

Have judges lost their humanity? A reflection on the evolution of constitutional jurisprudence regarding the judge's conviction and the purpose of justice

Introduction. From law to men

The history of modern law is marked by a structural tension between norms and conscience, between the letter of the law and the spirit that gives it meaning. In the European tradition, this tension has been ever-present: the law, being general, risks becoming rigid, while judgment, being applied to specific human situations, requires a form of moral reasoning capable of transcending the mere mechanics of the rule². In post-revolution Romania, this tension has taken on special relevance, as the judicial system has been rebuilt simultaneously on two fronts: reaffirming the supremacy of the law as a reaction to the previous political arbitrariness and rediscovering the role of the judge as a responsible interpreter of justice.

The controversy surrounding the "judge's conviction" became, in this context, a key point in the evolution of constitutional jurisprudence. In 2001, in Decision No. 171, the Constitutional Court considered that the reference to *the judge's conviction* in the old Code of Criminal Procedure contravened the principle of the judge's submission to the law, without making any distinction between personal moral conscience and professional legal conscience. Although motivated by the need to prevent arbitrariness, this decision led to a restriction of the reflexive dimension of deliberation and the emergence of a type of *judge-clerk*, oriented predominantly towards normative conformity.

An attempt was made to restore balance in 2015 when, in Decision No. 778, the Court distinguished between a person's moral conscience and the legal conscience that is formed only at the end of a criminal trial—a distinction that was missing in the initial reasoning from 2001. A year later, Decision No. 47 enshrined in the Constitution the standard of reasonable doubt – which had been introduced by the New Code of Criminal Procedure in 2014 – making objective the process of forming convictions and reconfiguring the way in which judges reach decisions in criminal matters. These latest decisions do not represent a renunciation of the supremacy of the law, but an attempt to reconcile legality with humanity, within the limits of prudent reasoning.

This paper aims to analyze this evolution by addressing three complementary directions:

- *First*, it reconstructs and interprets the context and significance of the three jurisprudential moments – 2001, 2015, and 2016 – to show how the role of judicial conviction was constructed, restricted, and subsequently reconceptualized.

¹ Lecturer, PhD, "Petre Andrei" University, Iași. E-mail: cristivdan@yahoo.com
Manuscript received on November 28, 2025.

² Among the many works on this subject, see Jurgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge, Massachusetts, 1996 (second edition).

- *Second*, it places this evolution in relation to the European and American tradition of equity and the main contributions of legal philosophy, from Aristotle and Thomas Aquinas to Dworkin, Ricoeur, and contemporary authors of legal hermeneutics.
- *Thirdly*, it proposes a series of institutional and professional training implications, given that any concept of judicial conviction presupposes a certain legal culture and a certain model of the magistrate.

All these directions converge to formulate the answer to a single structural question: "*Have judges lost their humanity?*" This is not a sentimental dimension, but an essential one: the extent to which the legal order still allows deliberation to be a rational and moral act, not just a technical operation. In this sense, the paper does not propose a point-by-point criticism, but rather an integrated interpretation of constitutional evolution, arguing that the rediscovery of judicial conviction as an act of moral reason is essential for a justice system that not only applies the law, but also restores and preserves its profound human meaning.

I. The moment of breaking: Decision No. 171/2001

1. The transition context and the totalitarian legacy

In the early 2000's, the Romanian judicial system still bore the scars of the previous regime: for decades, the law had been a tool of political power, and judges had been mere enforcers.³ In the accelerated post-revolution transition, two contradictory impulses emerged: the need to erect a wall of rules against any arbitrariness and the desire to rediscover the judge as a responsible person, not just a clerk.

In this context, the phrase contained in Article 63(2) of the old Code of Criminal Procedure⁴ – whereby judicial bodies were entitled to assess evidence "*according to their conviction (...) and guided by their conscience*" – sounded suspicious and generated ambiguity: was it a moral conscience, a legal conscience, or perhaps a political one?

The Constitutional Court, in Decision No. 171/2001⁵, took a "surgical" approach: it declared the expression unconstitutional because it contravened the principle that judges are subject exclusively to the law, as provided for in Article 124(3) of the Constitution. The reasoning is surprisingly brief and makes no distinction between personal moral conscience and professional legal conscience⁶. Any reference to "conviction" or "conscience" is therefore perceived as an open door to arbitrariness.

This decision is all the more surprising given that, just two years earlier, in Decision No. 43/1999, the Court had categorically rejected an exception of unconstitutionality raised against the same text of law, expressly stating that the assessment of evidence by judges "*according to their conviction (...) and guided by their conscience*" is a mental process that is "necessary, indispensable, and inevitable," that "the assessment of evidence is a particularly complex process, involving subjective elements, for the accurate evaluation of the objective reality

³ Article 102(1) of the 1965 Constitution of the Socialist Republic of Romania had the following content: "Through their judicial activity, courts and judges defend the socialist order and the rights of individuals, educating citizens in the spirit of respect for the law". When the Code of Criminal Procedure was published in 1968, Article 63(2) provided that judicial bodies should be guided by their "socialist legal conscience." See also Anita M. Naschitz, *Conștiința juridică socialistă [Socialist Legal Conscience]*, Editura Științifică, Bucharest, 1964.

⁴ The old Code of Criminal Procedure, approved by Law No. 60/1968, was applicable until January 31, 2014. On February 1, 2014, the current code, approved by Law No. 286/2009, came into force.

⁵ CCR, *Decision No. 171/2001*, published in the Official Gazette of Romania, Part I, No. 387 of July 16, 2001.

⁶ The only argument put forward by the Court appears in paragraph I and is as follows: in 1990, the Constitutional Assembly rejected an amendment to this constitutional article that would have allowed the use of the phrase "intimate conviction."

presented in criminal cases through evidence" and that this process is perfectly compatible with the principle of independence and the submission of judges only to the law⁷.

The abrupt break in 2001 with the Court's own previous jurisprudence ushered in an era of absolute formalism that would dominate Romanian justice for a decade and a half. The result is a brutal paradigm shift: the judge is no longer seen as a morally anchored rational being, but only as a strictly normative operator. The traditional ethical vocabulary – "intimate conviction," "professional conscience," "moral deliberation" – gradually disappeared from judgments and from the language of professional training. Instead, neutral formulations appeared: "the court finds," "objective analysis," "legal syllogism"⁸. In law schools and at the National Institute of Magistracy, the priority has shifted to techniques and literal readings, marginalizing the humanism of the profession. Several generations of magistrates have grown up with the idea that independence means textual conformity, not empathetic discernment.

The irony is that excluding "conscience" from the legal text did not eliminate it from reality. The judge still had to choose between contradictory evidence, assess the credibility of a witness, and sense when a story "did not add up." Only now he began to do all this in silence, without naming them or publicly explaining his reasoning. The resulting formalism emptied the judgment of humanity, or at least hid it: the law became absolute, and people – judges and defendants alike – became cogs in a mechanical machine.

However, rules become nothing when they are detached from real life: without the living memory of specific cases, the judge risks reducing the law to empty formulas, losing precisely the contact with the human element that gives meaning to the act of judging (as formulated by Karl Llewellyn⁹).

Fourteen years later, in Decision No. 778/2015 (para. 35), the Constitutional Court finally provided a consistent justification for the 2001 decision, introducing the distinction that was initially absent: *personal moral conscience* (variable, intuitive) vs. *professional legal conscience* (rational, objective). This retroactive correction – highly unusual – shows that the break in 2001 was not only abrupt but also insufficiently thought out.

It is perhaps worth noting that, in its original form from 1968, the provisions of Article 287(2) of the Code stipulated that the court should form its opinion "on the basis of the evidence presented in the case and in accordance with *legal conscience*" (our emphasis)¹⁰. The attribute "legal" in this phrase was repealed in the 1990s, but the idea will return, again through case law, in the same decision from 2015 (para. 32).

The cultural impact of the 2001 decision is still felt today. For example, the press release issued by the Judges' Section of the Superior Council of Magistracy on November 14, 2025, repeats almost verbatim the idea that courts "cannot disregard the applicable legal framework [...] without the possibility of supplementing it." And Judge A.E., a member of the Council, wrote on his Facebook page on November 5, 2025: "The courts only apply the law. The real

⁷ CCR, *Decision No. 43/1999*, published in the Official Gazette of Romania, Part I, No. 196 of May 5, 1999.

