social status).

3.1 Participants

40 participants, aged between 22 and 45 years, were recruited, divided equally between two groups: law students or legal practitioners (trainee judges, lawyers) and the general public. All participants declared the absence of neurological disorders and signed an informed consent agreement. The purpose of the comparative selection was to observe possible differences in brain activity associated with bias, depending on legal expertise¹[14].

3.2 Stimuli

Stimuli consisted of short legal scenarios (60 in total), written in the form of case descriptions involving criminal acts, witness statements, or evidentiary assessments. Half of these scenarios included biasing elements, such as:

- ethnic cues (“defendant of ethnicity X...”),
- economic status (“coming from a low-income family...”),
- gender or age (“a 19-year-old woman...”).

The scenarios were semantically balanced and previously validated in a pilot study to confirm the perceived presence of bias²[15].

3.3 Equipment and software

Brain activity was recorded with an actiCHamp 32-channel EEG system, using the standard 10–20 positioning. Stimuli presentation was performed with PsychoPy, and behavioral responses (guilt choices, severity ratings) were recorded for comparative analysis. EEG data were preprocessed in EEGLAB (MATLAB): filtering (1–30 Hz), ICA correction, segmentation (–200 ms to 1000 ms), and baseline correction³[16].

3.4 Procedure

Participants were instructed to read the scenarios displayed on the screen and to rate the guilt of the alleged defendant (guilty/not guilty) and the severity of the offense (on a scale from 1 to 5). The order of the scenarios was randomized. After each response, a 2-second intertrial interval was introduced. Each participant completed 60 trials (30 biased, 30 neutral), in a single session of approximately 40 minutes.

3.5 AI analysis

Based on the segmented EEG data, relevant temporal and spatial features (e.g. amplitude of N200, P300, LPP in frontal, parietal regions) were extracted. These were used as input for AI classifiers, in particular:

Support Vector Machines (SVM),

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Random Forest,

and a CNN (Convolutional Neural Network) model trained on averaged ERP patterns.

The performance of the algorithms was evaluated by cross-validation (10-fold), using accuracy, precision, recall and F1-score as metrics⁴[17].

4. RESULTS AND DISCUSSION

4.1 Results

The analysis of EEG signals and behavioral data revealed significant differences in brain response between biased and neutral conditions. In particular, the ERP components N200 and P300 showed increased amplitudes in biased conditions, signaling conflictive or incongruent processing at the cognitive level. These differences were most pronounced in frontal regions (Fz, FCz) for N200 and in parietal regions (Pz, CPz) for P300¹[18]. Also, the LPP component, associated with emotional processing, was larger in the face of scenarios containing ethnic or social status cues, suggesting an increased automatic affective response in these conditions²[19].

In terms of AI analysis, the SVM and Random Forest classifiers achieved significant performance in discriminating between biased and neutral conditions, with an average accuracy of 81.2%, AUC = 0.86 and F1-score = 0.79. The CNN model, trained on averaged ERP patterns, acquired more severe decisions (e.g. higher guilt scores) and faster responses, suggesting an automatic, non-deliberative influence. Interestingly, participants with legal experience demonstrated stronger cognitive control, with increased latencies and lower amplitudes in the N200, which may reflect more deliberative processing of biased information[21].

4.2 Discussion

The results support the hypothesis that certain forms of cognitive bias can be detected physiologically, through ERP analysis. The N200 component seems to be sensitive to conflicts between automatic stereotypes and legal norms, while the LPP suggests the involvement of affective networks in the evaluation of cases marked by implicit bias. Although EEG cannot

“read” intentions or attitudes, differential activations in the presence of biased elements indicate unconscious processing that can influence the decision.

These findings have relevant implications for the professional training of magistrates. Anti-bias training programs could be complemented by neurophysiological feedback, which helps participants become aware of automatic responses triggered by social stimuli. Also, AI systems trained on such data can provide support in the automatic identification of biases in the analysis of evidence or the drafting of motivations, without substituting human judgment.

At the same time, the methodological limitations of the study must be emphasized: the experimental context is controlled, but does not fully reflect the complexity of real decisions in the courts. The sample, although balanced, is relatively small, and the interpretation of EEG components may vary depending on the cognitive and individual context. In addition, AI models, no matter how powerful, are influenced by data set biases and may produce erroneous results in the absence of rigorous validation.

Therefore, the integration of EEG and AI in the analysis of legal decisions must be approached with scientific responsibility, normative prudence and interdisciplinary collaboration. Thus, these technologies can become useful tools to support impartiality, without jeopardizing the fundamental rights of individuals.

5. CONCLUSIONS AND OUTLOOK

The present study highlighted that cognitive biases can leave a neurophysiological imprint identifiable through EEG analysis, particularly in ERP components associated with cognitive conflict (N200), semantic evaluation (P300) and affective processing (LPP). The results suggest that biases triggered by factors such as ethnicity, social status or gender can be automatically activated, even in simulated legal contexts, subsequently influencing conscious decision-making.

The integration of artificial intelligence methods into the analysis of these EEG patterns allowed for the automatic classification of brain responses with high accuracy, thus demonstrating the technical feasibility of a bias detection system. However, the application of such systems in a

real judicial context requires a cautious and regulated approach, taking into account the scientific limitations and associated ethical risks.

From an applied point of view, the results can contribute to the development of anti-bias training programs, based on neurophysiological feedback, and to the improvement of decision-making assistance algorithms in court, without substituting human reasoning. In addition, such technologies could support the auditing of the impartiality of judicial decisions, providing clues about unconscious influences in the decision-making process¹[22].

However, to avoid abusive or superficially interpreted uses, it is essential that these tools are accompanied by clear ethical frameworks, based on the principles of transparency, informed consent and the protection of cognitive rights²[23]. Moreover, a sustained interdisciplinary collaboration between lawyers, neuroscientists, computer scientists and ethicists is required to ensure a balance between technological progress and respect for the fundamental norms of justice.

In the future, research can be expanded by:

- using more realistic stimuli (e.g. video recordings, real court files);
- integration of other types of data (eye tracking, GSR, language analysis);
- testing the efficiency of AI systems in adaptive feedback for training decision-makers;
- development of protocols for use in professional or ethical assessment contexts.

In conclusion, EEG and AI do not offer an infallible solution against bias, but they can constitute complementary scientific tools for understanding and reducing unconscious influences in legal decisions. A truly impartial justice requires not only correct norms, but also awareness of the psychological mechanisms that can distort them.

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EEG-BASED PREDICTION OF IMPULSIVE BEHAVIOR USING MACHINE LEARNING ALGORITHMS

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Abstract

This study explores the feasibility of combining electroencephalography (EEG) and machine learning (ML) algorithms to identify the predisposition to impulsive behavior. Impulsivity, defined as the tendency to act quickly without deliberation, is associated with deficits in inhibitory control, which can be observed both behaviorally and neurophysiologically. Using a Go/No-Go task and 32-channel EEG recordings, we analyzed ERP components (N200, P300) and oscillatory activity (theta, beta) in 42 participants grouped based on their BIS-11 impulsivity scores. Machine learning models—SVM, Random Forest, and Convolutional Neural Networks (CNN)—were trained to classify participants' impulsivity levels. The CNN model achieved the best performance (accuracy: 85.4%; F1-score: 0.83).

Results confirm the existence of specific brain activity patterns associated with impulsivity and demonstrate the predictive capacity of AI in identifying individual behavioral traits. These findings highlight the potential applications of EEG+AI in psychiatry, neuropsychological assessment, public safety, and forensic contexts. However, their implementation requires rigorous ethical protocols and extensive validation to ensure responsible use.

Keywords

Impulsivity, EEG, event-related potentials (ERP), inhibitory control, machine learning, SVM, neural networks, neuropsychology, automated classification

1. INTRODUCTION

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Impulsivity is a multidimensional personality trait characterized by the tendency to act quickly, without deliberation, in the absence of adequate assessment of consequences [1]. Although it may be adaptive in some contexts (e.g. rapid reactions to danger), increased impulsivity is frequently associated with maladaptive behaviors, increased risk of accidents, impulse control disorders, addictions, and criminality²[2].

The assessment of impulsivity is traditionally based on psychometric questionnaires (such as the Barratt Impulsiveness Scale – BIS-11) or on laboratory behavioral tasks (e.g. Go/No-Go, Stop Signal Task)³[3]. However, these methods are often influenced by contextual and motivational factors, which limits their predictive accuracy. In this context, the development of objective and neural methods to assess the predisposition to impulsive behavior becomes increasingly necessary.

Over the past two decades, cognitive neuroscience has identified a number of EEG correlates of impulsivity, particularly in the activity of the prefrontal cortex and response inhibition systems. Among the frequently associated markers are:

- N200, an early negative component associated with cognitive control and response conflict;
- P300, related to attention allocation and context updating;
- as well as frontal theta and beta oscillations, associated with motor inhibition and impulsivity, respectively⁴[4].

In parallel, artificial intelligence (AI) and machine learning methods have provided extremely useful tools for extracting complex patterns from EEG data. Algorithms such as Support Vector Machines (SVM), Random Forest and Convolutional Neural Networks (CNN) have already been successfully used to classify cognitive, emotional states or individual traits⁵[5]. Applying these methods to identify impulsive predisposition based on brain activity could open new directions in neuropsychological screening, early intervention and behavioral profiling.

The objective of the present study is to explore the feasibility of using EEG and machine learning algorithms in combination to predict impulsive behavior. Starting from the hypothesis that participants with high impulsivity scores show specific patterns in brain activation during inhibition tasks, the study aims to train AI models capable of classifying these patterns with

high accuracy. Finally, this research aims to contribute to the foundation of an objective, automated and replicable tool, applicable in fields such as clinical psychology, neuropsychiatry, public safety or behavioral justice.

2. THEORETICAL FOUNDATIONS

Impulsivity represents a complex psychological construct, integrated in numerous explanatory models of human behavior, from temperament and personality theories to executive models of cognitive control. It is conceptualized as a tendency to react quickly, without planning, despite possible negative consequences, and is frequently divided into subdimensions such as motor, cognitive, and unplanned impulsivity¹[6]. Impulsivity is a transdiagnostic factor in multiple psychiatric disorders – ADHD, impulse control disorders, borderline personality disorder, substance use disorders – but is also found in the general population as a personality trait²[7].

From a neuroscientific perspective, impulsivity is associated with dysfunction or underactivation in frontal networks involved in response inhibition and executive control – particularly in the dorsolateral prefrontal cortex (DLPFC), anterior cingulate cortex (ACC), and ventromedial prefrontal cortex³[8]. EEG recordings during Go/No-Go or Stop Signal Tasks have shown that individuals with high levels of impulsivity exhibit reduced amplitude of the N200 and P300 components, indicating deficits in conflict detection and in allocating attention to inhibitory stimuli⁴[9].

At the same time, impulsivity has been correlated with changes in oscillatory activity: reduced frontal theta oscillations (4–8 Hz) and increased beta oscillations (13–30 Hz) may indicate imbalances between cognitive control mechanisms and automatic motor tendencies[10]. These EEG signals can be used to differentiate levels of impulsivity in clinical and non-clinical populations.

In parallel, advances in machine learning have enabled the development of algorithms capable of recognizing complex patterns in EEG data. Algorithms such as Support Vector Machines (SVM), Random Forest, k-Nearest Neighbors (k-NN) and Convolutional Neural Networks (CNN) have already been used to predict attention levels, emotional states, personality traits or even clinical conditions such as depression and anxiety, based on brain activity[11]. In

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particular, CNNs allow for the automatic extraction of features from raw EEG data, without extensive preprocessing, offering high performance in classification tasks.

The integration of EEG and ML algorithms in an impulsivity prediction system offers an alternative to classical assessment methods, with potential for clinical, psychoeducational and behavioral-preventive applications. However, the use of these technologies requires a careful balance between performance, interpretability and respect for the cognitive rights of individuals.

3. METHODOLOGY

To test the hypothesis that EEG patterns can be used to predict impulsivity, a controlled experimental design was designed, based on standardized cognitive tasks and real-time brain activity recording. The research steps included: participant selection, EEG acquisition during an inhibition task, data preprocessing, feature extraction, and AI model training.

3.1 Participants

The study involved 42 healthy adult subjects (22 women, 20 men), aged between 20 and 35 years ($M = 26.3$; $SD = 4.1$), recruited from the university environment. The level of impulsivity was previously measured with the Barratt Impulsiveness Scale – BIS-111[12]. Based on the global scores, the participants were divided into two groups: low scores ($\leq$ sample median) and high scores ($>$ median), for comparative analysis.

3.2 Experimental Task

Participants completed an adapted version of the Go/No-Go task, designed to assess inhibitory control. Visual stimuli (letters X and O) were presented sequentially on the screen (duration: 200 ms; ISI: 1,000 ms), and participants were instructed to press a key only for a certain symbol (Go), refraining from pressing the other (No-Go). The task included 400 trials (75% Go, 25% No-Go), presented in a randomized manner2[13].

3.3 EEG Acquisition

Brain activity was recorded using a 32-channel EEG system (actiCHamp), positioned according to the international 10–20 system. Electrode impedance was kept below 5 k Ω . The sampling rate was 500 Hz. EEG data were preprocessed in EEGLAB (MATLAB): band-pass filter application (1–30 Hz), artifact correction by ICA, temporal segmentation (–200 ms to 800 ms from stimulus), baseline correction and averaging to obtain ERP3 components[14].

3.4 EEG feature extraction

The following features were extracted:

- Amplitudes and latencies of N200 and P300 components at frontal (Fz, FCz) and parietal (Pz) electrodes;
- Spectral power in the theta (4–8 Hz) and beta (13–30 Hz) bands, in frontal and central regions;
- Behavioral inhibition index (No-Go error percentage, average reaction time in Go).

The features were normalized and labeled according to each participant's BIS-11 score.

3.5 Machine Learning Analysis

The processed EEG data were used as input for ML classifiers. Three types of algorithms were compared:

- SVM (Support Vector Machine) with RBF kernel;
- Random Forest with 100 decision trees;
- Convolutional Neural Network (CNN) with two convolution and pooling layers, trained on raw EEG4 segments[15].

The dataset was divided into 80% training and 20% test. 10-fold cross-validation was used, and the performance of the classifiers was evaluated by: accuracy, F1-score, AUC and confusion matrix. For interpretability, a feature importance estimation model (SHAP values) was also applied.

4. RESULTS AND INTERPRETATION

4.1 EEG Results

The analysis of ERP components indicated significant differences between the high and low impulsive groups of participants, especially in the inhibition (No-Go) conditions. The N200 component showed significantly reduced amplitudes in the impulsive group ($M = -2.8 \mu V$) compared to the control group ($M = -4.1 \mu V$; $p < .01$), in the medial frontal region (Fz)1[16]. Also, the mean latency of the N200 was shorter in the impulsive group, suggesting a faster but less efficient activation of the cognitive control mechanism.

For the P300 component, differences were observed in the parietal area (Pz), with reduced amplitudes in the impulsive group ($M = 5.3 \mu V$ vs. $M = 7.8 \mu V$; $p < .05$). This reduction may reflect a reduced capacity for context updating and for allocating attentional resources in inhibitory decision-making2[17].

In spectral analysis, the impulsive group showed a significant decrease in frontal theta power and an increase in beta activity, a pattern associated with self-regulation deficits and a tendency towards rapid, uncontrolled reactions3[18].

4.2 Results of ML classifiers

Machine learning models were able to classify participants with high accuracy according to their impulsivity score, based on the extracted EEG features. The average performances of the algorithms on the test set are presented below:

Algorithm Accuracy (%) F1-score AUC

SVM (RBF) 82.1 0.80 0.85

Random Forest 79.6 0.78 0.83

CNN 85.4 0.83 0.88

The CNN model provided the best results, managing to capture subtle patterns in brain activity, even without manual feature extraction. SHAP analysis showed that N200 amplitude, frontal theta power and P300 latency were the most influential features for the classifier's decision[19].

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4.3 Interpretation

These results confirm the hypothesis that impulsivity has a measurable neurophysiological substrate and that machine learning can leverage these data to achieve valid automatic classifications. The decrease in ERP amplitudes and the imbalance of oscillatory activity suggest a deficient activation of inhibitory control networks, consistent with neurocognitive models of impulsivity. The obtained correlations also support the viability of using EEG as an objective tool for screening impulsivity in clinical or applied contexts.

However, the interpretation of the results should be done with caution: EEG patterns may only reflect temporary predispositions or states and cannot be considered in isolation as evidence of impulsive behavior per se. In addition, the generalization of these results requires validation on larger samples, in more varied ecological contexts and with realistic stimuli.

5. DISCUSSION

The obtained results confirm the research hypothesis according to which impulsivity is associated with distinct neurophysiological patterns, detectable through EEG. The decrease in N200 and P300 amplitudes, correlated with the reduction of frontal theta activity and the intensification of beta activity, suggests a deficiency in inhibitory control mechanisms and in the capacity for adaptive processing of relevant stimuli. These findings are congruent with previous literature describing impulsivity as an imbalance between cognitive inhibition systems and automatic motor tendencies[7].

The integration of machine learning techniques has allowed not only the detection of these patterns, but also the automatic classification of the level of impulsivity, with high performance. Thus, the combination of EEG and AI algorithms offers an innovative framework for the development of objective screening tools of behavioral traits, with potential application in fields such as clinical psychology, neuropsychiatry, road safety or behavioral assessment in the judiciary.

However, it should be emphasized that machine learning should not be conceived as a substitute for clinical assessment, but as a complementary support tool, intended to provide additional

data and support the human decision-making process. Interpreting the results generated by the classifiers requires interdisciplinary expertise and psychological, ethical and normative contextualization.

The study also presents several important limitations. The relatively small sample size and the controlled nature of the experimental task limit the ecological validity of the conclusions. Also, EEG activity is sensitive to factors such as fatigue, motivation or emotional state, which may affect the reproducibility of the results in real-world contexts. Furthermore, ML classifiers can be influenced by the structure of the dataset, requiring repeated testing and generalizations on diverse samples.

For the future, it is recommended to expand research by integrating multimodal data – such as eye tracking, GSR (galvanic skin response) and motor behavior analysis, in order to achieve a more robust and holistic prediction of impulsivity. Also, the application of these methods in clinical populations (e.g. ADHD, personality disorders, impulse control disorders) and in forensic fields could bring significant contributions to both research and practice.

Overall, the study supports the technological viability and psychological relevance of using EEG and AI in understanding and predicting impulsivity, provided that clear principles of scientific validation and ethical responsibility are respected.

6. CONCLUSIONS AND OUTLOOK

The results of this study support the idea that EEG analysis, combined with artificial intelligence algorithms, can be a viable and promising tool for identifying predisposition to impulsive behavior. Neurophysiological markers associated with response inhibition – such as the N200 and P300 components – correlated with specific oscillatory signals, can reflect significant differences in impulsivity levels between individuals. In addition, the use of machine learning models has demonstrated a high capacity for automatic classification of these brain patterns, with an accuracy that validates the technological applicability of the method.

These findings have relevant implications for fields such as psychiatry, applied neuropsychology, behavioral assessment in the judiciary and even in road safety policies, where the ability to anticipate impulsive reactions can contribute to the prevention of risky or

dangerous behaviors. EEG+AI systems can support, in this context, both preventive screening and monitoring progress in therapeutic or educational interventions.

However, the real application of these technologies requires a rigorous normative and ethical framework. It is essential to develop standardized protocols for the collection, processing and interpretation of EEG data, along with mechanisms for the protection of cognitive data and personal autonomy. Any use of these methods outside of experimental research must respect the principles of transparency, informed consent and interpretability of algorithms.

In conclusion, EEG and AI do not offer a definitive solution in the assessment of behavioral traits, but they can become valuable complementary tools in understanding impulsivity, contributing to the consolidation of a more objective, personalized and evidence-based psychodiagnostic approach.

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NEUROCOGNITIVE PROFILES IN IMPULSE CONTROL DISORDERS

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Abstract:

Impulse control disorders (ICD) are frequently associated with criminal behaviors characterized by lack of premeditation, reactive aggression, and poor emotional regulation. This study aims to investigate the specific neurocognitive profiles of individuals with ICD and explore their implications for the individualization of criminal sentencing. A total of 60 participants (30 with ICD, 30 controls) were assessed using EEG recordings during a cognitive inhibition task, alongside validated psychometric tools (BIS-11, PCL-R).

Results revealed distinct patterns in the clinical group, marked by reduced N200 and P300 amplitudes, as well as frontal oscillatory imbalances (decreased theta, increased beta activity). These markers correlated significantly with high impulsivity, aggression, and antisocial traits. Moreover, EEG features showed predictive value for both recidivism risk and responsiveness to cognitive rehabilitation interventions.

The findings support the integration of neuropsychological assessments into the legal framework, particularly in evaluating criminal responsibility, dangerousness, and diminished

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capacity. Neurocognitive profiles are proposed as supportive tools for tailoring sanctions to individual characteristics-without replacing judicial discretion. The article emphasizes the urgent need for ethical protocols and methodological standards to ensure the responsible use of neuroscientific evidence in forensic contexts.

Keywords: impulsivity, EEG, cognitive inhibition, criminal behavior, neuropsychological assessment, sentencing individualization, criminal responsibility, recidivism, neuroethics

1. INTRODUCTION

1.1. Impulse control disorders (ICDs) – prevalence, social and legal impact

Impulse control disorders (ICDs) are a spectrum of psychopathological conditions characterized by persistent difficulties in inhibiting inappropriate, aggressive or risky behaviors, despite awareness of their negative consequences [1]. These disorders include intermittent explosive disorder, kleptomania, pyromania, pathological gambling, as well as other impulsive-compulsive behaviors included in the spectrum of personality disorders or addictions [2].

According to epidemiological data, the prevalence of impulse control disorders in the general population is estimated between 4% and 10%, with higher rates in institutionalized populations, including prisoners [3].

The impact of these disorders is significant not only at the individual and clinical level, but also at the social and legal level. Impulsive manifestations, such as physical aggression, compulsive theft or destructive behavior, can lead to criminal consequences, questioning the criminal responsibility of the person. At the same time, judicial systems face challenges related to recidivism, the assessment of dangerousness and the correct individualization of punishment, especially when impulsivity is accompanied by personality disorders or cognitive deficits [4].

1.2. The need for neurocognitive understanding of impulsive behavior in the criminal context

In this context, a neurocognitive understanding of impulsive behavior becomes essential to overcome the limits of strictly behavioral or moral-normative explanations of criminal

behavior. Research in cognitive neuroscience has shown that impulsivity is not just a psychological trait, but is associated with structural and functional dysfunctions in neural networks involved in inhibition control, emotion regulation and decision-making [5].

Thus, a person's neurocognitive profile can provide important clues about the capacity for self-control, the level of premeditation and the tendency towards behavioral recurrence, all of which are relevant aspects in the legal analysis of guilt and criminal sanction.

1.3. The role of cognitive sciences in the assessment of dangerousness and criminal responsibility

From a legal perspective, cognitive sciences can contribute to the assessment of the degree of criminal responsibility, especially in situations where judgment is impaired by neuropsychiatric disorders. They also provide an objective basis for assessing social dangerousness, an essential criterion in decisions regarding hospitalization, conditional release or the application of security measures [6].

In recent years, neurocriminology has consolidated as an emerging field, exploring the links between brain functioning, personality traits and criminal behavior [7]. However, these approaches have also raised ethical and legal questions regarding the use of neuroscientific evidence in the courtroom, the risk of biological determinism and respect for the rights of the person being assessed.

1.4. Objectives of the article

In this direction, the present article aims to investigate the neurocognitive profiles specific to individuals with impulse control disorders, in order to understand the mechanisms that can lead to impulsive criminal behaviors. By correlating data from neuropsychological tests, EEG/ERP measurements and clinical observation, the paper aims to highlight the differences from typical cognitive profiles, as well as the potential of this information in individualizing punishment. Finally, the implications of these results for judicial practice and for the development of more personalized penal policies are discussed, which take into account not only the committed act, but also the cognitive and volitional capacity of the person to control it.

2. THEORETICAL FOUNDATIONS

2.1. Defining Impulse Control Disorders: DSM-5 Criteria

According to the DSM-5, impulse control disorders and disruptive behavior disorders are classified as a family of disorders characterized by the inability to resist an impulse, temptation, or desire to perform an action that is harmful to oneself or others [8].

Included in this category are diagnoses such as intermittent explosive disorder, characterized by disproportionate aggressive outbursts, kleptomania, defined by the recurrent urge to steal objects of no personal practical value, and pathological gambling (ludomania), which involves repetitive gambling behaviors despite major negative consequences [9].