⁸ "The reasoning behind the court decision must show the legal syllogism from which the application of the legal rule to the facts of the case results" – Art. 128, para. of the Internal Rules of Procedure of the Courts, approved by Decision No. 3.243/2022, published in the Official Gazette of Romania, Part I, No. 1254 of December 27, 2022. This rule does not appear to be in line with, or at least seems to avoid, constitutional requirements: "The court's decision must include, as a guarantee of the fairness of the judicial proceedings and of respect for the parties' right of defense, the factual and legal grounds on which the court based its decision, as well as those on which the parties' claims/defenses were dismissed" – para. 171 of CCR Decision No. 33/2018, published in the Official Gazette of Romania, Part I, No. 146 of February 15, 2018.

⁹ Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study*, Oceana Publications, 1930, lectures given at Columbia Law School in 1929-1930, translation *Hățîșul in Noua Revista a Drepturilor Omului* no. 3/2011, pp. 113-125.

¹⁰ See also V. Dongoroz, S. Kahane et al., *Theoretical explanations of the Romanian Code of Criminal Procedure. Special section*, vol. VI, 2nd edition, Editura Academiei Române, Bucharest, 2003. p. 136.

responsibility is political, not judicial."¹¹ These phrases, taken literally, are the legacy of the 2001 decision: even within the system, judges are still seen as mere instruments of the law, *as judges-technicians*.

2. Critical analysis of the Court's reasoning

At first glance, the Court's reasoning seems clear: the judge obeys only the law, and any mention of "conviction" and "conscience" threatens arbitrariness in a process that is meant to be objective and predictable. A closer look, however, reveals deep conceptual fault lines, with damaging effects on the judicial role.

The first error lies in equating "conviction" with subjective will. In procedural matters, conviction is not a personal inclination, but the result of deliberation that weaves together professional reasoning, experience, and evidence. In the European view, conviction means rational certainty, not intuitive whim – hence the freedom of conviction or conscience explicitly mentioned in foreign criminal codes, seen as an intellectual exercise. Removing it from the text does not erase it from the judge's mind; it only silences it in public.

The second confuses the source of authority (*the law*) with the internal engine of reasoning (*deliberation*). These planes are not mutually exclusive, but rather complementary: submission to the norm does not require abandoning thought, and reflection on its purpose does not usurp the legislator¹². The judge acts through the law, and careful interpretation amplifies its force.

The third targets transparency of reasoning. Without references to conscience, deliberation becomes veiled: judges do not become more detached, but rather more silent about their inner journey. The evaluation of evidence always involves human nuances - the credibility of a witness, the narrative thread, the fairness of the punishment - which escape the dry logic we have become accustomed to in the Romanian judicial system. Without calling them "conviction," these nuances lie unspoken, outside of any ownership.

This is where the central paradox comes from: by suppressing moral language, the Court erodes the very guarantees against arbitrariness that it wanted to protect. However, subjectivity can be blocked not through silence, but through a rational explanation included in the reasoning – for example, explaining why a certain piece of evidence is convincing, how a contradiction is resolved, or why a legal norm comes to life in a particular case.

Otherwise, judges risk losing public trust when they distance themselves from the human reality of the case and take refuge in the rigidity of the text, transforming authority into an exercise devoid of empathy and moral responsibility (Lord Neuberger)¹³.

The fourth limitation consists in ignoring the European and American heritage of deliberate fairness – from Aristotelian *epieikeia* to Dworkin's hermeneutics – where the judge is not seen as a mere executor, but as an interpreter who adapts the general rule to the specific case, while preserving its essential purpose.

¹¹ Press release from the Judges' Section of the Superior Council of Magistracy, November 14, 2025; Facebook post, Judge Alin Ene, November 5, 2025.

¹² *Submission* to the law is not synonymous with conscious *obedience* to it. The distinction, latent in Kant and taken up again by Dworkin and Alexy, separates passivity from rational loyalty: the former comes from fear or inertia, the latter from moral adherence to the meaning of the norm, seeing it as an expression of human autonomy.

¹³ Lord Neuberger of Abbotsbury, President of the Supreme Court of the U.K., lecture on January 29, 2015, translation "'Judge not, that ye be not judged': judging judicial decision-making", in *New Journal of Human Rights* no. 2/2015, pp. 141-156, at www.revistadrepturileomului.ro/sumar_2_2015.html.

Let us look at a specific example: in a minor corruption case, where the evidence is ambiguous (a witness who has recanted their initial statement, a bank transfer that can ultimately be explained), conviction does not mean arbitrarily choosing between guilt and innocence, but rationally reconstructing the sequence of events, taking into account the human context — family pressures, administrative errors. Without this space for deliberation, the judge risks mechanically subsuming the act under the norm, turning justice into a sterile exercise, devoid of understanding of the real story behind the case.

Finally, **the fifth limitation** overlooks the hermeneutic essence of law. Application is not mechanical, but a bridge between the abstract and the real, between the universal and the singular. Hidden under the mask of absolute obedience, deliberation becomes a phantom—invisible, unfeeling. Without the acknowledgement of conviction, the judge deliberates in the shadows, lacking the tools for lively reasoning.

These fault lines give rise to a shaky legal culture: reason is reduced to procedural routine, professional conscience becomes a taboo subject, and the ethics of the magistrate melt into sterile formalism. All these aspects will pave the way for the repositioning of the Court through the decisions of 2015 and 2016. Without such mediation, the law risks descending into a normative automaton, where human justice gives way to automated decisions governed by algorithms and AI models¹⁴. Karl N. Llewellyn's argument is relevant in this regard: authentic judgment begins where the judge manages to distinguish the case-problem from the rigidity of the rules, separating the real human being from the general policy of law — a rare capacity, essential for the public trust in justice¹⁵.

3. The judge's conviction in comparative law: an ignored European standard

Decision No. 171/2001 of the Constitutional Court stands out from the European background in the way it abolishes the judge's "conviction." In most European countries, it is not erased but directly anchored in the deliberation as a principle of free evaluation of evidence. Romania has thus broken with tradition, transforming inner reflection into a simple routine application.

3.1. Germany – free conviction as an expression of legal reasoning

Article 261 of the German Code of Criminal Procedure (StPO)¹⁶ states: "The court shall decide on the outcome of the evidence according to *its free conviction*, derived from the proceedings as a whole" (our emphasis). This model integrates evidence without fixed hierarchies, giving the judge rational freedom – neither mechanical nor arbitrary – anchored in reasoning. It is a guarantee of intellectual independence, which is precisely what was missing in the restrictive view of Decision No. 171/2001, and by no means a threat to legality.

3.2. France – “inner conviction”: a rational act, not a subjective one

Article 427(1) of the French Code of Criminal Procedure¹⁷ states: "Unless otherwise provided by law, offences may be established by any means of evidence, and the judge shall

¹⁴ For a fictional scenario, see Cristi Danileț's short story, *The Year 2045: Open Doors Day*, published on October 25, 2025, available at <https://cristidanilet.ro/blog/2045>.

¹⁵ K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, The Yale Law Journal, Vol. 49, No. 8 (Jun., 1940), pp. 1355-1400, translation *Normativul, juridicul și sarcinile dreptului: problema metodei juridice (I)*, in *Noua Revistă a Drepturilor Omului* no. 4/2009, pp. 119-137, at www.revistadrepturileomului.ro/sumar_4_2009.html.

¹⁶ *Strafprozeßordnung*, 1950, updated at www.gesetze-im-internet.de/stpo/___261.html.

¹⁷ Code of Criminal Procedure, 1958, available in its updated form at www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154.

decide according to *his or her inner conviction*" (our emphasis). Since the French Revolution, legal rules of evidence (based on the number or types of evidence) have given way to free evaluation, restrained by a motivation that charts the rational course. Conviction becomes moral certainty built on the consistency of evidence, not on vague impressions.

3.3. Spain – evidentiary integrity and judicial experience

Article 741 of the Spanish Code of Criminal Procedure (LECrim)¹⁸ states: "The court, evaluating according to its *conscience* the evidence presented at trial, the arguments put forward by the prosecution and the defense, as well as the statements of the parties, shall deliver a judgment within the time limit provided for by this law" (our emphasis). Here, "conscience" means moral reason kept in check, with the evidence melted into a unified analysis. Conviction arises from the rational reconstruction of the facts, supported by firm reasoning.