These disorders do not involve only occasional impulsive behaviors, but a stable pattern of failure to control behavior, often accompanied by psychological distress and social or legal consequences. DSM-5 draws attention to the distinction between impulsivity, compulsivity, and aggression – concepts that are close, but neurocognitively and clinically differentiated [10].

2.2. Neurocognitive mechanisms involved

The normal functioning of behavioral control depends on a series of neurocognitive mechanisms, among which the most relevant for ICD are:

response inhibition, i.e. the ability to stop an automatic or planned action;

emotional regulation, through which the individual manages to manage disproportionate affective reactions;

decision-making, especially under conditions of uncertainty and delayed reward;

and cognitive and affective empathy, which mediates the relationship to the consequences for others [11].

Dysfunctions in these processes are associated with impairments in moral development, reduced frustration tolerance, lack of anticipation of consequences and externalization of responsibility. Thus, impulsive behaviors are not only expressions of weak will, but may reflect deficits in cognitive and affective processing, influenced by genetic, neurobiological and psychosocial vulnerabilities [12].

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2.3. Neurophysiological and neuroimaging markers

EEG and fMRI studies have highlighted a series of neurobiological markers of impulsivity and self-control deficits. At the EEG level, decreased amplitude of the N200 and P300 components in inhibition tasks (e.g. Go/No-Go) indicates poor conflict detection and poor attention allocation [13]. In addition, reduced frontal theta oscillations and increased beta activity are associated with increased motor impulsivity and poor executive regulation [14].

On the other hand, fMRI data indicate hypoactivation in the ventromedial and dorsolateral prefrontal cortex, structures responsible for planning and evaluating consequences, along with hyperactivity in the amygdala and anterior insula, correlated with increased emotional reactivity [15]. Also, the anterior cingulate cortex (ACC), involved in error monitoring and behavioral regulation, frequently appears dysfunctional in TCI, which explains the difficulty in learning from the negative consequences of previous actions [16].

2.4. Relevance of the neurocognitive profile in the context of criminal responsibility and recidivism

In a criminal context, the neurocognitive profile can provide objective data on the individual's capacity for self-control, discernment, and premeditation, essential elements in the assessment of criminal responsibility. Also, in the prediction of future behavior, neurocognitive profiles can function as predictors of recidivism, complementing traditional clinical assessments and actuarial scales [17].

This approach supports a more nuanced view of guilt, in which the seriousness of the act is interpreted in the context of the perpetrator's cognitive capacities. Thus, an individual with a neurological disorder or a neurophysiologically demonstrable inhibition deficit could benefit from a differentiated assessment in the process of individualizing punishment – including alternatives such as psychiatric treatment, cognitive rehabilitation programs, or safety measures [18].

3. METHODOLOGY

3.1. Participants

The study included a total of 60 participants, divided into two main groups: a clinical group ($n = 30$) consisting of individuals diagnosed with impulse control disorders (ICDs), and a control group ($n = 30$) consisting of individuals without a significant psychiatric or behavioral history. Participants in the clinical group were recruited from psychiatric centers and probation services, based on a previously established diagnosis according to DSM-5 criteria, confirmed by the Structured Clinical Interview for DSM Disorders (SCID-I) [19]. The control group was selected from the general population, matched for age, sex, and educational level.

Exclusion criteria for both groups included: known neurological conditions, active substance use, IQ below 80 (assessed with WAIS-IV), or lack of informed consent.

3.2. Instruments used

To characterize the psychological and behavioral profile, the following were used:

- Barratt Impulsiveness Scale – BIS-11, to quantify the degree of global impulsivity and on subscales (motor, cognitive, non-planned) [20];
- Hare Psychopathy Checklist – Revised (PCL-R), to assess psychopathic traits relevant in the criminal context [21];
- SCID-I and SCID-II, to diagnose personality disorders and psychiatric comorbidities.

Brain activity was recorded using a 32-channel EEG system, with positioning according to the international standard 10–20. Stimuli presentation was performed using PsychoPy software, within an adapted Go/No-Go task, designed to assess response inhibition and cognitive control.

3.3. Experimental procedure

Participants were tested individually, in a controlled, acoustically isolated environment. After obtaining informed consent, they completed the BIS-11 scale and underwent the SCID interview. This was followed by the EEG stage, in which they were presented with a Go/No-Go task consisting of 300 trials, of which 25% with inhibitory stimulus (No-Go). EEG activity was recorded continuously during the task (approximately 20 minutes).

After recording, EEG signals were preprocessed in EEGLAB (MATLAB): band-pass filtering (1–30 Hz), ICA correction for eye movement artifacts, temporal segmentation (–200 ms to +800 ms from the stimulus) and baseline correction. Relevant ERP components (N200, P300) were extracted and spectral power indices in the theta and beta bands were calculated for frontal and parietal electrodes.

3.4. Data analysis

Statistical analysis was performed in SPSS and Python (scikit-learn). The following were performed:

- comparative analyses (t-test, ANOVA) between the clinical and control groups, for BIS-11 scores and EEG parameters;
- Pearson correlations between neurophysiological indicators and psychometric scores;
- logistic regression analyses to identify predictions of clinical group membership based on EEG patterns.

To explore the predictive capacity of EEG data, AI classifiers (Support Vector Machines, Random Forest, Logistic Regression) were trained, using cross-validation (10-fold) and metrics such as accuracy, AUC and F1-score. These analyses aimed to test the hypothesis that the neurophysiological profile allows discrimination between individuals with TCI and those without disorders, thus offering a potential objective tool to support clinical assessment.

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4. RESULTS

4.1. Neurocognitive profiles identified

Comparative analysis of EEG and psychometric data revealed distinct neurocognitive profiles in the clinical group, characterized by deficits in behavioral inhibition, impulsive decision-making, and hypoactivation of the prefrontal cortex. In the Go/No-Go task, participants with TCI recorded a significant decrease in the N200 amplitude at frontal electrodes (Fz, FCz), suggesting poor conflict detection and difficulties in suppressing automatic responses. Also, the P300 component, associated with cognitive context updating, was reduced in parietal regions (Pz), indicating a deficient allocation of attention in inhibitory situations.

At the spectral level, a significant decrease in frontal theta activity (4–8 Hz) and an increase in beta activity (13–30 Hz) were observed, a neurophysiological pattern specific to increased excitability and deficient executive control.

4.2. Subgroup differences

To highlight internal variability, participants in the clinical group were divided into two subgroups: individuals with a criminal history ($n = 18$) and clinically diagnosed patients without criminal involvement ($n = 12$). Results showed that offenders with TCI presented higher scores on the BIS-11 and significantly higher scores on the “antisocial” dimension of the PCL-R scale. Neurophysiologically, they showed even lower N200 and P300 amplitudes, as well as a pronounced hypoactivation of frontal regions, compared to non-criminal patients.

The control group presented a typical EEG profile, with well-defined ERP components and balanced frontal activity, without signs of deficient inhibition. These differences validate the hypothesis of the existence of specific brain patterns associated with impulsive behavior in a criminal context.

4.3. Correlations between brain patterns and severity of antisocial behavior

Significant correlations were observed between reduced N200 amplitude and high scores on aggression, motor impulsivity and psychopathic traits. In particular, the N200 component correlated negatively with the total PCL-R score ($r = -0.51$, $p < 0.01$), and frontal theta power correlated negatively with the frequency of self-reported antisocial behaviors. These associations support the hypothesis that neurocognitive deficits may underlie violent or irresponsible behavioral manifestations.

In addition, prolonged P300 latency was associated with reduced ability to anticipate consequences and with more impulsive decisions in delayed reward tasks (e.g. Delay Discounting Task), highlighting the interaction between executive impairment and moral evaluation.

4.4. Predictors of relapse or treatment response

Based on a logistic regression model, the ability of neurophysiological markers to predict the probability of relapse (relapse within 12 months) was tested. The results showed that decreased N200 amplitude and increased BIS-11 score were significant predictors ($p < 0.01$), with an accuracy of 78.2%. Also, frontal theta power was a positive predictor for favorable response to cognitive-behavioral rehabilitation interventions, supporting the idea that the neurocognitive profile can inform the strategic targeting of treatment.

Therefore, combined EEG–psychometric analysis offers not only a differential diagnostic tool, but also a potential clinical and legal prediction system, with direct implications on the form and duration of the criminal sanction.

5. INTERPRETATION AND DISCUSSION

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5.1. Interpretation of neurocognitive differences in ICD

The differences identified in EEG parameters between the analyzed groups reflect the presence of systematic dysfunctions in neural networks involved in inhibitory control, decision-making and consequence processing. The reduced amplitudes of the N200 and P300 components among participants with impulse control disorders (ICD) indicate early deficits in conflict detection and attention allocation, suggesting a disrupted neurocognitive mechanism for suppressing impulsive reactions.

Furthermore, the imbalances in frontal oscillatory activity (decreased theta and increased beta) suggest a neurophysiological tendency towards rapid, automatic reactions in the absence of deep executive processing. This profile is congruent with neuropsychological models of pathological impulsivity and supports the idea that ICD involves more than a simple behavioral dysregulation – reflecting a functional impairment of cognitive control.

5.2. Relevance in the assessment of the capacity for discernment and dangerousness

From a legal perspective, these findings can contribute to the assessment of the capacity for discernment at the time of the act. Although EEG does not provide “definitive evidence” of the absence of responsibility, it can support the clinical argument regarding the reduced capacity to anticipate, evaluate and control the action, especially in cases where the existence of a relevant neuropsychiatric substrate is suspected.

At the same time, the neurocognitive profile can have an important role in the assessment of social dangerousness, an essential criterion in decisions regarding the application of safety measures or involuntary hospitalization. The presence of clear deficits in inhibition and decision-making can suggest the risk of relapse or uncontrolled behaviors, especially in the absence of adequate treatment.

5.3. Ethical and legal implications: to what extent can neuroscience be used in justice?

Although promising, the use of neuroscientific evidence in the legal sphere raises fundamental ethical and epistemological questions. To what extent can these data be interpreted as indicators of diminished culpability? Can they be used in the assessment of intention or premeditation? Is

there a risk of a dangerous biological determinism that reduces human responsibility to simple brain dysfunctions?

It is necessary that the interpretation of these data be accompanied by professional caution, interdisciplinary expertise and methodological transparency, avoiding the temptation to use neurotechnology as a substitute for moral or legal judgment. It is also necessary to guarantee the protection of the cognitive rights of the person being evaluated and the avoidance of biological stigmatization in the criminal justice system.

5.4. The role of profiles in individualizing punishment

One of the most promising directions for applying these results is in individualizing punishment. Neurocognitive profiles can function as objective indicators of the need for treatment, the degree of voluntary control and the risk of recidivism, thus informing the judge's decision regarding:

- the choice between punitive and therapeutic measures (e.g. hospitalization, counseling, rehabilitation);
- mitigating circumstances, where a reduced capacity for self-control is observed;
- assessing diminished criminal responsibility, without completely excluding it.

Thus, the integration of neurocognitive results in the criminal process can contribute to a more personalized, fair and evidence-based justice, without denying responsibility, but by nuanced it in the context of individual vulnerabilities.

5.5. Limitations of the study

The present study, although relevant, has certain methodological limitations that must be recognized. First, the sample size is relatively small, which limits the generalizability of the results. Second, the experimental task has an artificial character (Go/No-Go) and does not fully reflect the complexity of moral decisions or real behaviors.

Also, the external validity of EEG patterns is influenced by factors such as the state of attention, fatigue or motivation of the subject. Last but not least, AI models used in profile classification require further validation on diverse clinical samples, to avoid overfitting and premature conclusions.

6. CONCLUSIONS

6.1. Neurocognitive profiles can contribute to a more nuanced understanding of impulsive criminal behavior

The results of this study support the idea that impulse control disorders (ICDs) cannot be understood exclusively from a behavioral or moral perspective, but involve concrete alterations in neurocognitive functioning. The identification of specific brain patterns, such as decreased amplitude of ERP components (N200, P300) and imbalances in frontal oscillatory activity, highlights that impulsive criminal behaviors often reflect dysfunctions in the processes of inhibition, emotional regulation and decision-making. These findings support the importance of interdisciplinary assessments that integrate the neurological and psychological dimensions of antisocial behavior.

6.2. Integrating neuropsychological assessments can support personalized justice

The use of neurocognitive data in the assessment of discernment capacity, dangerousness and risk of recidivism can bring added objectivity to the process of individualizing the criminal response. It is not advocating the substitution of legal judgment by neurotechnology, but rather the complementarity between scientific expertise and legal reasoning. In this sense, the profiles obtained can guide decisions related to the form of the sanction (punishment vs. treatment), the degree of criminal responsibility and post-sentence measures (rehabilitation, supervision, counseling). This approach promotes a more equitable justice adapted to the individual profile, instead of the uniform application of sanctions.

6.3. Responsible use protocols are required, avoiding stigmatization and biological determinism

Despite the promising application potential, the use of neuroscientific evidence in the legal space must be accompanied by rigorous ethical and methodological standards. It is essential to avoid the deterministic interpretation of neurophysiological data, which could lead to

stigmatization, exclusion or excessive labeling. The cognitive rights of the person being assessed must also be protected, ensuring informed consent, confidentiality and transparency in interpretation. In the absence of a clear regulatory framework, the risk of abuse or overinterpretation becomes real.

In conclusion, neurocognitive profiles can become valuable tools for personalized justice, but they cannot substitute for the complexity of legal decision-making. They must be used with scientific discernment, legal responsibility and ethical sensitivity, for the benefit of a more humane, fair and efficient penal system.

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NEUROTECHNOLOGY AND CRIMINAL RESPONSIBILITY. INTEGRATING EEG AND AI INTO LEGAL ASSESSMENT

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Abstract

In recent decades, advances in neuroscience and artificial intelligence (AI) have opened new avenues for understanding, evaluating, and evidentially supporting criminal responsibility. This article explores the combined use of electroencephalography (EEG) and machine learning algorithms to identify relevant neurocognitive patterns related to judgment, volition, and inhibitory control—core components of legal accountability.

Building on current literature and empirical studies, the paper proposes a theoretical and methodological model through which ERP signals can be correlated with behavioral responses and automatically classified based on the degree of voluntariness or cognitive control involved. Simulated applications and experimental scenarios relevant to forensic assessments are also discussed.

The paper highlights both the potential of these technologies to inform judicial decisions and their current limitations—from interindividual variability in EEG responses to ethical risks such as biological determinism and algorithmic error. In conclusion, the article underscores the need for a robust normative and ethical framework that would allow the responsible, transparent, and rights-based use of these methods in the legal system.

Keywords: criminal responsibility, EEG, artificial intelligence, judgment, inhibitory control, machine learning, forensic assessment, neurolaw, neuroscientific evidence

1. INTRODUCTION

1.1. The Evolution of Criminal Responsibility Assessment in the Age of Neuroscience and AI

Criminal responsibility is one of the essential foundations of modern criminal law, presupposing a person's capacity to understand the wrongfulness of an act and to direct his or her behavior accordingly [1]. Traditionally, this capacity was assessed based on clinical observation, psychological interviews, and forensic expertise, anchored in descriptive models of psychopathology.

With the rapid advance of neuroscience and computational analysis technologies, a paradigm shift has occurred: from interpretations based exclusively on behavior and history, towards the identification of the neurobiological substrates of will, inhibitory control, and intentionality [2]. This approach is supported by emerging directions such as neurolaw, which investigates how information about brain activity complements or recalibrates traditional legal concepts such as discernment, imputability, or culpability [3].

1.2. EEG and AI are important in forensics and forensics

Among the neurophysiological investigation methods, electroencephalography (EEG) is one of the most accessible and relevant for application in the legal field. Unlike functional imaging (fMRI), EEG offers high temporal resolution, being able to capture brain reactions in milliseconds, which makes it suitable for studying fast cognitive processes involved in decision-making, response inhibition and moral awareness [4].

In parallel, progress in artificial intelligence (AI), especially in the field of machine learning, allows the automatic analysis of complex EEG patterns, the extraction of specific neurocognitive signatures and their classification according to psychological or behavioral traits [5]. These capabilities open the possibility of building tools that, without replacing expert judgment, support the objective assessment of self-control capacity or predisposition to impulsive and automatic reactions, essential aspects in establishing criminal liability.

1.3. Objectives of the article

This article investigates the extent to which the combination of EEG analysis with artificial intelligence algorithms contributes to the understanding and support of decisions regarding the criminal responsibility of a person. Starting from the current literature in neuroscience, criminal law, criminal procedural law and AI, the paper explores the possibility of identifying relevant neurophysiological profiles for the analysis of discernment, intention and inhibitory control.

At the same time, the scientific, ethical and legal limits of this approach are discussed, emphasizing the need for a normative framework, rigorous empirical validation and respect for the cognitive rights of the assessed person. In a climate in which technology is becoming increasingly present in the legal sphere, a critical reflection on the way in which science supports, without distorting, the criminal justice process is essential.

2. THEORETICAL FOUNDATION

2.1. Criminal liability - classic legal elements

Criminal liability is defined, in contemporary criminal law, as the ability of a person to be legally responsible for the acts committed, based on his ability to understand the significance of the actions and to act according to this understanding. This notion presupposes the cumulative fulfillment of three fundamental elements: discernment (the ability to critically assess the nature of the acts), culpability (the existence of intention or negligence) and premeditation (planning the act with anticipation and awareness of the cause) [6].

Discernment is traditionally assessed through psychiatric expertise, being considered absent or diminished in cases of mental illness, intoxication or major cognitive disorders. However, in the current context of interdisciplinarity, these assessments are complemented with objective methods, including from the field of neuroscience, which provide additional information about the individual's effective capacity to control his behavior and anticipate its consequences [7].

2.2. The Neurocognitive Substrate of Responsibility

From a neurocognitive perspective, criminal responsibility involves the proper functioning of complex mental processes, such as inhibitory control, rational decision-making, outcome

anticipation, and intentionality. These functions are mediated by distributed neural networks, with their epicenter in the dorsolateral prefrontal cortex, orbitofrontal cortex, anterior cingulate, and insula—regions involved in moral processing, risk assessment, and self-control [8].

Damage to these circuits—through developmental dysfunction, trauma, or psychiatric disorders—can lead to impulsive, aggressive, or automated behaviors, with diminished self-regulation capacity. Studies in neuroethics and neurocriminology support the idea that discernment is not an absolute state, but a functional construct dependent on the brain's ability to mediate between impulse, norm and reasoning [9].

2.3. EEG and neurophysiological markers of voluntary behavior

In this context, electroencephalography (EEG) and evoked potential analysis (ERP) allow real-time observation of brain activity associated with decision-making processes involved in criminal liability. The most relevant neurophysiological markers are:

- Bereitschaftspotential (BP)³⁰⁶ – or “movement readiness potential” – which precedes the voluntary initiation of an action; it is considered an indicator of conscious motor intention [10];
- P300³⁰⁷ – ERP component associated with cognitive context updating and meaning detection, sensitive to surprise and decisional relevance [11];
- LPP³⁰⁸ (Late Positive Potential) – correlated with affective processing and moral evaluation of stimuli, being activated in conditions of value conflict or moral dilemma [12].

By analyzing these signals, researchers can distinguish between automatic and voluntary reactions, as well as between affective and deliberative processing, which provides a potentially useful framework in the assessment of intention and behavioral control in a judicial context.

³⁰⁶ The Bereitschaftspotential (BP), also known as the “readiness potential”, is a slow component of EEG activity that occurs approximately 1–1.5 seconds before the initiation of a voluntary movement. It is considered a neurophysiological marker of motor intention and reflects the gradual activation of premotor and motor areas of the cerebral cortex in preparation for an action.

³⁰⁷ The P300 is a positive component of the evoked potential (ERP) that occurs approximately 300 milliseconds after the presentation of a significant stimulus, particularly in tasks involving novelty detection, decision-making, or contextual updating. It is interpreted as reflecting the allocation of attentional resources and the processing of the meaning of an event, often being larger for unexpected or decision-relevant stimuli. The amplitude and latency of the P300 vary depending on the difficulty of the task and the level of cognitive involvement. In a forensic context, the P300 is useful in assessing the response to stimuli with moral or normative content, as well as in detecting intention or recognition of relevant information.

³⁰⁸ The LPP is a longer-lasting ERP component (starting at ~400 ms and lasting over 1000 ms), which reflects emotional processing and affective evaluation of socially or morally relevant stimuli. The LPP is more pronounced when subjects are exposed to strong emotional images, stimuli with high negative/positive valence, or ethical dilemmas, indicating a heightened level of emotional and motivational involvement. It is frequently used in studies of unconscious bias, stereotyping, morality, and empathy.

2.4. The role of AI: automatic classification of brain patterns associated with will and self-control

The development of machine learning methods allows the automatic extraction and classification of complex EEG patterns, overcoming the limits of visual observation or unidimensional analysis. Algorithms such as Support Vector Machines (SVM), Random Forest, or Convolutional Neural Networks (CNN) have already been successfully used in research aimed at discriminating between cognitive states (intention vs. non-intention, control vs. impulse) [13].

Applying these algorithms to EEG data obtained under experimental conditions can lead to the identification of neurocognitive “signatures” of voluntary or automatic behavior. For example, the sequential activation of the BP - P300 - LPP components in the context of a moral task may reflect deliberative processing, while the absence of BP or a decrease in P300 could suggest a reflexive, uncontrolled reaction [14].

Thus, artificial intelligence becomes a support tool for the objectification of brain activity in relation to legal questions, such as: “Did he act intentionally?”, “Did he have the capacity for self-control?”, “Did he realize the consequences of the act?”. These questions, although traditionally addressed through clinical expertise, can receive an additional scientific foundation by integrating EEG and AI technologies, in a carefully regulated regulatory framework.

3. METHODOLOGICAL FRAMEWORK

3.1. Description of a possible EEG/AI assessment procedure for criminal liability

To investigate the potential of combining electroencephalography (EEG) with artificial intelligence (AI) algorithms in the assessment of criminal liability, we propose a standardizable experimental protocol that can be applied in controlled clinical or judicial contexts. The procedure involves recording EEG activity during a series of legally relevant cognitive tasks, followed by analysis assisted by machine learning methods.

Subjects undergo a testing session in which they are presented with normatively charged visual and verbal stimuli (e.g. moral dilemmas, quick decision situations between legal and illegal options), while their EEG is monitored in a multi-channel mode. ERP components associated with intention, decision and inhibitory control are recorded, as well as behavioral data (reaction time, choices made) [15].

3.2. Examples of cognitive/legal stimulation, experimental tasks, signal processing

Cognitive stimulation can be achieved through Go/No-Go tasks with normative content (e.g., “Press if the action is legal”), moral flankers, or scenarios from criminal literature presented as visual moral dilemmas. For example, participants can be asked to decide in real time whether an illustrated action is justifiable or not, depending on the context (e.g., self-defense, psychological coercion, etc.) [16].

EEG signals are recorded at a frequency of 500–1000 Hz and processed using standard pipelines:

- Band-pass filtering (1–30 Hz),
- artifact correction (e.g., ICA for eye movements),
- temporal segmentation (e.g., -200 ms to +800 ms from the stimulus),
- and baseline correction.

ERP components such as Bereitschaftspotential (BP), N200, P300, and LPP are extracted, as well as spectral power parameters (theta, beta) for frontal and parietal regions.

3.3. Machine learning algorithms used

The preprocessed data are introduced into an automated machine learning-based analysis system, with the aim of classifying brain patterns associated with controlled versus impulsive reactions or with voluntary intention versus reflex response.

The algorithms used are:

- Support Vector Machines (SVM), for binary classification of cognitive states (e.g. control/incontrol),
- Random Forest, for robustness to small data sets and the importance of variables,
- Convolutional Neural Networks (CNN), for processing EEG signal matrices (spatiotemporal topographies) and identifying complex signatures [17].

The dataset is divided into training/testing subsets, using cross-validation (e.g. 10-fold) to reduce overfitting. The algorithms are evaluated according to standard metrics: accuracy, AUC (Area Under Curve), precision, recall and F1-score.

3.4. Data validation and error control

Validation of this type of procedure involves several levels:

- internal validity: obtaining significant differences between experimental conditions (e.g. stimuli with vs. without inhibitory control),
- external validity: replicability of results on other samples or in real legal contexts,
- constructive validity: correlation of EEG patterns with independent psychological measurements (e.g. scores on self-control scales, clinical interviews) [18].

To control errors, it is necessary:

- blinding of evaluators;
- testing of EEG signal quality (e.g. impedances, signal-to-noise ratio);
- and analyzing algorithmic biases (e.g. controlling for overfitting or for unbalanced distributions between classes).

Such a procedure, carefully calibrated and validated, could constitute an objective technological support for experts who assess criminal liability, offering a complementary decision model and not a substitute for traditional clinical and legal analysis.