3.4. Poland – sound reasoning and life experience

Article 7 of the Polish Code of Criminal Procedure (KPK)¹⁹ states: "Judicial authorities shall form their *convictions* on the basis of all the evidence obtained, freely assessed in accordance with the principles of sound reasoning and the indications of knowledge and life experience" (our emphasis). Compared to other codes, this one explicitly adds the need for sound reasoning and human experience—a caution that elevates deliberation above algorithms, toward a conviction woven from logic and reality.

3.5. Switzerland – conviction formed on the basis of the entire proceedings

Article 10(2) of the Swiss Code of Criminal Procedure (StPO)²⁰ states: "The court shall freely evaluate the evidence presented, in accordance with its own *personal conviction* based on the entire proceedings" (our emphasis). The emphasis is on a global view, without pre-established priorities, linking freedom with the obligation to provide the reasoning. The conviction is not locked in the judge's mind; it is verified in the motivation for the decision.

3.6. Austria – prudent conviction and the priority of reasonable doubt

Article 14 of the Austrian Code of Criminal Procedure (StPO)²¹ states: "To establish that the facts are proven is a matter which the court may decide freely on the basis of the evidence and according to *its own conviction*; in case of *doubt*, it shall always decide in favor of the accused or other persons whose rights are affected" (our emphasis). Freedom is intertwined with the protection of the accused, making reasonable doubt part of the ethics of judgment—a balance between the search for truth and prudence, complemented by the principle of *in dubio pro reo* provided for in Art. 260 (2).

3.7. Conclusion: a European standard that Romania ignored in 2001

These legal systems share a common core:

- the judge's conviction is a rational act, woven from logic, prudence, and experience;
- the exercise of conviction protects the judge's independence, it does not jeopardize it;
- the decision's motivation makes it verifiable, making room for criticism;

¹⁸ Ley de Enjuiciamiento Criminal, 1882, updated at [www.boe.es/eli/es/rd/1882/09/14/\(1\)/con](http://www.boe.es/eli/es/rd/1882/09/14/(1)/con).

¹⁹ Kodeks postępowania karnego, 1987, updated at <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-karnego-16798685>.

²⁰ Schweizerische Strafprozessordnung, 2010, updated, available online at www.fedlex.admin.ch/eli/cc/2010/267/de.

²¹ Strafprozeßordnung, 1975, updated at www.jusline.at/gesetz/stpo.

- evidence is evaluated holistically, not mechanically.

Through Decision No. 171/2001, Romania broke away from this line of thinking. Not distinguishing between moral and legal conviction, the Court preferred to abandon it altogether. What we lacked in 2001 was a conceptual framework to keep professional conscience away from personal whims – an absence that would create the need for extensive repairs years later.

II. Returning to balance: Decisions No. 778/2015 and No. 47/2016

1. The context of constitutional rebalancing

Almost fifteen years after the 2001 decision, the doctrine of the Romanian legal system entered a phase of profound change towards maturity. Judicial practice, institutional reforms, and European pressure had revealed the limits of the formalism imposed until then. Removing "conviction" from the norm had not increased objectivity and instead had concealed genuine deliberation, leaving the judge's reasoning in the shadows. The doctrine insisted that the assessment of evidence inevitably calls for conviction²² and that a democratic justice system cannot survive on blind obedience to the letter of the law alone.

Last but not least, external pressures – the reports of the Cooperation and Verification Mechanism from 2007 to 2013, as well as the consistent case law of the Strasbourg Court – accelerated the change. They showed that a fair trial means not only compliance with the norm, but also transparency of the judge's inner journey.

In 2014, the new Code of Criminal Procedure took a decisive step and reintroduced "*conviction*" into the legal text, alongside a new concept – "*reasonable doubt*".²³

- Art. 4 (2): "Any doubt in the formation of the conviction of the judicial authorities shall be interpreted in favor of the suspect or defendant";
- Art. 100 (2): "The court shall administer evidence (...) in order to form its conviction";
- Art. 103 (2): "A conviction shall only be handed down when the court is convinced that the charge has been proven beyond reasonable doubt."

Challenges to the new texts, which seemed similar to those found problematic by the Constitutional Court, were not long in coming. The Court used this opportunity not to reimpose the formalism of 2001, but to radically revise its own case-law.

Thus, Decision No. 778/2015 introduces the distinction that was missing in the previous decision: personal moral conscience (variable, intuitive) versus professional legal conscience (rationally built on the body of evidence). The judge is no longer a mere executor, but the architect of professional certainty, filtered through legal reasoning.

²² Gheorghită Mateuț, "Libertatea aprecierii probelor. Limite" [*Freedom to assess evidence. Limits*], *Revista de drept penal [Criminal Law Review]*, no. 3/2004, Bucharest, 2004, pp. 40-47; idem, *Procedură penală. Partea generală* [Criminal Procedure. General Part], Editura Universul Juridic, Bucharest, 2019, pp. 494-498; Jean-François Renucci, *Intime conviction, motivation des décisions de justice et droit à un procès équitable*, in "Recueil Dalloz," 2009, no. 15, pp. 1058-1059, online at www.dalloz-etudiant.fr/fileadmin/actualites/pdfs/D2009-1058.pdf.

²³ The phrase "*beyond reasonable doubt*" crystallized in the 17th century in European common law as reflecting the requirements of a fair trial. It is seen as a measure of persuasion by which the prosecution must convince the judge of all the essential elements of guilt in order to protect people from dubious and unjust convictions, with resulting losses of life, liberty, and property. For history and details, see U.S. Supreme Court, *In re Winship*, 397 U.S. 358 (1970), which established that this burden of proof would be applicable in all cases in all states, thus removing the standard of preponderance of evidence. Available at <https://supreme.justia.com/cases/federal/us/397/358>.

A year later, Decision No. 47/2016 takes the rebalancing even further: it enshrines "reasonable doubt" as a constitutional standard and makes objective conviction through a clear epistemic filter – certainty born from removing any justified, instead of imaginable, doubt²⁴.

Both decisions restore the space for deliberation without making it arbitrary: they anchor it morally (legal conscience) and epistemically (reasonable doubt). The judge does not create law, but interprets it responsibly, and conviction becomes a tool of a justice system that is regaining its soul.

Thus a question is raised: how far has this rebalancing gone and has it ultimately succeeded in healing the rift of 2001 – or merely concealed it under more nuanced language?

2. Decision No. 778/2015: the distinction between moral conscience and legal conscience

In Decision No. 778/2015²⁵, the Constitutional Court verifies the validity of the norms regarding the *conviction* that underpins judges' decisions²⁶. The Court revises the formalism imposed in 2001, reshaping the "judge's conviction" closer to the European heritage.

In its reasoning, the Court outlines three key features of conviction. It must be:

- aligned with the moral conscience of the magistrate (para. 31);
- based exclusively on legal conscience, built only after the exhaustion of judicial confrontation and legal assessment of evidence (para. 32);
- free from distortions such as blind trust in intuition (para. 33).

The argument contains an important passage – paragraph 35 – which does exactly what was completely missing in the 2001 decision: it defines a clear boundary between two completely different types of conscience. On the one hand, there is *moral conscience*—an intuitive, variable, and personal feeling, incompatible with justice. On the other hand, there is *legal conscience*, the only one admissible in the deliberation process, which is rationally structured and made objective by evidence. The latter is a "*conviction involving certainty and assurance, formed as a result of a logical, scientific, and rigorous analysis of the facts*" (para. 32)²⁷.

The decision finally resolves the paradox of 2001: instead of prohibiting any appeal to conscience (the brutal solution at the time), the Court preserves conscience but strictly delimits it—personal conscience remains outside the courtroom, while legal conscience becomes the very heart of professional reasoning. Thus, the decision restores the link between reason and conscience, but under strict control: it recognises the inner space of deliberation, subjecting it to verification. The judge constructs the decision through reasoning, not feeling; moral conscience is a negative condition – it does not allow ethical disagreement – but it is not a decisive source.

The Court further notes: "*As long as the magistrate's conviction respects the principle of independence and submission only to the law, it becomes a guarantee of justice*" (para. 32).