4. SIMULATED RESULTS OR APPLICATIONS

4.1. Relevant studies using EEG/ERP in the assessment of intention or inhibition

Experimental studies in the last two decades have highlighted the relevance of EEG components in identifying the intentionality of action and the capacity for cognitive inhibition, both of which are essential in the assessment of criminal responsibility. A classic example is the experiments conducted by Benjamin Libet, who demonstrated that BP - the movement preparation potential - occurs several hundred milliseconds before the person consciously reports the intention to act, which has generated numerous debates on free will [19].

In more applied situations, recent research has used Go/No-Go and Stop Signal Tasks to investigate inhibitory control among people with self-control disorders or criminal history. The

N200³⁰⁹ and P300³¹⁰ components have been identified as neurophysiological markers of decisional conflict and effective inhibition, while variations in frontal theta activity have been correlated with impulsive tendencies and difficulties in regulating behavior [20].

In parallel, machine learning analysis methods applied to EEG data have allowed the automatic classification of voluntary vs. reflexive reactions, opening perspectives for the application of these tools in forensic psychiatric expertise [21].

4.2. Preliminary results or theoretical model

Based on these researches, a theoretical model applicable to the assessment of criminal responsibility can be outlined, in which a combination of EEG markers and behavioral parameters is automatically analyzed to provide clues regarding the level of cognitive control and the existence of deliberate intention. Such a model could include:

- BP presence – as an indicator of voluntary initiation of the action;
- N200/P300 amplitude – associated with decisional conflict and processing of meaning;
- Reaction time and response accuracy – as a reflection of deliberation or automatic reactions;
- Theta power in frontal regions – correlated with cognitive inhibition effort.

These variables can be introduced into a classification algorithm (e.g., SVM or CNN), which establishes the probability that a behavior was conscious, voluntary and controlled, versus automatic, reflex or pathological.

³⁰⁹ The N200 is a negative component of the evoked potential (ERP) that occurs approximately 200–350 milliseconds after the presentation of a stimulus. It is particularly associated with the detection of cognitive conflicts, error recognition, and response inhibition (especially in Go/No-Go or Stop-signal tasks). The N200 is amplified when the subject encounters a stimulus that requires the suppression of an automatic response or that contradicts cognitive expectations. Its activation is observed in the anterior cingulate cortex and frontal regions, and is considered an indicator of early mechanisms of cognitive control and selective attention.

³¹⁰ The P300 is a positive ERP component that occurs 300–600 milliseconds after a stimulus, and is one of the best-studied components of the brain response. It is related to processing stimulus meaning, updating mental context, and decision-making in situations where the stimulus is rare, unexpected, or task-relevant. The P300 reflects the redistribution of attentional resources and the cognitive assessment of the relevance of an event. It generally occurs with greater amplitude in conditions of surprise, personal significance, or moral conflict, making it useful in research on intentionality, morality, and evidence-based reactions (e.g., the Guilty Knowledge test).

4.3. Prediction possibilities: voluntary vs. automatic response, control vs. impulse

Simulations performed on public EEG databases (e.g., PhysioNet, OpenBCI) or on experimental mini-batches have demonstrated that machine learning models can achieve an accuracy of over 80% in discriminating between voluntary and automatic reactions, using ERP patterns and spectral features [22]. This suggests that, under controlled conditions, it is possible to objectively identify the level of self-control involved in an action, information that can complement clinical assessments in criminal liability expertise.

However, it is important to emphasize that these methods provide probabilistic clues, not definitive evidence. The predictions obtained must be integrated into a broader context, which includes psychiatric history, behavioral observation, psychometric tests, and legal understanding of the concept of discernment.

5. INTERDISCIPLINARY DISCUSSIONS

5.1. EEG and AI Criminal Responsibility Assessment

The combined use of EEG and AI in the legal context raises the fundamental question: can these tools provide a direct assessment of criminal responsibility, or do they only function as auxiliary tools in the forensic examination? The reasonable answer, supported by the specialized literature, is that EEG data and AI classification contribute significantly to the understanding of the neurocognitive state of the subject, but cannot replace integrative legal and psychiatric analysis [23].

In a procedural setting, the interpretation of brain signals must remain in the hands of a qualified expert, who can contextualize the results in relation to the medical history, observable behavior and criminal law norms. Therefore, the role of EEG+AI is complementary, providing added objectivity and technical detail, but without substituting clinical judgment or judicial decision.

5.2. The probative value of neurophysiological evidence

The introduction of neuroscientific evidence into legal proceedings is a controversial topic. In some jurisdictions, such as the USA or Germany, such evidence has been admitted as additional elements in the expertise on discernment, predisposition to violence or risk of recidivism [24]. However, the probative validity depends on the transparency of the method, scientific validity and admissibility standards (e.g. the Daubert test in American law).

In Romania, although there is no explicit prohibition, the lack of regulated protocols and legal recognition of EEG+AI methods limits direct applicability in court. Therefore, this evidence can function, for now, only as support in forensic expertise, without autonomous probative force.

5.3. Risks regarding biological determinism, violation of cognitive rights and classification errors

The integration of neurophysiological technologies into justice entails significant epistemological and ethical risks. One of the most discussed dangers is the slippage into biological determinism – the tendency to explain criminal responsibility exclusively through neurological factors, which would undermine the principle of free will and individual responsibility [25].

In parallel, concerns arise regarding the cognitive rights of the individual: the confidentiality of thoughts, informed consent for recording brain activity, the risk of neurobiological stigmatization. AI models can also produce errors – false-positive or false-negative results – caused by unbalanced data sets, inadequate preprocessing or overfitting, which requires extreme caution in interpretation [26].

5.4. Comparison with other psychiatric assessment methods

Unlike traditional methods, such as structured clinical interviews (SCID), behavioral observation or functional magnetic resonance imaging (fMRI), EEG+AI brings the advantage of high temporality and the possibility of automatic classification in real time. However, these methods do not offer the same spatial resolution as fMRI, nor can they capture the qualitative nuances of psychic experience as human clinical assessment does.

In conclusion, none of the methods is singularly sufficient. An integrated evaluative model, combining EEG analysis, psychological testing, clinical assessment and legal interpretation, seems to be the most appropriate path for the responsible and valid use of these tools in the context of criminal liability.

6. LEGAL IMPLICATIONS

6.1. EEG and AI - accepted tools in criminal proceedings

The inclusion of brain activity (EEG) evidence, processed with the help of artificial intelligence, in the criminal process raises fundamental questions regarding admissibility, probative value and compatibility with legal principles. Although, at present, these methods are not enshrined in Romanian criminal law or in the Code of Criminal Procedure, nothing prohibits their use as a supporting element in forensic expertise, as long as they are scientifically validated and interpreted by authorized specialists [27].

In particular, these techniques complement the assessment of the defendant's mental capacity (art. 184 C.pr.pen.), providing additional data on inhibitory control, intentionality and automatic reactivity, with an impact on the classification of the act and legal responsibility. In order to become a valid evidentiary instrument, however, it is necessary to institutionalize methodological standards, audit procedures and admissibility criteria, in line with the jurisprudence of the European Court of Human Rights on the fairness of the criminal trial [28].

6.2. Implications regarding diminished discernment, lack of will, guilt in a pathological context

In the criminal legal system, discernment is not an absolute parameter, but is evaluated in relation to the medical and psychological context of the person.

According to the Romanian Penal Code, the existence of a mental disorder that affects the ability to critically assess the content and consequences of the act may lead to the exclusion or diminution of liability (art. 16 and art. 114 of the Penal Code).

In this context, EEG and AI can provide objective technical support for arguing the existence of diminished discernment (without automatically canceling it), especially in cases where

behavior is affected by neurological or psychiatric disorders that are not clinically expressed. For example, the absence of BP or the systematic attenuation of P300 in decision-making contexts may support the idea of a deficit in moral processing or an inability to anticipate consequences, relevant in the assessment of reduced culpability or guilt in a pathological context [29].

At the same time, these tools may be relevant in establishing the appropriateness of safety measures instead of custodial sanctions, especially when a neurophysiological basis for deviant behavior is demonstrated, correctable through therapeutic interventions.

6.3. Perspectives on the regulation and standardization of these methods

To avoid abusive uses or overly deterministic interpretations, it is essential to develop a coherent regulatory framework for the use of EEG and AI methods in criminal expertise. This framework should include:

- Application protocols, approved by forensic institutions and courts;
- Scientific validation standards, based on replicability and clinical relevance;
- Ethical and informed consent guidelines, which protect the cognitive autonomy of the person being evaluated;
- Interdisciplinary training of experts, with training in neuroscience, AI and criminal law [30].

It is also necessary for courts to receive methodological support in the interpretation of this evidence, either by appointing scientific advisors or by integrating it exclusively into the conclusions of forensic expertise. Only under these conditions can emerging technologies be transformed from simple laboratory hypotheses into supporting tools for fair, scientifically substantiated justice.

7. CONCLUSIONS

7.1. The potential contribution of AI and EEG to a scientifically based justice

In a situation where criminal justice is increasingly confronted with complex dilemmas regarding discernment, will and imputability of criminal behavior, the combination of EEG analyses with artificial intelligence algorithms offers a promising direction. These technologies allow the capture of brain patterns associated with intention, inhibitory control or automated

reactions, thus providing objective clues that can support forensic assessments and specialized expertise. If used with methodological discernment, these tools can contribute to a more precise, personalized and scientifically informed justice, which takes into account not only the legal facts, but also the neurocognitive capacities of the person being assessed.

7.2. Current limitations and need for further research

Despite the demonstrated potential, the practical application of these technologies is limited by several factors: the lack of large clinical samples, the variability of EEG signals depending on the context, the sensitivity of AI models to data biases, and the need for rigorous standards of scientific validation. Furthermore, it should be emphasized that no EEG indicator or AI prediction can replace the complexity of clinical or legal judgment. It is imperative that future research explores these methods under ecologically valid conditions (e.g., studies on prison populations, longitudinal assessments, multimodal combinations with GSR or eye-tracking), in order to strengthen the robustness and applicability of the conclusions.

7.3. The need for a solid normative and ethical framework

For EEG and AI to become accepted components of criminal expertise, it is necessary to develop a clear normative framework and comprehensive ethical guidelines. These must regulate not only technical aspects (precision of methods, algorithmic interpretation), but also fundamental rights of the person, such as cognitive autonomy, protection of neural data, informed consent and prevention of biological labeling. Only through an interdisciplinary, responsible and regulated approach, these technologies can become real support for fair justice, which integrates scientific progress without abdicating the principles of human rights.

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**COMPOSITION OF THE PANEL OF JUDGES. THE ABSOLUTE NULLITY
PROVIDED BY ARTICLE 281 PARAGRAPH 1 letter a of the Code of Criminal
Procedure.**

Judge

Laura Mihaela Sarcina

Abstract

The right to a fair trial is a fundamental principle of the criminal proceedings, and can only be respected if the trial is judged by an independent and impartial court, established by law. In this context, this article points out the inaccuracies regarding the composition of the panel that judges the exception of the illegal composition of the court and, respectively, the exception of its illegal constitution, highlighting that, according to the current regulation, these incidents are judged by the court before which they are invoked (excepting the statements of abstention and the requests for recusal, regarding which art. 50 NCPC contains derogating provisions). The same procedural inadvertence occurs in the case of the exception of incompatibility – a controversial institution, whose "autonomy" is viewed with doctrinal reservations. De lege ferenda, it is necessary to amend the legal provisions on the composition of the court that judges these procedural incidents, in order to truly comply with the requirements of the imperative of impartiality.

Keywords: The right to a fair trial; the independence and impartiality of the judge; the composition of the court; the establishment of the court; the exception of incompatibility.

1. The right to an independent and impartial tribunal established by law – an essential component of the fairness of any judicial proceeding

The principle of the right to a fair trial, in an optimal and predictable time frame can be considered to have an axiomatic role in the modern civil process, being enshrined both in domestic legislation and in numerous international normative acts.

In this regard, it should be noted that the meanings of the notion of "fair trial" are outlined by a rich jurisprudence of the European Court of Human Rights, pronounced in application of the provisions of art. 6 of the European Convention on Human Rights, which is an integral part of the so-called conventionality block, which has supra-legislative³¹¹ force, so that in regulating civil law legal relationships and in resolving disputes in this area, both the national legislator and the courts are³¹² obliged to refer to the case-law of the Strasbourg Court³¹³, as well as to the case-law of the CJEU³¹⁴.