²⁴ The distinction between "doubt" and "reasonable doubt" is very important: *reasonable doubt* does not mean that the judge must reach a "total absence of doubt," as the standard only requires that the doubt not be *reasonable*—that is, justified, serious, derived from the evidence.

²⁵ CCR, *Decision No. 778/2015*, published in the Official Gazette of Romania, Part I, No. 111 of February 12, 2016.

²⁶ The phrase "reasonable doubt" was not subject to challenge, bringing Romania in line with the ECHR: the standard of "beyond reasonable doubt" requires rational conviction, with the prosecution obliged to remove serious doubts (ECHR, *Bragadireanu v. Romania*, Dec. 6, 2007; *Orhan v. Turkey*, June 18, 2002; *Ireland v. United Kingdom*, Jan. 18, 1978).

²⁷ The Court's analysis reveals a coherent conceptual model regarding the act of deliberation: moral conscience accompanies, without dominating; legal conscience orders reasoning (respect for the law, evidence, rights, logic); conviction is the final product; intuition is a controlled risk; independence is the framework of free reason.

Conviction therefore expresses internal freedom limited by the norm – the law encompassing the entire system, from the Constitution to lower acts. The legalistic reflex therefore attenuates the hermeneutic openness²⁸.

Philosophically, however, the decision creates a prudent balance: it restores conviction without moral autonomy; it brings back critical reason, not sensitivity. The judge thinks freely, but still does not feel justice. This careful evolution paves the way for 2016, when the standard of reasonable doubt will complete the architecture of conviction.

3. Decision No. 47/2016: reasonable doubt and making conviction objective

Decision No. 47/2016 marks a turning point in the architecture of judicial conviction.²⁹ In order to strengthen the presumption of innocence and the new evidentiary threshold, the Court reshapes internal deliberation: the standard of "beyond reasonable doubt" makes intimate conviction, marked by subjectivity, objective. It is no longer sufficient for the judge to "believe" that the defendant is guilty; he must be able to demonstrate that there is no serious doubt, based on evidence. Thus, the Court elaborates: "*to the extent that the evidence... contains doubtful information precisely regarding the guilt of the perpetrator, the courts cannot arrive at a definite conviction and must conclude innocence*" (para. 18).

This valorization of judicial conviction was confirmed and consolidated in a further decision – in Decision No. 22/2018, the Constitutional Court expressly recognizes the inevitable nature of the cognitive process and the judge's inner conviction. Analyzing the exclusion of illegal evidence, the Court states there that the formation of conviction is "*a cognitive process, specific to judicial psychology, which intrinsically involves the judge's own subjective assessment,*" and the mere legal exclusion of illegal evidence cannot prevent the magistrate from "refreshing his memory" with the information in question³⁰. Thus, the Court implicitly recognizes that the judge is not a normative automaton, but a living conscience that cannot be "reset" through formal exclusions—a recognition that radically contradicts the 2001 paradigm and which, in practice, confirms that "the human in the judge" cannot be eliminated without destroying the very essence of the act of judgment.

This vision changes the compass: the focus of deliberation shifts from the positive reconstruction of facts to the identification of possible legal fault lines. It is a paradigm shift: if until 2014 the judge had to convict when the "conviction" of guilt was formed, after the new Code came into force, he can only do so when "reasonable doubt" about innocence has been removed. Doubtful evidence blocks certainty, imposing acquittal not on the basis of material truth, but on the limits of legal truth. Doubt becomes a priority, and the magistrate becomes the guardian of innocence, not a detective of facts.

The change introduced by Decision No. 47/2016 raises a profound dilemma regarding the judge's role. While the 2015 decision brought rational criticism back into deliberation, the 2016 decision channels it toward negative control: the emphasis is no longer on the coherent reconstruction of facts, but on identifying gaps in the prosecution's case. Lively, holistic interpretation is gradually giving way to a defensive logic centered on caution.

²⁸ This legalistic reflex is also found in other decisions. For example, the paragraph "Justice is done in the name of the law, eliminating any other source that could constitute a basis for arbitrariness or injustice. The administration of justice cannot be a subjective act, *pro causa*, of the judge, but an objective, impartial act, derived from the application of the law to the facts of the case and from the judge's submission to the law" can be found in para. VI.1 of Decision No. 972/2012 published in the Official Gazette of Romania, Part I, No. 800 of November 28, 2012, respectively in para. 164 of Decision No. 33/2018, *cited above*, and para. 36 of Decision No. 233/2021, published in the Official Gazette of Romania, Part I, No. 508 of May 17, 2021.

²⁹ CCR, *Decision No. 47/2016*, published in the Official Gazette of Romania, Part I, No. 323 of April 27, 2016.

³⁰ CCR, *Decision No. 22/2018*, published in the Official Gazette of Romania, Part I, No. 177 of February 26, 2018, paras. 19–22.

Restricting conviction to a strictly evidentiary process risks turning judgment into a technical operation, devoid of the art of human interpretation. In the absence of an authentic deliberative space, the judge becomes a mere *verifier of evidence*, not an interpreter of the deeper meaning of the case. This loss of the reflective dimension becomes dramatic in concrete cases, where human nuances—fear, shame, pressure—matter decisively.

Take, for example, a real case of domestic violence with weak evidence: vague marks on the body, hesitant statements by the victim that are then retracted under family pressure, indirect witnesses with contradictory statements. The standard of reasonable doubt in Decision No. 47/2016 urges the judge to first consider a plausible doubt—for example, the hypothesis of self-harm or the escalation of a minor conflict—before attempting to shape the thread of events into a coherent narrative. The acquittal thus arises not from a holistic understanding of the abusive pattern, but from the impossibility of dispelling a minor shadow of doubt. The judgment becomes cautious, focused on avoiding judicial error, not on illuminating the hidden truth.

Seen in this light, the decision not only defends the presumption of innocence—an undeniable merit—but inevitably restricts the art of interpretation. Justice gains procedural security, but loses human depth; it gains epistemic rigor, but risks losing rational empathy. Too many protective "shields" turn the judge into a *technician of doubt*, not a responsible storyteller of the Law – someone who, as we have seen countless times in practice, knows that behind every case file lies a fragile life, not just evidence to be verified.

It is precisely this tension that justifies a joint reading with Decision No. 778/2015: if the latter reopens the judge's mind to moral reflection, the 2016 decision keeps it in check with epistemic prudence, narrowing conviction from holistic interpretation to rigorous verification.

4. The ethics of doubt and formalist reductionism

From the perspective of reasonable doubt, Decision No. 47/2016 invites critical scrutiny through the lens of current theories on the act of judgment. The Court sees conviction as a logical operation, closely linked to the norms, with the judge as the guardian of innocence through the negative filtering of evidence. It no longer weaves the truth, but defends it from errors – a preventive mechanism, not a reconstructive one.

This is where a profound tension arises. While the Constitutional Court tends to transform reasonable doubt into a formalistic filter – almost a *checklist* operation – contemporary Italian authors elevate it to the rank of an ethical and epistemic principle of the entire jurisdiction.

Luigi Ferrajoli proposes a different path, anchored in procedural guarantees. For him, judgment begins with the ethics of doubt: awareness of the relativity of procedural truth, the impossibility of absolute certainty, and the weight of each choice. "*The ethics of doubt implies the rejection of any cognitive arrogance, prudence in judgment – hence the beautiful name 'jurisprudence'—as a moral and intellectual style of judicial practice*"³¹, says the Italian author. Doubt is not just a threshold of evidence, but perpetual vigilance, keeping the magistrate alert to the limits of his knowledge.

Domenico Pulitanò takes the idea further, going beyond strict formalities. He sees doubt not as an obstacle, but as the foundation of valid conviction: the ethics of judgment is – must be –

³¹Luigi Ferrajoli, "Dieci regole di deontologia giudiziaria, conseguenti alla natura cognitiva della giurisdizione" [Ten rules of judicial ethics, consequent to the cognitive nature of jurisdiction], in *L'etica giudiziaria* [Judicial ethics], *Quaderno* no. 17 SSM, Rome, 2022, pp. 26–27, available at www.scuolamagistratura.it.

the ethics of doubt³². Without constant scrutiny of hypotheses, the consistency of evidence and possibilities, no certainty holds. Conviction becomes a prudent conclusion, aware of the epistemic limits of criminal law – not synonymous with absolute truth.

Moreover, Pulitanò shows that the judge operates simultaneously on two hermeneutic planes: the interpretation of facts and the interpretation of norms. To reduce him to a mere technician is to ignore the reflexive dimension of jurisdiction, in which disciplined subjectivity contributes to the construction of legal meaning. The judge is a hermeneut of life situations, not a docile instrument of rules.

The gap between the vision of our Constitutional Court and that of the two authors analyzed becomes thus evident: the Court uses reasonable doubt as a procedural shield which, once raised, allows for a conviction; Ferrajoli and Pulitanò transform it into the very substance of judgement, a state of permanent vigilance that never ends completely. While Decision No. 47/2016 outlines a neutral magistrate, focused on the norm and anti-error, Ferrajoli and Pulitanò bring him back to doubt as a living resource, not a barrier. Conviction is legitimized not by formalization, but by critical reflection, debate, and risk-taking.

Their doctrine thus gives nuance to what the Court says: the judge cannot be reduced to the role of a technical operator of doubt, but must be recognized as a responsible interpreter of facts and norms, engaged in a difficult balance between doubt, guarantees, and a lucid acceptance of the risk of the decision. This is the true ethics of doubt – one that does not paralyze conviction, but makes it human, critical, and authentically legal.

III. Equity, conscience, and law: a European-American genealogy of judicial conviction

1. The European tradition of equity and conviction

The problem of the balance between law and conscience, between legality and equity, is one of the oldest tensions in Western legal thought. Essentially, this problem concerns the possibility of law remaining human even when it becomes a rigorous system. Over the centuries, European philosophy has formulated different answers, constructing a veritable genealogy of moral reason in the act of judgment.

In this regard, we invoke **Georg Schwarzenberger**: justice and the interpretation of the norm cannot be separated from the structure of the community in which they are applied; their meaning varies with the forms of human association, which confirms that the judge never decides in a vacuum, but within the concrete horizons of a social world that shapes his conviction and responsibility³³.

Mark Goodale, in turn, insists that law cannot be understood in its institutional isolation, but only in contact with people and the real dynamics of social life; *the emic perspective*—the

³² Domenico Pulitanò, “Il dubbio e il paradigma penalistico della certezza. Una ricognizione di problemi” [Doubt and the criminal law paradigm of certainty. A review of issues], in *Quaderno di storia del penale e della giustizia penale* n. 5/2023, published by EUM - Edizioni Università di Macerata, pp. 225-232, doi:10.13138/2704-7148/3743.

³³ Georg Schwarzenberger, *Three Types of Law, Ethics*, Vol. 53, No. 2 (Jan., 1943), pp. 89-97, The University of Chicago Press, translated as *Cele trei tipuri de drept*, in *Noua Revistă a Drepturilor Omului (New Journal of Human Rights)* No. 2/2010, pp. 109-118, online at www.revistadrepturileomului.ro/sumar_2_2010.html.

view from within of those involved—reveals that justice is above all a human process through which communities manage suffering and rebuild social bonds³⁴.

1.1. Ancient thought – equity as a form of justice

Aristotle distinguishes between *dikaioyne nomike* (legal justice) and *epieikeia* (equity)³⁵. The law is, by its nature, general (*katholou*), because it must cover a multitude of future, unknown cases, but life is particular (*kata meros*), and a rigid application of the general norm can lead to injustice in a specific case. Therefore, for Aristotle, equity is seen as a *corrective to general law*, a higher form of justice (*beltion tou dikaiou*), which intervenes when strict application of the letter would betray the spirit of the norm.

This view underpins the idea that judges are not mere executors of the law, but *responsible interpreters* who must ensure that the purpose of the law (justice) is not betrayed by its means (formal rigor). Thus, fair judges do not defy the law; they implement it, adapting it to concrete human reality.

Lord Neuberger of Abbotsbury emphasizes that equity is the bridge between the norm and the human condition: human rights cannot be applied mechanically, but only through a judgment that is sensitive to the particularities of each individual, which requires a judge capable of seeing the person behind the text³⁶.

In Roman thought, **Cicero** continues the Aristotelian line, formulating one of the most famous warnings against legal formalism: "*Summum ius, summa iniuria*" - "*The strictest application of the law becomes the greatest injustice*"³⁷. He refers to the injustices caused by clever, even cunning interpretations that distort the meaning of the law. For Cicero, the law is not just a system of commandments, but an expression of practical reason and natural equity (*aequitas*), therefore the judge must apply it in its letter and spirit. The fundamental legal virtue is rational moderation (*moderatio*), a prudence that prevents the law from becoming an instrument of cruelty. Cicero intuits that, in order to be legitimate, the law must remain compatible with humanity.

Thus, since ancient times, a red line of European legal thinking has emerged: the judge is not an automaton of the norm, but a person called upon to save the spirit of justice when its letter becomes tyrannical. This is precisely the line that Decision No. 171/2001 brutally broke, eliminating any space for moral reason and equity, and it is precisely this line that Decisions No. 778/2015 and No. 47/2016 have attempted, each in its own way, to rehabilitate – the former through the distinction of legal conscience, the latter through the ethics of reasonable doubt. The genealogy of equity is therefore not just history; it is the criterion by which we measure how close or far we are today from the profound purpose of the act of judging.

1.2. Thomas Aquinas and *epieikeia* as a moral virtue

³⁴ Mark Goodale, *Anthropology and Law: A Critical Introduction*, 2017, New York University Press, an idea presented and discussed in Mihai Popa's review in *Noua Revistă a Drepturilor Omului* no. 1/2018, pp. 84-87, available at https://www.revistadrepturileomului.ro/sumar_1_2018.html.

³⁵ Aristotle, *Nicomachean Ethics*, V, 10 (1137b11–27), Editura Științifică și Enciclopedică, Bucharest, 1988, p. 129. Essentially, *epieikeia* is the name given to the virtue that allows the law to be applied with kindness and flexibility when its strict application would lead to injustice.

³⁶ Lord Neuberger of Abbotsbury, lecture at The Reform Club London, November 5, 2009, translated as "Echitatea drepturilor omului", in *Noua Revistă a Drepturilor Omului* no. 4/2015, pp. 137-150, online at https://www.revistadrepturileomului.ro/sumar_4_2015.html.

³⁷ Marcus Tullius Cicero, *De officiis*, I, 10, 33, translated as *Despre îndatoriri*, Editura Științifică, Colecția Biblioteca Filozofică, Bucharest, 1957, p. 55.

In the Middle Ages, canonical theology transformed the Aristotelian concept into a moral virtue. **Thomas Aquinas**, in *Summa Theologica*, states that when the literal application of the law contradicts the intention of the legislator, man must follow not the letter of the law, but its spirit, that is, the intention of the legislator. He sees *epieikeia* as part of justice in its broad sense, which cannot be reduced to legal justice, which concerns only the letter of the law³⁸. In this view, judgment becomes an act of conscience formed through reason. The judge's conviction is not a subjective intuition, but a form of moral reason oriented toward the finality of the law.

For Thomas Aquinas, therefore, a well-formed legal conscience is the very virtue of *epieikeia* – exactly what Decision No. 171/2001 declared incompatible with the principle of submission only to the law, and exactly what Decision No. 778/2015 reintroduced under the name of "professional legal conscience." Thomas Aquinas tells us that the judge cannot be reduced to a mere executor of the letter of the law, because justice sometimes requires going beyond it – in order not to violate the law, but to fulfill it.

1.3. The Enlightenment and critical reason

Charles-Louis de Secondat, Baron de Montesquieu, writes that "*judges are no more than the mouth that pronounces the words of the law; mere passive beings incapable of moderating either its force or rigor*"³⁹. Although often interpreted mechanistically, the passage was about limiting the abuses of judicial parliaments, not excluding moral reason.

The context is essential: Montesquieu wrote in opposition to French monarchical absolutism, where French judicial parliaments often usurped legislative or executive power, blocking royal reforms⁴⁰. He sought to limit judicial arbitrariness by strengthening the separation of powers, not to reduce the judge to an automaton. Moreover, in other passages of the same treatise, Montesquieu calls for "moderation" (XI, 4), "the spirit of the laws" (*passim*), and "humanity" in the application of norms (e.g., XXVI, 3).