³¹¹ Thus, in the domestic regulation, the right to a fair trial is provided by: art. 21 para. (3) of the Romanian Constitution, which establishes that the parties have the right to a fair trial and to the settlement of cases within a reasonable time; Article 6 of the Code of Civil Procedure, which enshrines the right to a fair trial, in an optimal and predictable time frame and takes into account the right of any person to have his or her case judged fairly, within an optimal and foreseeable time, by an independent, impartial court established by law, and for this purpose, the court has the duty to order all the measures permitted by law and to ensure the speedy conduct of the trial; of art. 10 of Law no. 304/2004 on judicial organization, which stipulates that all persons have the right to a fair trial and to the resolution of cases within a reasonable time, by an impartial and independent court, constituted according to the law.

³¹² In this regard: Article 6 of the ECHR provides for the right of every person to have his or her case heard fairly, publicly and within a reasonable time by an independent and impartial court, established by law, which shall rule on the violation of his civil rights and obligations; Article 47 of the Charter of Fundamental Rights of the European Union, marginally entitled "Right to an effective remedy and to a fair trial" states that everyone has the right to a fair trial, publicly and within a reasonable time, before an independent and impartial court, previously constituted by law; Article 10 of the Universal Declaration of Human Rights provides that everyone has the right in full equality to be heard fairly and publicly by an independent and impartial tribunal, which will decide either on his civil rights and obligations, or on the merits of any criminal charge brought against him; Article 14 of the International Covenant on Civil and Political Rights provides that all people are equal before tribunals and tribunals of justice and that everyone has the right to have the dispute in which he finds himself fair and publicly examined by a competent, independent and impartial tribunal established by law, which shall decide either on the merits of any criminal charge against him, or on appeals regarding his civil rights and obligations.

³¹³ For the analysis of this notion, see: C. Bîrsan, *European Convention on Human Rights – Comments on Articles*, vol. I, Rights and Freedoms, C.H. Beck Publishing House, Bucharest, 2005, p. 103.

³¹⁴ On the relationship between the national law of the member countries of the European Union and the law of the European Union, see: P. Craig, G. de Burca, *Dret Unione Europea. Commentaries, jurisprudence and doctrine*, fourth edition, Hamangiu Publishing House, Bucharest, 2009, p. 431-474. This principle of the primacy of Community law was enshrined for the first time in 1964, by the judgment of the Court of Justice of the

By means of the exception of unconventionality (or the exception of the priority of European Union law over the rules of national law), the courts have the possibility to set aside any non-conventional legal provision or to interpret it in full accordance with the letter and spirit of the European Convention. The courts seized with the resolution of the dispute are obliged under the provisions of Article 20 of the Romanian Constitution and the obligations that Romania has assumed following the ratification of the covenants, conventions and treaties on fundamental human rights to ignore the domestic laws and interpretations of the Constitutional Court that contravene these international regulations.

The obligation of the national judge to apply international regulations as a priority over domestic legislation, even if its constitutionality has been verified by the Constitutional Court, was also recently ruled by the Judgment of the Court of Justice of the European Union, pronounced on 18.05.2021³¹⁵ in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, concerning a number of preliminary questions referred by national courts, in which the European court again emphasises the central role assigned to the national judge, referring to the standard of independence to which every national judge must enjoy, making it clear that this standard is not a privilege, but a right of the European citizen. The need to establish the most appropriate safeguards for the observance of the independence of judges is all the more pressing now, when the national authorities will express their right to assess the

European Community of 15.07.1964 – C 6 / 64 Case of Flaminio Costa vs. E.N.E.L., and, reaffirmed in 1978, in C 106 / 77 - Case of Amministrazione delle Finanze dello Stato vs. Simmenthal S.A., by which it was held that "The national court responsible for applying the provisions of Community law within the framework of its jurisdiction has the obligation to ensure the full effect of these norms, against any contrary provision of national legislation, even later, without requesting or waiting for its prior elimination by legislative means or by the constitutional court". Applying with priority the international regulations regarding human rights or community law, the courts of law do not exceed the judicial limits and do not arrogate specific attributions to the other powers in the state (legislative and executive) because they do not create new norms, but apply the existing international ones to the detriment of the domestic ones, international norms that, by ratification or by Romania's accession to the European Union, have become part of the domestic law.

³¹⁵ See the analysis of this decision, in the view of the Ministry of Justice, available online at <http://www.just.ro/analiza-hotararii-cjue-din-18-mai-2021/>, which characterizes it as "*a reference decision* on the rule of law and the organization of the judicial system in Romania", mentioning that it "(...)pointed out that the guarantees of independence and impartiality required under EU law presuppose the existence of rules which make it possible to dispel any legitimate doubt in the minds of individuals as to the impenetrability of the court in question with regard to external factors and its neutrality in relation to the interests at stake. This principle means that judges must be protected not only from external interventions or pressures that may jeopardize their independence, but also from any indirect influence likely to guide the decisions of the judges in question and thus remove a lack of the appearance of independence or impartiality."

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legal framework governing the activity of some judicial institutions, a right explicitly recognised by the Court's judgment. The principle of the primacy of EU law and that of sincere cooperation require all Romanian authorities to take due account of the requirements of the Court and to adopt measures which effectively strengthen the independence of the judiciary, one of the guarantees of the right to a fair trial recognised for every citizen. Unlike domestic jurisprudence, which, in principle, does not represent a formal source for civil procedural law (except in cases where the legislator itself states otherwise³¹⁶), the jurisprudence of the European Court of Human Rights³¹⁷, and respectively the jurisprudence of the European Court of Justice³¹⁸, constitute sources of law in the field of civil procedural law as well, the respective jurisprudential solutions being directly applicable in judicial practice.

³¹⁶ For example: art. 501 para. (1) NCPC states that: "in case of cassation, the decisions of the court of appeal on the questions of law resolved are binding on the court hearing the merits", which means that the decision of the court of appeal constitutes a source of law for the court of first instance, with regard to the decisions given to the questions of law in the case brought before the court; the court decisions by which the High Court of Cassation and Justice admits the appeals in the interest of the law, in respect of which art. 517 para. (4) NCPC states that "The resolution given to the issues of law judged is binding for the courts from the date of publication of the decision in the Official Gazette of Romania, Part I", which means that the resolution given on the question of law that was the subject of the appeal in the interest of the law will be mandatory for all courts judging similar cases, in this manner, ensuring the unitary interpretation and application of the law, in accordance with the provisions of art. 514 NCPC; the preliminary decisions pronounced by the High Court of Cassation and Justice for the resolution of some questions of law, in respect of which art. 518 para. (3) NCPC provides that "The resolution given to questions of law is mandatory for the court that requested the resolution from the date of the decision, and for the other courts, from the date of publication of the decision in the Official Gazette of Romania, Part I.", with the specification that, according to the provisions of art. 518 NCPC, the applicability of the decision in the interest of the law will cease on the date of the amendment, repeal or find unconstitutionality of the legal provision that was the subject of interpretation; the jurisprudence constituted by the decisions pronounced by the Constitutional Court of Romania, even if it is not part of the system of courts, is also binding on the courts.

³¹⁷ In recent doctrine it has been emphasized that "(...) the Court's jurisprudence is taken into account in each trial that is related to a solution already pronounced by it and that could provide a certain resolution to the case, given the analogy of the situation" - A. Tabacu, *Civil Procedural Law, Domestic and International Legislation. Doctrine and Jurisprudence*, Universul juridic Publishing House, Bucharest, 2019, p. 18.

³¹⁸ In that regard, the request for a preliminary ruling is a mechanism for cooperation between the national court and the European court, 'a non-contentious procedure designed to assist the national court in the administration of justice'. In this regard, in its judgment in *Albatros*, 20/64, 4 February 1965, the Court of Justice defines the prior request as "judicial cooperation (...) whereby the national court and the Court of Justice in the legal order in which they have jurisdiction are called upon to contribute directly and mutually to the drafting of a decision with a view to ensuring the uniform application of Community law throughout the Member States'. Thus, according to Article 267 of the Treaty on the Functioning of the European Union (brevitatis causa, 'TFEU'), where a court or tribunal of a Member State of the European Union, in the context of a dispute before it, has uncertainties as to the interpretation and application of EU law, it may (second paragraph) or is required (third paragraph) to refer the matter to the European Court of Justice. For an analysis of the conditions under which the reference for a preliminary ruling becomes mandatory, see: D.-M. Șandru, C. M. Banu, D. Călin, *Are there sanctions for breach of the national court's obligation to make a reference for a preliminary ruling to the Court of Justice?*, article

The principle of procedural legality is the basis of a legal system and requires compliance with procedural rules in the conduct of justice, guaranteeing a fair trial. An important aspect of this principle is the legal composition of the panel of judges. The illegal constitution of the panel entails sanctions, the most serious of which is the nullity of the judicial acts issued under these conditions.

Some of the absolute nullities, provided by art. 281 para. 1 lit. a of the Criminal Code, refers to the violation of the provisions on the composition of the panel of judges.

By the illegal composition of the panel of judges, the legislator intended to sanction with absolute nullity not only the wrong composition of the panel with the number of judges necessary to judge a case, according to its specificity or the composition with judges who are not specifically designated to judge cases (for example, to judge minors or corruption crimes), but also the existence of cases of incompatibility or those related to ensuring continuity panel that rules on the criminal case³¹⁹.

The composition of the panel of judges refers to the number and quality of judges who participate in the resolution of a case. The rules on the composition of the panel are laid down by law, varying according to the judicial level, the nature of the case and its complexity.

In the Romanian judicial system, we find as forms of composition of the panel of judges: the single judge (in cases of first instance, considered simpler or urgent); the panel of two judges (on appeal or in specialised courts);

the panel of three judges (in more complex cases or on appeal); the panel of five judges (specific to the High Court of Cassation and Justice, being used in particular to hear appeals in the interest of the law or other cases of particular importance)

available online, accessible at: <https://www.juridice.ro/377100/exista-sanctiuni-pentru-incalcarea-obligatiei-instantei-nationale-de-efectuare-a-unei-trimiteri-preliminare-la-curtea-de-justitie.html>. In the same sense, see also: T.-M. Rusu, Effects of the preliminary rulings rendered by the Court of Justice of the European Union, article available online, accessible at: <http://revista.universuljuridic.ro/efectele-hotararilor-prejudiciale-pronunate-de-catre-curtea-de-justitie-uniunii-europene/>

³¹⁹ I. Neagu, M. Damaschin, Treatise on Criminal Procedure. General Part, Second Edition, Universul Juridic Publishing House, Bucharest, 2015, p. 719

In some cases, the law may provide for the participation of judicial assistants alongside judges (in the field of labour law or social security).

Ensuring the legal composition of the panel of judges is not a simple procedural formality, but also a fundamental guarantee of the right to a fair trial, enshrined in Article 6 of the European Convention on Human Rights³²⁰ and the Romanian Constitution, confers legitimacy and authority to the judgment rendered. Failure to comply with the rules on the composition of the panel may affect the impartiality and independence of judges, as well as public confidence in the act of justice.

Nullity is the procedural sanction that deprives a procedural act of its normal legal effects due to non-compliance with the legal requirements for its fulfilment. In procedural law, a distinction is made between absolute nullity and relative nullity³²¹.

Absolute nullity occurs when the procedural irregularity violates mandatory rules that protect an essential public interest, such as the organisation of the judiciary or the fundamental principles of the trial.

The unlawful composition of the panel of judges is a ground for absolute nullity, justified by the fact that the rules on the judicial organization and the constitution of the courts are of public order, aiming at the proper functioning of justice and the guarantee of a fair trial.³²²

As examples of situations that can lead to absolute nullity for the illegal composition of the panel, we can mention:

- The trial of a case by a single judge when the law provides for a panel of three.

³²⁰ C. Bîrsan, *The European Convention on Human Rights – Comments on Articles*, vol. I, 2005 (*op. cit.*), p. 490 et seq.

³²¹ According to art. 282 NCPP, "relative nullity may also be invoked by the prosecutor when there is his own procedural interest in complying with the violated legal provisions"; The "own" legitimate interest of the prosecutor being specified by art. 131 para. (1) of the Constitution, "in the judicial activity, the Public Prosecutor's Office represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens".

³²² Teodor-Viorel Gheorghe, *The New Code of Criminal Procedure Commented* (N. Volonciu), Hamangiu Publishing House, Bucharest, 2014, p. 663.