Thus, Montesquieu contributed to the affirmation of the modern idea of judicial independence – a rational freedom situated between the constraints of the rules and responsibility towards its purpose.

The famous quote was, in fact, often invoked in isolation and incorrectly in post-2001 Romania to justify absolute formalism — the exact opposite of what Montesquieu wanted. He did not call for the suppression of the judge's reason, but only for the limitation of the abuse of political power through judgment. A complete reading of his work shows that his true legacy is the balance between obedience to the law and rational moderation – precisely the balance that Decisions 778/2015 and 47/2016 have each attempted, in their own way, to restore.

1.4. The crisis of positivism and the rediscovery of morality

The 20th century brought a profound crisis of legal formalism. The experience of totalitarian regimes showed that the application of the law can lead to state crimes and that blind

³⁸ Thomas Aquinas, *Summa Theologica*, collective translation published by Polirom Publishing House, Iași, 2016, Q.120, vol. III, pp. 818-819.

³⁹ Charles-Louis de Secondat, Baron de Montesquieu, *De l'esprit des lois*, Livre XI, Chapitre VI, translated as *Despre spiritul legilor*, Editura Științifică, Bucharest, 1964, vol. I, p. 203.

⁴⁰ At that time, judicial parliaments were regional supreme courts which, in addition to their judicial role, also had a political role, being able to *veto* royal edicts.

obedience to the law – as implied, for example, by Hans Kelsen through the strict separation of law from morality⁴¹ – does not guarantee justice and instead can destroy it.

In 1946, **Gustav Radbruch** formulated the famous formula that bears his name (*Radbruchschen Formel*): "*There is a conflict between positive law and justice, and when this reaches an intolerable degree, positive law must yield to justice*"⁴².

The post-totalitarian lesson is clear: a judge without a moral conscience (who invokes "*the law is the law*" in his defense) becomes an accomplice to legalized injustice. Therefore, the rehabilitation of the ethical dimension of the judiciary is not a philosophical fad, but a condition for the survival of the rule of law itself. This formula has brought morality back at the center of Law.

For post-Revolution Romania, Radbruch's lesson is painfully relevant. Decision No. 171/2001 – by excluding any reference to conscience and elevating blind obedience to the law to the rank of a constitutional principle – was, in essence, a return to the very extreme positivism that Radbruch had condemned as responsible for the moral catastrophe of the 20th century. It was only Decisions No. 778/2015 and No. 47/2016 that began to repair this historical error, bringing legal conscience and reasonable doubt back at the center of the act of judging – precisely in the spirit of the post-totalitarian European lesson.

1.5. Modernism – moral hermeneutics

After World War II, **Ronald Dworkin** rejected the model of the "mechanical judge" and proposed the concept of "*law as integrity*": "*The judge must decide not by mechanically applying the rule, but by providing the best moral justification for the entire legal system*"⁴³.

The ideal judge is one who, in difficult cases, possesses extraordinary legal skills and constructs the best interpretation of the law, taking into account general principles of law and equity ("*Judge Hercules*"). Dworkin sees the legal system as an "epic" in which each judge must interpret past decisions to make them as coherent and principled as possible, as if creating a unified moral story. The judge's conviction thus becomes an act of *moral integration*, a rationale that unifies law and justice⁴⁴.

In the same vein, **Lon L. Fuller** puts forward the theory of the "*internal morality of law*." In order to be law, and not a mere constraint, the law must comply with eight internal conditions: generality, publicity, clarity, prospectivity (non-retroactivity), non-contradiction, possibility of compliance (it does not require the impossible), relative constancy, and congruence between the text of the norm and its enforcement⁴⁵. These requirements are not merely technical, procedural,

⁴¹ Hans Kelsen, in his seminal work *Reine Rechtslehre (Pure Theory of Law)*, second edition, (Franz Deuticke Verlag, Vienna, 1960), proposes a system in which law is completely autonomous from morality, religion, politics, or justice. The effect was the dehumanization of the act of justice: the judge is not a moral interpreter, but a normative executor who deduces the solution from the higher norm. Blind obedience to the law generated a heated debate between Hart and Fuller (1958).

⁴² Gustav Radbruch, German law professor and philosopher, former Minister of Justice in the Weimar Republic. The "formula" appears in the article "Gesetzliches Unrecht und übergesetzliches Recht" ("Legal Injustice and Extra-Legal Justice"), *Süddeutsche Juristen-Zeitung*, Year 1, No. 5, August 1946, pp. 105–108, available online: www.jstor.org/stable/20800812.

⁴³ Ronald Dworkin, *Law's Empire*, Harvard University Press, Cambridge, Massachusetts, 1986, pp. 225-250.

⁴⁴ Ronald Dworkin is the greatest critic of H.L.A. Hart, who in his seminal work *The Concept of Law* (1961) redefined legal positivism in a "soft" form. Dworkin accuses him of reducing law to rules, ignoring principles, and justifying excessive judicial discretion (*Taking Rights Seriously*, Harvard University Press, Cambridge, Massachusetts, 1977, chaps. 2–4). Hart replied that he should indeed have discussed principles more, but that law is not reducible to morality and that judges must have discretion in situations that are insufficiently regulated (Postscript to *The Concept of Law*, 2nd ed., Oxford University Press, New York City, 1994, pp. 259–263).

⁴⁵ Lon L. Fuller, *The Morality of Law*, Harvard University Press, Cambridge, Massachusetts, 1964, revised edition 1969, pp. 38-41.

but have a moral basis: they respect human beings as rational beings, capable of organizing their conduct according to known and stable rules.

This perspective is complemented by **Paul Ricoeur**, for whom justice is not a simple application of the rule, but a quest to restore the broken balance between people, to reconcile them⁴⁶. This presupposes a *double fidelity*: to the law (as a source of authority and predictability) and to man (as the recipient of the norm and the bearer of dignity). The judge thus becomes a *mediator* who cannot abandon reason (otherwise falling into arbitrariness), but neither can he renounce humanity (otherwise producing legal injustice). The judicial sentence has a profound symbolic function: it "retranslates the conflict into the language of justice."

Therefore, judicial deliberation is not a purely cognitive process, but a *moral-reflexive* one. It involves not only understanding the legal text, but also discerning the right meaning of its application. In the spirit of Paul Ricoeur's thinking, to judge means to understand, both on the part of the judge and on the part of the litigants.

This marks the end of a European tradition of equity and conviction which, from Aristotle to Ricoeur and others, has maintained the same essential belief: *the law cannot be separated from man without losing its meaning*.

For Romania, this tradition is not just a beautiful story, but a verdict. Decision No. 171/2001 brutally interrupted it, reducing the judge to "the mouth that pronounces the words of the law" and declaring any appeal to conscience incompatible with obedience to the law – exactly the model that Dworkin called "the nightmare of the mechanical judge," Fuller declared devoid of internal morality, and Ricoeur saw as a betrayal of the symbolic function of justice. It was not until 2015 and 2016 that the Constitutional Court began to pick up the broken thread, bringing legal conscience and reasonable doubt back at the center of deliberation. However, the road to a true moral hermeneutics – in which Romanian judges can, like Dworkin's Hercules or Ricoeur's mediator, say "this is the best moral reading of our entire law" – remains long and uncertain.

2. The judge and the balance between reason and compassion

At the heart of the act of justice lie deliberative reason and moral responsibility. Without reason, the Law becomes arbitrary; without compassion, it is emptied of humanity. The tension between these two dimensions – between the law that organizes and the humanity that understands – defines the condition of the modern judge. Western philosophy shows that this tension is the source of discernment. To judge is to balance objectivity and understanding, the law and life.

2.1. Moral reason as the foundation of judgment

For **Immanuel Kant**, reason is twofold: theoretical and practical. While the former pursues truth, the latter seeks what is right. In *Critique of Practical Reason*, Kant asserts that man is moral because he can reflect on his own conduct: "*Two things fill the mind (...): the starry heavens above me and the moral law within me.*"⁴⁷

The judge, as a rational being, applies positive law in accordance with the inner moral law. This means *ethical autonomy*—the freedom to decide according to reason, not instinct. Practical reason imposes *the categorical imperative*: "*Act only according to that maxim whereby*

⁴⁶ Paul Ricoeur, *Le Juste*, Éditions Esprit, Paris, 1995, p. 10.

⁴⁷ Immanuel Kant, *Critique of Practical Reason*, "Conclusion" (Ak. 5:161–162), translated by Nicolae Bagdasar, Editura IRI, Bucharest, 1999, p. 188.

you can, at the same time, will that it should become a universal law"⁴⁸. Lawfulness cannot be separated from morality; pure reason is fulfilled through moral reason, which transforms abstract rules into just decisions.

2.2. The virtue of prudence – *phronesis* as applied reason

In the Aristotelian spirit of *phronesis*, prudence is the practical reason that helps man to act well in particular circumstances, overcoming the rigidity of the letter without denying its authority. Applied to justice, *phronesis* is the virtue by which the judge finds the balance between the letter and the spirit of the law, between law and justice.⁴⁹

Paul Ricoeur, whom we have already mentioned as a hermeneut of the symbolic function of justice, describes this virtue as the ability to see the person behind the case⁵⁰. The judge does not apply the law to a case, but to a person's cause. Through *phronesis*, the application of the law becomes an act of moral interpretation, where reason and empathy meet.

Alasdair MacIntyre radicalizes this tradition in the 20th century: authentic justice cannot be reduced to the application of rules in a bureaucratic institution, but is a living "practice" in which internal goods – moral excellence itself – are pursued and extended through cooperation and tradition. When modern institutions replace the virtues of practice with managerial efficiency and predictability, the judge risks becoming a mere "managerial character" lacking *phronesis*⁵¹ — precisely the danger that post-2001 Romanian formalism has embodied for a decade and a half.

The judge's conviction is, therefore, a prudent reason – a deliberation that recognizes man as the measure of ultimate fairness.

2.3. Compassion as moral reason

In the 20th century, *compassion* was revalued not as the opposite of *reason*, but as a higher form of moral reflection.

Hannah Arendt observed that evil does not come from passion, but from the absence of thought—the Nazi Eichmann, she notes, was unable “*to think from the standpoint of somebody*”

⁴⁸ *Ibid.*, p. 62.

⁴⁹ Regarding the “spirit” of the law or the Constitution, we note in the case law of the Constitutional Court:

- that “a text in the fundamental law should not be interpreted restrictively, but in the spirit of the Constitution” (Decision No. 683/2012, para. II.7);
- that a law cannot “violate the letter or spirit of the Fundamental Law” (Decisions No. 542/2009, No. 232/2010, No. 126/2011, No. 132/2021, para. 17);
- - that “the legal norm must be interpreted in its positive sense, generating legal effects, the legal methods of interpreting a legal norm must take into account not only the letter but also the spirit of the law, so that the result of the practical application of the legal norm is as close as possible to the purpose pursued by the legislator” (Decision no. 682/2015, para. 31);
- that “in interpreting the law, the judge must strike a balance between the spirit and the letter of the law, between the requirements of drafting and the purpose pursued by the legislator” (Decisions No. 838/2009, No. 972/2012, para. VI.1; No. 233/2021, para. 36; No. 216/2024, para. 14; No. 787/2021, paras. 16 and 25). The Court itself explains the spirit of the law in specific cases (Decisions No. 418/2014, paras. 37 and 41; No. 736/2016, para. 21; No. 96/2024, para. 5);
- - that “if normative administrative acts add to the law or deviate from the letter and spirit of the law, judicial review of these acts may be triggered” (Decisions no. 401/2018, para. 21; no. 567/2018, no. 441/2019, para. 15; No. 86/2020, para. 18; No. 531/2020, para. 25; No. 134/2025, para. 18);
- - that the powers of the state must collaborate “in the spirit of constitutional loyalty” (Decisions no. 51/2012, no. 683/2012, para. II.9).

⁵⁰ Paul Ricoeur, *op. cit.*, p. 47.

⁵¹ Alasdair MacIntyre, *After virtue: a study in moral theory*, translated by Mircea Flonta, Humanitas, Bucharest, 1998, pp. 198–206.

else," that is, he did not reflect morally on the consequences of his actions⁵². Thus, compassion is not sentimentality, but the ability to think from the perspective of the other.

This idea redefines the ethos of the judge: it is not enough for him to be impartial, but he must show *rational empathy*, an understanding without identification. The lack of this ability would reduce judgment to a mere administrative act.

In the same vein, **Martha Nussbaum** argues that literary imagination is essential for justice because it develops "*cognitive empathy*" - the ability to perceive the moral complexity of human life: "*Imagination is the surest antidote to cruelty. It allows us to see beyond stereotypes and perceive our common humanity*"⁵³.

The ideal judge does not ignore emotion, but transforms it into rational understanding.

2.4. Empathetic reasoning and deliberative justice

In contemporary thinking, **Amartya Sen** has expanded on the idea of *empathetic reasoning*, arguing that justice cannot ignore the real consequences for real people: "We must take into account the perspectives of others, especially those most affected."⁵⁴

The judge becomes an *engaged conscience*, taking on the reflective responsibility of seeing not only what the law says, but also *what the law does* in people's lives.

This viewpoint corresponds to the model of *deliberative justice*, where decision-making is a process of public moral reasoning. To decide is to convince, and to convince is to translate the law into human terms—through opinions that are clear, accessible, and responsible to those involved in the process.

2.5. Rational compassion — between emotion and rigor

Judith Shklar warns that excessive legalism – that is, treating moral issues as if they were only legal – creates institutional cruelty⁵⁵.

The true measure of *legal reason* is the ability to integrate empathy without losing rigor. *Rational compassion* is not weakness, but moral lucidity: recognizing humanity without abandoning the norm.

The balance between reason and compassion is not achieved through compromise, but through *reflective maturity* — a virtue through which the judge sees in each case not just a legal problem, but a *human story*.

Thus, this balance remains the gravitational center of justice: the place where the law meets humanity and where meaning becomes judgment. For Romania, it is the test of emerging from the shadow of Decision No. 171/2001, which reduced the magistrate to an "operator of the norm," detached from moral reason and human understanding.

⁵² Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed., Penguin Books, London, 2006, p. 287 (Afterword).

⁵³ Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*, Beacon Press, Boston, 1995, pp. 73–74.

⁵⁴ Amartya Sen, *The Idea of Justice*, Harvard University Press, 2009, p. 172 (phrase adapted from those contained in chapter 7, "Position, Relevance and Illusion").

⁵⁵ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, 2nd edition, Harvard University Press, Cambridge, Massachusetts, 1986, p. 111.

The Romanian judge after 2016 is called upon to revive a two-thousand-year-old tradition – from Aristotelian *phronesis* to the empathetic reasoning of Sen and Shklar – not as a vague ideal, but as a genuine constitutional duty. Decisions No. 778/2015 and No. 47/2016 have timidly reopened this door: one towards rational legal conscience, the other towards epistemic prudence.

It remains to be seen, however, whether the magistrate will have the courage and space to go all the way, transforming conviction not only into an instrument for verifying reasonable doubt, but into an act of authentic *phronesis* – practical, empathetic, and deeply human reason, capable of saying, in each case, that the solution given is "the fairest that the law can offer to a real person." Will we have judges capable of exercising this rational compassion in writing their opinions, or will we remain prisoners of a formalism which, although masked today in the rhetoric of "reasonable doubt," risks perpetuating the very institutional cruelty denounced by Shklar?

IV. Institutional recommendations

Romania is now facing a unique window of opportunity. The painful lesson of the 2001 Decision and the formalism that dominated for almost two decades has been partially overcome by new rulings of the Constitutional Court. However, the risk of technocratization and a "faceless justice" is greater than ever. If we do not act now, we will replace the bureaucratic judge with the algorithmic judge – and then there will be nothing left to repair.

1. The National Institute of Magistracy

The National Institute of Magistracy bears the essential responsibility of training judges who *combine rational rigor with moral sensitivity*. Current programs, although technically sound, remain dominated by the paradigm of measurable performance and objective evaluation, which often overshadows the indispensable ethical dimension of deliberation.

It is necessary to introduce dedicated modules on **reflective ethics** and **legal hermeneutics**, inspired by the French and Canadian models⁵⁶. These should include the analysis of constitutional and jurisprudential decisions from the perspective of *moral conviction* and of responsibility to the community.

This interdisciplinary training must be consistent with the recommendations for the Superior Council of Magistracy and the Constitutional Court, forming a unified system of legal culture. Elements of **moral philosophy**, **judicial psychology**, and **the sociology of law** would contribute to strengthening *rational empathy* – the ability to understand the person behind the case without compromising the requirements of the law.