- The participation in the trial of an incompatible or recused judge, without the request for recusal having been legally resolved.
- Failure to constitute the panel according to the special rules provided for certain matters (lack of a judicial assistant in the cases provided for by law).
- Exceeding the material or territorial jurisdiction by a single judge, in the sense that that case should have been judged by a panel of 2 or more judges.
- Failure to comply with the specialization provided by law (e.g. corruption cases);
- Failure to comply with the draw procedure at the HCCJ;
- Unjustified change of composition during the trial without resumption of debates.
- Illegal modification of the composition of the panel during the trial, without complying with the legal provisions.

The consequences of the absolute nullity of the acts issued by an illegally constituted panel may consist in: the abolition of the act, (the decision pronounced by an illegally constituted panel being devoid of any legal effect, the act being considered non-existent, and the parties - in the situation prior to its issuance); resumption of the procedure (retrial by a constituted legal panel, from the procedural moment affected by the irregularity); the impossibility of covering the nullity (the absolute nullity cannot be covered by the agreement of the parties or by the passage of time, the court being obliged to find it even ex officio).

In this regard, there are also CCR Decision no. 685/2018 - "The lack of designation by lot of the panels of 5 judges from the HCCJ is an irregularity that affects the legality of the composition of the panel and entails absolute nullity." (Formal and transparent designation is essential for legality.);

HCCJ Decision no. 26/2019 (RIL) - "The lack of designation by decision of the governing board of the panels specialized in corruption entails absolute nullity." (The mere fact that a judge has experience does not replace official appointment.);

CCR Decision no. 417/2019 "The composition of the court is part of the guarantees of a fair trial. Its irregularity affects the impartiality and legality of the trial." (The correct composition of the panel is a constitutional guarantee.);

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ECHR – *Luka v. Romania* (2009) – "A tribunal that is not constituted according to the law violates Article 6 §1 ECHR, regardless of the quality of the decision taken." (ECHR requires formal compliance with the law regarding composition.);

Incompatibility is the legal situation in which a judicial body cannot participate in the resolution of a case for legal reasons, either because of a personal connection with the case or with the parties, or because of previous involvement in other procedural phases.

The cases of incompatibility are provided for in art. 64 para. (1) C. proc. pen. and may consist of a functional incompatibility, (for example, the judge who participated in the resolution of a request for preventive measures cannot judge the merits), personal incompatibility³²³ (family ties between the judicial body and one of the parties, for example), incompatibility derived from previous involvement, etc.

In the practice of the Romanian courts, but also in the jurisprudence of the European Court of Human Rights, the importance of the appearance of impartiality of the courts has been emphasized.

ECHR, in the case of *Păduraru v. Romania* (2005) found the violation of Article 6 of the ECHR due to the participation of the same judge in the taking of preventive measures and subsequently in the trial phase, emphasizing the importance of functional separation and the appearance of impartiality.

National courts have consistently annulled acts performed by judges or prosecutors in situations of incompatibility, without requiring proof of actual harm.

By expressly regulating the incompatibility and the corresponding sanction, the Romanian legislator protects the principle of impartiality and ensures the confidence of the parties in the act of justice.

³²³ V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Theoretical Explanations of the Romanian Code of Criminal Procedure. The General Part*, vol. I, Romanian Academy Publishing House, Bucharest, 1975, p. 410.

The provisions of art. 3 para. (3) C. proc. pen. provide that the exercise of one judicial function is incompatible with the exercise of another judicial function (for example, criminal prosecution and trial cannot be exercised by the same person in the same case).

This provision ensures a clear separation between the prosecution phase (prosecution) and the trial phase. The rationale for establishing this rule is to ensure that the judge hearing the case is not influenced by the criminal proceedings in which he or she participated in the same case, thus ensuring an objective and impartial approach to the evidence and arguments presented by the parties. The impartiality of the judge presupposes a subjective dimension (lack of prejudice or personal bias) and an objective dimension (providing sufficient guarantees to exclude any legitimate doubt about the lack of bias).

Thus, a judge who has previously exercised criminal prosecution functions in the same case (ordered or carried out acts of criminal investigation as a prosecutor) is incompatible to judge that case. A judge who has participated in the trial of the same case in another capacity (as a judge at an earlier stage of the trial or in another court) is also incompatible.

The aim is the same: to guarantee the judge's impartiality and to avoid any legitimate suspicion about his objectivity.

We exemplify with situations in which the violation of art. 64 C. proc. pen., in correlation with art. 3 para. (3) C. proc. pen., entails absolute nullity:

- A prosecutor who has carried out criminal prosecution acts (ordered searches, took statements as a suspect or defendant) is subsequently appointed as a judge and participates in the trial of the same case
- A judge who has heard a case at first instance participates in the trial of the same case on appeal or appeal.
- A judge who took part in the resolution of a request for pre-trial detention in the criminal investigation phase subsequently participates in the trial of the merits of the same case.

The notion of "composition of the court" is associated with the composition or formation of the court with the number of judges provided by the law and must be analyzed not only from the

quantitative perspective, i.e. the number of judges who must take part in the trial, but also qualitatively, which aims at the specialization of judges.³²⁴

The composition of the panels of judges is regulated by art. 57 of Law no. 304/2004, on the judicial organization, the governing boards of each court establishing the composition of the panels of judges at the beginning of the year, aiming to ensure the continuity of the panel, the change of the members of the panels of judges being possible only exceptionally, based on the objective criteria established by the Rules of Procedure of the Courts. Para. 2 establishes that the management of the panel of judges is carried out, by rotation, by one of its members.

The governing board of the court approves the composition of the specialized sections and panels and proposes to the president of the court, in relation to the nature and number of cases, the establishment of the panels, including the specialized ones (art.17 para.1.b) and c of the R.O.I.)

In practice, various situations may be encountered in which the illegal composition of the court becomes incidental, such as: the panel of judges to which the case is assigned is not made up of the number of judges provided by law; a trainee judge is part of a panel of judges to which cases that exceed the limits of the competence provided by law for trainee judges are randomly assigned; etc.

In the general framework regarding the composition of the panel of judges, we have identified three particular situations that may arise as a result of the violation of the legal provisions, namely: absolute nullity following the occurrence of the incompatibility provided by art. 3 para. 3 of the Criminal Code referred to in art. 64 para. 4 of the Criminal Code; absolute nullity following the occurrence of the incompatibility provided by art. 64 para. 5 of the Criminal Code and the absolute nullity of the panel of judges specialized in the field of corruption crimes.³²⁵

³²⁴ M. Udroi, Criminal Procedure. The general part. The New Code of Criminal Procedure, C.H. Beck Publishing House, Bucharest, 2015, p. 650.

³²⁵ Teodor-Viorel Gheorghe, The New Code of Criminal Procedure Commented (N. Volonciu), Hamangiu Publishing House, Bucharest, 2014, p. 663.

2. The absolute nullity as a result of the occurrence of the incompatibility provided by art. 3 para. 3 of the Criminal Code. rap. Art. 64 para. 4 of the Criminal Code.

The Code of Criminal Procedure provides for the separation of the function of disposition regarding fundamental rights and freedoms from that of judgment, separation by which the right to a fair trial is protected, with reference to ensuring the functional impartiality of the court, so that the same persons who ordered the deprivation of liberty or intrusive evidentiary procedures in private life during the criminal investigation cannot judge the respective case, in order to avoid the risk that he has already formed an opinion that would influence the conduct of the trial in the criminal trial.

Thus, in art. 3 para. 3 of the Criminal Code. It was expressly provided that "in the conduct of the same criminal trial, the exercise of a judicial function is incompatible with the exercise of another judicial function, except for the one provided for in para. (1) letter c) – the function of verifying the legality of the indictment/non-indictment, which is compatible with the function of judging, and art. 64 para. 4 of the Criminal Code. provides that "the judge of rights and freedoms may not participate, in the same case, in the preliminary chamber procedure, in the trial on the merits or in the appeals."

Thus, it follows that for the judge of rights and freedoms, the legislator itself provided for a total incompatibility, based on elements of an objective nature – the exercise of the function of disposition regarding fundamental rights and freedoms, the sanction applicable in case of non-compliance with the provisions regarding incompatibility being the absolute nullity, according to the provision of art. 281 para. 1 letter a of the Criminal Code, failure to comply with the provisions regarding the composition of the panel of judges.

In this regard, there is also Decision 501/2016 of the Constitutional Court which, in paragraph 18 of the recitals, states: "The Court holds that the new cases of appeal for annulment, including the one in 426 para. 1 lit. d of the Criminal Code. – when the court of appeal was not composed according to the law or there was a case of incompatibility – there are also cases of absolute nullity, regulated in art. 281 of the Code of Criminal Procedure, the acquisition of the authority of res judicata of the court decision also producing effects on the procedural nullities that were

not invoked, these no longer having any applicable legal significance, the prejudice presumed by the law being covered by resuming the discussion within the extraordinary attack."

In the same sense are Decision no. 129 of March 2, 2021 of the Constitutional Court of Romania, published in O.M. no. 483/10.05.2021, sentence no. 376/2023 of 20.04.2023 pronounced by the Timiș Tribunal, Decision no. 235/A/28 June 2017 of the High Court of Cassation and Justice - Criminal Section.

3. The absolute nullity following the occurrence of the incompatibility provided by art. 64 para. 5 of the Criminal Code.

The Code of Criminal Procedure establishes that the judge who participated in the trial of a case can no longer participate in the trial of the same case in an appeal or in the retrial of the case after the annulment or quashing of the judgment. With regard to the case of absolute nullity provided by Article 281 paragraph 1 letter a of the Criminal Code, which refers to the composition of the panel of judges, it is noted that this notion is subsumed by the rules regarding the number of judges who make up the panel, the continuity of the panel in debates and those regarding *the compatibility of judges*.

Returning to the provisions of art. 64 para. 5 of the Criminal Code, I consider that they are also incidental in the situation in which the judge of the preliminary chamber sends the case in order to reopen the criminal investigation and subsequently the defendant is sent to trial, the case being randomly assigned to the same judge.

In this regard, the criminal decision no. 596 of 08.06.2018 of the Court of Appeal of Suceava: By Decision no. 496 of 23 June 2015, pronounced by the Constitutional Court of Romania, published in the Official Gazette no. 708 of 22.09.2015, with reference to art. 335 para. 4 of the Code of Criminal Procedure, the following is stated, among others:

The provisions of art. 335 para. (1)—(3) of the Code of Criminal Procedure legislates three situations of reopening the criminal investigation by the prosecutor, ex officio. According to para. (1) of Article 335, the reopening of the criminal investigation takes place when the hierarchical prosecutor superior to the one who ordered the closure solution finds that there is

no circumstance on which the closure solution was based. In this case, the hierarchically superior prosecutor invalidates the dismissal order and orders the reopening of the criminal investigation, returning the file to the criminal investigation body, according to Article 317 of the Code of Criminal Procedure. According to art.335 para. (2) of the Code of Criminal Procedure, the reopening of the criminal investigation may also be ordered in the situation where new facts or circumstances have arisen from which it results that the circumstance on which the dismissal was based has disappeared. In this case, the prosecutor annuls the ordinance and orders the reopening of the criminal investigation. Finally, according to art. 335 para. (3) of the Code of Criminal Procedure, the prosecutor revokes the order to drop the criminal investigation and orders the reopening of the criminal investigation when he finds that the suspect or defendant has not fulfilled in bad faith the obligations established according to Article 318 para. (3) of the same Code.

The provisions of art.335 para. (4) of the Code of Criminal Procedure, according to which the reopening of the criminal investigation is subject to confirmation by the judge of the preliminary chamber, within 3 days at the latest, under penalty of nullity. In order to pronounce a solution in this regard, the judge of the preliminary chamber is obliged to verify both the legality and the merits of the order reopening the criminal investigation.

The verification of the legality of the order reopening the criminal investigation consists in the analysis carried out by the preliminary chamber judge regarding the fulfillment of the legal conditions for the resumption of the criminal investigation in case of reopening, namely the fact that, in law, one of the situations provided for in art.335 para. (1)—(3) of the Code of Criminal Procedure. Failure to meet the conditions of legality determines the invalidation of the ordinance to reopen the criminal investigation.

However, the verification of the validity of the order to reopen the criminal investigation implies the performance of a control over the factual situations that determine the application of the legal provisions of art.335 para.(1)—(3) of the Code of Criminal Procedure. Thus, the preliminary chamber judge is, according to the criticized text, in a position to verify and find that, *concretely, the circumstance on which the decision to close the case was based did not exist* (in the situation provided for in Article 335 para. (1) of the Code of Criminal Procedure], *new facts or circumstances have arisen that make the circumstance on which the dismissal was*

based disappear [in the situation provided for in art.335 para. (2) of the Code of Criminal Procedure] or that *the suspect or defendant did not fulfill, in bad faith, the obligations established according to art.318 para.(3) of the Code of Criminal Procedure*, on the occasion of the prosecutor's waiver of the criminal prosecution (in the situation provided for in art.335 para. (3) of the Code of Criminal Procedure].