The National Institute of Magistracy should not be a mere technical training center, but a space where *professional conscience* is cultivated and strengthened. Learning to think justly means not only knowing the law, but also understanding its human purpose.

2. The Superior Council of Magistracy

The Superior Council of Magistracy should not be perceived strictly as an administrative institution, but should assume the role of *guarantor of the internal independence* of judges. Independence is not limited to autonomy from the other powers of the state, but includes *the moral freedom* to decide according to one's own conscience.

⁵⁶ École Nationale de la Magistrature (ENM), *Rapport annuel de formation judiciaire*, Bordeaux, 2023, pp. 12–14 (modules "Éthique et responsabilité du magistrat"); cf. National Judicial Institute (Canada), "Social Context Education" programs.

In this light, the Superior Council of Magistracy should develop a **comprehensive code of ethics** that reaffirms conscience as a fundamental and constitutive dimension of the judicial profession⁵⁷. Professional evaluation cannot remain focused exclusively on criteria of speed and volume of activity, but must include *the quality of reasoning* and *the maturity of legal reflection*.

To write an opinion means not only narrating and demonstrating, but also *convincing*⁵⁸. A culture of moral deliberation must be encouraged through practical guidelines, regular debates, and a process of continuous training. Only in this way can institutional control be transformed into an exercise in *ethical responsibility*, rather than a mechanism of bureaucratic conformity.

3. The Constitutional Court of Romania

The Constitutional Court remains the privileged space in which **the philosophy of constitutional justice** is defined and developed. Following the developments marked by the decisions of 2015-2018, the Court has the opportunity to explicitly consolidate and develop the concept of *humanistic legality* – a legality that unifies the norm with moral reason.

The Court should continue and expand the line started by these decisions, affirming more clearly the principle of *rational and moral reasoning* as a constitutional requirement⁵⁹. The reasoning behind a decision is not a routine procedural act, but precisely the place where the law acquires meaning through the conscience of the judge.

Looking ahead, the Constitutional Court of Romania could contribute to a **framework of ethical jurisprudence**, inspired by the broader ethos of constitutional review enshrined in contemporary German doctrine⁶⁰. In this tradition, the mission of the constitutional court goes beyond the strict protection of the text, assuming the role of guardian of *the balance between law and man*: an institution that not only applies the fundamental norm, but interprets it in order to protect the dignity, freedom, and rationality of the constitutional order. Such a charter would explicitly clarify the moral identity of constitutional justice, strengthening public confidence by assuming a hermeneutic responsibility towards the meaning of fundamental rights.

The National Institute of Magistracy *trains* judges, the Superior Council of Magistracy *supports* them, and the Constitutional Court sets their *values*. Together, these institutions can ensure that the painful lesson of Decision 171/2001 is not just a closed wound, but the foundation of a truly humane justice system—the only one capable of resisting both the "steel cage" and the faceless algorithm.

⁵⁷ *Code of Ethics for Judges and Prosecutors*, approved by SCM Decision No. 328/2005, published in the Official Gazette of Romania No. 815 of September 8, 2005, amended by SCM Decision No. 135/2022, published in the Official Gazette of Romania No. 1017 of October 19, 2022.

⁵⁸ The case-law of the Constitutional Court of Romania discusses the ability of judges to *convince* litigants, by providing substantial opinions for court decisions, that justice has been done – see paragraphs 35, 36, 46, 49, 81, 90, and 96 of Decision No. 233/2021, *cited above*.

⁵⁹ "The decision must not only take into account the relevant legal instruments, but also the non-legal concepts and realities specific to the context of the dispute, such as ethical, social, or economic considerations. This requires the judge to be sensitive to these considerations when making a decision" – point 22 of the Consultative Council of European Judges, *Opinion No. 11 (2008) to the Committee of Ministers of the Council of Europe on the quality of judicial decisions*, CCJE(2008)5, Strasbourg, December 18, 2008, available at <https://rm.coe.int/16807482bf>. Our Court has begun a justification in the same vein – see the entire CCR Decision No. 233/2021 and para. 178 of Decision No. 33/2018, *cited above*.

⁶⁰ For the foundations of the ethos of constitutional courts in the German tradition, see: Dieter Grimm, *Die Zukunft der Verfassung*, Suhrkamp, Berlin, 1991, reprinted 2020, where the author shows that constitutional jurisprudence cannot be limited to the letter of the law, because the protection of dignity and freedoms requires a creative interpretative role on the part of the Court; Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Suhrkamp, Frankfurt am Main, 1991, reprinted 2024, for the idea that constitutional order implies an ethical responsibility that goes beyond legalism; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edition, C.F. Müller, Heidelberg, 1999, which sets out the principle of the "value order" of the fundamental law, the basis of the moral role of the Court.

The necessary reforms do not necessarily involve legislative changes, but rather a profound change in legal culture—the transition from formal, technocratic justice to reflective, humane justice, in which the enforcement of the law is accompanied by moral deliberation. Only in this way will the Romanian judicial system finally be able to rediscover its true vocation: *not to apply the law, but to do justice.*

Conclusions

This paper has explored the evolution of the jurisprudence of the Constitutional Court of Romania with regard to the conviction of the judge, highlighting the profound transformation from rigid rationalist formalism to the reaffirmation of a justice centered on moral reason and the humanistic dimension.

Between the 2001 decision and those of 2015 and 2016, there is a history of rediscovering humanity in law. While the former separated conscience from law and emphasized formalism, the latter two integrated reason and humanity, shaping a model of reflective justice, sensitive to the moral dimensions of decision-making.

The Constitutional Court understood that procedural perfection does not guarantee true justice. Therefore, at a certain point, it reconfigured the role of the judge as a living and responsible interpreter of the law, not as a mere executor of the norm. This change transcends doctrine and has anthropological significance: it represents a change from technical reason to moral reason, from a mechanical view of man to a reflexive one.

Thus, the judge's conviction becomes once again the space of inner freedom, where reason and compassion meet and harmonize to give full meaning to the law.

The judge is not called upon to choose between law and conscience, but to harmonize them in a flexible and responsible balance. The authentic independence of the judge presupposes fidelity to humanity, not isolation from society. Justice exists through the people who carry it out (the enforcers of justice) and is measured by the way in which man is understood in it (the litigants).

In the age of algorithms and automated decisions, the role of the judge is more relevant than ever: not the impersonal confirmation of order, but its humanization. Justice cannot be a simple mechanism for issuing verdicts, but must be an act of moral understanding. Each decision reflects not only the facts, but also human fragility – the source of true justice.

No algorithm can feel compassion, no code can understand suffering. Between the text of the law and the life of the person being judged, there must be a human being who thinks, reflects, and feels. Being a judge, therefore, means translating the law into human language. When the norm becomes too rigid, conscience softens it; when morality becomes confused, reason illuminates it. Between these two breaths lies justice – alive, fragile and yet authentic.

The future may bring virtual courts, electronic processing of cases, and automatically generated decisions. Our own Constitutional Court acknowledges, in its 2018 decision, that a judge cannot be reduced to a data processor: his or her inner conviction is an inevitable cognitive process, and his or her memory cannot be erased by legal exclusions. An algorithm can exclude evidence with a *click*, but a human judge cannot erase what they have seen and what has made an impression. That is precisely why justice without hesitation, doubt, or emotion would no longer be human; it would be merely a formal, perfect order, but one devoid of meaning.

In Romania, the road from the 2001 decision to the recognition of conscience as a constitutional requirement took almost two decades of wandering and returning – a wandering made all the more painful by the fact that, in 1999, the same Constitutional Court considered that the role of the judge's conscience is "necessary, indispensable, and inevitable." We hope that it will not take another two decades for us to understand that the next step is not the algorithm, but the human being.

For this reason, the right to judge humanely is worth defending, and at the heart of the law we must preserve that intimate space of silence in which the judge listens not only to arguments, but also to the human being in their suffering.

For the true measure of justice is not found in codes or formulas, but in conscience.

As long as the judge can still say, with all the conviction of his soul, "*Justice has been done!*", the human spirit of justice will endure – and Romania will still have a chance to be not just a state governed by the rule of law, but a place where the Law is truly Justice.