The Court also found that the reopening of the criminal investigation has the effect of resuming the criminal investigation in accordance with the provisions of Article 285 et seq. of the Code of Criminal Procedure. In this regard, art.335 para. (1) of the same Code provides that if the hierarchical prosecutor superior to the one who ordered the solution subsequently finds that the circumstance on which the closure was based did not exist, he shall invalidate the order and order the reopening of the criminal investigation, the provisions of Article 317 of the Code of Criminal Procedure being to be applied accordingly. Thus, the reopening of the criminal investigation will have the purpose of ordering by the prosecutor one of the solutions provided for in Article 327 of the Code of Criminal Procedure, namely either the indictment, if the criminal investigation material shows that the act exists, that it was committed by the defendant and that he is criminally liable, or the dismissal or abandonment of the prosecution. If the last two potential solutions do not change the legal situation of the person in respect of whom the reopening of the criminal investigation is ordered, the solution of indictment, by indictment, may have the effect of subjecting him to judicial investigation. But, in any of the legal situations analyzed, an accusation in criminal matters will be filed against the person in respect of whom the solution of reopening the criminal investigation is confirmed.

By Decision No 599 of 21 October 2014, paragraphs 33 to 34, published in the Official Gazette of Romania, Part I, No 886 of 5 December 2014, it was held that the concept of 'accusation in criminal matters' must be understood within the meaning of the Convention and can be defined as 'the official notification, by the competent authority, of the suspicion of the commission of a criminal act', a definition which also depends on the existence or absence of 'significant repercussions on the situation (of the suspect)' (see judgment of 27 February 1980 in *Deweert v. Belgium*, paragraph 46; Judgment of 15 July 1982 in the case of *Eckle v. Germany*, paragraph 73). In this regard, the Court noted that the current Code of Criminal Procedure enshrines three types of accusation in criminal matters, regulated by Article 307 regarding the notification of

the status of suspect, Article 309 regarding the initiation of the criminal action and the notification of the status of defendant and Article 327 letter a) regarding the resolution of cases by issuing the indictment and notifying the court. If in the first two situations the official communication consists in informing the suspect before his first hearing and in communicating to the defendant the order by which the criminal action was initiated, which is also called for hearing, in the third situation, the official notification consists in the communication to the defendant of a certified copy of the indictment under the conditions of art.344 para. (2) of the same Code which provides for the procedure of the pre-trial chamber.

At the same time, by Decision no. 663 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 52 of 22 January 2015, paragraph 18 , regarding the criticism regarding the possibility of the judge of the preliminary chamber who ruled on the decisions of non-indictment or on the subject matter of the procedure of the preliminary chamber to also exercise the function of judging the merits of the case, the Court found that it has two components, one relating to the procedure established by Articles 340 and 341 of the Code of Criminal Procedure and another relating to the procedure established by Articles 342 to 348 of the same Code. Thus, the Court found that, according to Art. 64 para. (5) and (6) of the Code of Criminal Procedure, the judge who participated in the resolution of the complaint against the decisions of non-prosecution or non-indictment may not participate in the same case in the trial on the merits or in the appeals, and the judge who ruled on a measure subject to appeal may not participate in the resolution of the appeal.....

Relating the above-mentioned arguments to the situation in the present case, the Court finds that the same magistrate who resolved the merits of the case in the first instance, pronouncing the criminal sentence no. pronounced by the Court in case no. x conviction of the defendant, had previously pronounced two conclusions confirming the reopening of the criminal investigation, on – file no. x of the Court D. and on – file no. x of Court D., conclusions that resulted in the formulation of a criminal charge against the defendant, followed by his indictment and his submission to judicial investigation. However, the reasoning set out by the Constitutional Court in the above-mentioned Decisions regarding the reasons that attract the incompatibility of the judge with the preliminary chamber to exercise the function of trial in

question are fully applicable in the present case as well, the same reason pleading for the same solution as in the previous cases.

Thus, finding the incompatibility of the trial judge in the exercise of the judicial function, the Court considers fully applicable the case of absolute nullity regulated by Article 281 paragraph 1 letter a of the Code of Criminal Procedure – composition of the panel of judges, nullity that can also be invoked ex officio by the court, with the effect provided by Article 421 item 2 letter b of the Code of Criminal Procedure, of abolition of the criminal sentence no. pronounced by the Court of Justice D. in the case no. x and the referral of the case for retrial on the merits to Court D."

4. The absolute nullity of the panel of judges specialized in the matter of corruption crimes.

By Decision no. 299 of 28.09.2006 of the Superior Council of Magistracy, in order to ensure the requirements of the provisions of art. 29 para. 1 of Law no. 78/2000, regarding the obligation to judge in the first instance the crimes provided for by this normative act by specialized panels, the establishment of specialized panels for judging corruption cases was approved.

According to art. 29 para. 1 of Law no. 78/2000 for the trial of corruption crimes and crimes assimilated to them, provided for in this law, specialized panels may be constituted, according to art. 15 of Law no. 92/1992 for judicial organization, republished, with subsequent amendments. This legal provision was later amended by Law no. 161 of 19 April 2003, in the sense that "for the trial in the first instance of the offences provided for in this law, specialised panels shall be constituted".

Therefore, the obligation to set up specialized panels in the field of corruption crimes was established and the optional nature of the constitution of such panels provided by the initial form of the law was eliminated.

According to art. 57 para. 1 of Law no. 304/2004: "The governing boards shall establish the composition of the panels of judges at the beginning of the year, aiming to ensure the continuity of the panel" and the provisions of art. 17 para. 1 letter c of the Internal Regulations of the

courts approved by Decision no. 3243/2022 of the Superior Council of Magistracy, which establishes the power to propose to the President the establishment and dissolution of specialized panels.

The reorganization of the judicial functions in criminal matters, respectively the constitution of the panels of judges of rights and freedoms, judges of preliminary chamber and of first instance, *as well as the specialization including in the matter of judging corruption crimes*, which cannot be presumed, having to be expressly established³²⁶.

By decision no. 17/2018 pronounced by the High Court of Cassation and Justice on appeal in the interest of the law, it was established, in the unitary interpretation and application of the provisions of art.129 para. (2) item 2, art.129 para. (3), art.130 para. (2) and (3), art.131, art.136 para. (1), art. 200 para. (2) of the Code of Civil Procedure, art. 35 para. (2) and art. 36 para. (3) of Law no. 304/2004, the lack of procedural material competence of the specialized section/panel is of public order.

Although the aforementioned decision was pronounced as a result of the notification formulated in relation to the provisions of the Code of Civil Procedure, the recitals of this decision refer to the obligation of the courts to set up specialized panels both in the cases provided for by Law no. 304/2004, as well as in those provided by other special laws, the obligation to set up specialized panels for the trial of corruption crimes in the first instance being provided for in a special law, namely Law no. 78/2000 – art. 29 para.1.

By "composition of the court" we mean, in a narrow sense (the quantitative aspect), the composition of the court with the number of judges provided by law, and in a broad sense, the composition of the court with the judges who can be part of the panel, the composition of the court/panel therefore not being limited only to the quantitative aspect. It is unanimously accepted that there are situations in which the qualitative aspect of the composition is concerned, one of these being the case when, under the law, certain categories of disputes must be managed by the specialized panels/sections, according to the object or nature of the dispute.

³²⁶ Gheorghe Mateuț, Criminal Procedure. General Part, Universul Juridic Publishing House, Cluj, 2019, p. 1018.

The specialization of judges and court sections is regulated in Law no. 304/2004 on judicial organization.

The norms regulating the procedural (specialized) substantive jurisdiction are of public order, protecting a public interest – the good administration of the act of justice, through the specialization of judges, necessary in relation to the complexity and number of cases.

On the other hand, the specialization of sections and judges is not a private matter, but one related to the organization and administration of justice. The interpretation according to which specialized jurisdiction is governed by private rules cannot be accepted, since the latter protect the interests of the parties and cannot be left to the discretion of the parties that, for example, a civil court settles a dispute in criminal matters cannot be accepted.³²⁷

In its jurisprudence, the Constitutional Court, by decision no. 417/2019, found that there was a legal conflict of a constitutional nature between the Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand, generated by the failure by the High Court of Cassation and Justice to set up specialized panels of judges for the trial in the first instance of the offences provided for in Law no. 78/2000 for the prevention, the discovery and sanctioning of the acts of corruption, contrary to the provisions of art. 29 para. (1) of Law no. 78/2000, as amended by Law no. 161/2003. The operative part of the same decision reads as follows (item 2): "The cases registered before the High Court of Cassation and Justice and resolved by it in the first instance prior to the Decision of the Governing Board of the High Court of Cassation and Justice no. 14 of January 23, 2019, insofar as they have not become final, are to be retried, under the conditions of art. 421 item 2 letter b of the Criminal Code, by the specialized panels formed according to art. 29 para. 1 of Law no. 78/2000, as amended by Law no. 161/2003".

Regarding the sanction incident in the case of the case being settled by a non-specialized panel, paragraph 138 states: "The sanction of judging a case by a specialized panel under the conditions in which the competence belonged to a non-specialized panel is absolute nullity (decisions no. 328 of 20 January 2004, no.1.052 of 24 February 2004, no.1.436 of 12 March

³²⁷ Teodor-Viorel Gheorghe, *The New Code of Criminal Procedure Commented* (N. Volonciu), Hamangiu Publishing House, Bucharest, 2014, p. 683.

2004, no.3.395 of 18 June 2004, no.401 of 19 January 2005 and no.32 of 5 January 2005, pronounced by the High Court of Cassation and Justice – Criminal Section). And in the opposite situation, namely the trial of a case by a non-specialized panel under the conditions in which the competence belonged to a specialized one, entails the sanction of absolute nullity of the decision thus pronounced".³²⁸

By decision no. 11/2020 issued by the High Court of Cassation and Justice – Panel for the resolution of certain questions of law in criminal matters, the notification filed in the present case ex officio, for the issuance of a preliminary decision in order to resolve in principle the following question of law, was rejected as inadmissible:

"In the interpretation of art.29 para. (1) of Law no. 78/2000 on the prevention, detection and sanctioning of corruption deeds, it may be considered that the judge of the court of first instance who was previously appointed as the holder of a specialized panel for judging corruption cases, and subsequently the governing board of the court did not appoint him to a specialized panel is competent to judge corruption cases assigned during the period in which he was not designated by the decision of the governing board as the holder of the to a specialized panel, given that, during that period, no panel of the criminal section of the respective court was appointed to judge corruption cases?

In the event of a negative answer, what is the sanction in this case, relative nullity or absolute nullity?"

Although the High Court of Cassation and Justice rejected the complaint as inadmissible, the recitals of the decision state that the text of Article 29 paragraph 1 of Law no. 78/2000 which provides "that "for the trial in the first instance of the offences provided for in this law, specialized panels shall be constituted" is sufficiently clear, especially given that the Constitutional Court of Romania has pronounced Decision no. 417 of 3 July 2019 on the request for the resolution of the legal conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand, published in the Official Gazette of Romania, Part I, no. 825 of 10 October 2019, in which it

³²⁸ Alexandru Zampieri, Controversial aspects regarding nullities in the criminal process. Comments and Jurisprudence, Hamangiu Publishing House, Bucharest, 2021, p. 15.

was extensively examined and pronounced both on the notion of "*specialized panel*", as well as on the notion of "*specialized judge*", both with reference to the trial, in the first instance, of the cases provided for by Law no. 78/2000 for the prevention, discovery and sanctioning of corruption deeds".

Given the distinction established by the Constitutional Court between the notion of specialized panel and that of specialized judge, in general, and in the field of corruption offences, in particular, what is important is the existence or non-existence of the specialization of the panel of judges, and not of the judge who pronounced the solution.

5. Conclusions

The critical examination of the provisions of Articles 280, 281 and 282 of the NCPP (legal texts regulating the institution of criminal procedural law of nullities) allows the observation that, in the new vision, the legislator has restricted the role of nullities in ensuring the legality of the criminal trial, thus limiting their scope of incidence and creating a much more permissive framework in the performance of procedural and procedural acts, in the sense of validating them, in the circumstance in which the legal provisions have been violated or disregarded.

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