The Indivisibility of the Legal Order for Its Subjects – A Guarantee of the Rule of Law[1]

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Abstract

This article examines the indivisibility of the legal order in relation to its subjects as a constitutive requirement of the modern rule of law. Using a doctrinal and conceptual analysis of the Romanian Constitution, particularly Articles 4, 10, 11, 20, and 148, the study develops the argument on two interconnected levels. First, the constitutional characterization of Romania as the common and indivisible homeland of all its citizens is interpreted as imposing obligations on the state rather than duties of emotional attachment or ideological loyalty on individuals. The state must afford equal legal protection to all citizens, including those who contest dominant political, national, or patriotic values, and may not establish differentiated legal regimes on the basis of identity, opinion, affiliation, or presumed fidelity to a collective consciousness. Secondly, the article reconsiders the traditional opposition between monism and dualism in the relationship between domestic and international law. It argues that neither an abstract hierarchy of legal sources nor the supremacy of one legal order over another adequately reflects the position of individuals as subjects of rights. Instead, the incorporation and direct applicability of international norms give rise to a third, subjective legal order that integrates domestic and international law from the standpoint of their addressees. This order is structured not as a vertical hierarchy but as a horizontal network of legal resources. Within this framework, the judge must identify and apply, in each concrete case, the norm that provides the most effective and favourable protection to the subjects concerned. The article concludes that the indivisibility of the legal order constitutes a substantive guarantee of the rule of law because it prevents exclusion, reinforces the direct protection of rights, and places the individual—rather than the sovereign origin or formal rank of norms—at the centre of legal interpretation and adjudication.

Keywords: *indivisibility of the legal order; patriotism, citizenship, international law, internal law, monism, dualism, integration of legal orders, prevalent application of norms, normative hierarchy, network of norms.*

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1. Introduction

The rule of law is traditionally described through a set of institutional and formal requirements: the subjection of public power to law, the separation of powers, legal certainty, access to an independent judiciary, and the protection of fundamental rights. These requirements presuppose, however, a more fundamental condition that is not always expressly identified: the legal order must be indivisible in relation to its subjects. A state governed by the rule of law cannot recognize persons as equal subjects while simultaneously fragmenting the legal protection available to them according to their identity, political opinions, relationship with the majority, or the domestic or international origin of the norms upon which they rely.

The indivisibility examined in this study is therefore not identical to the territorial indivisibility of the state or to the formal unity of its institutional organization. It concerns the manner in which the legal order relates to the persons subject to it. From this perspective, the unity of law is not primarily a unity of sources, institutions, or normative procedures. It is a unity of legal protection. The legal order must be capable of addressing every person as a subject of rights and of making all applicable legal resources available to that person without creating categories of citizens whose protection depends upon conformity with a dominant identity, ideology, or conception of political loyalty.

This requirement has two interconnected dimensions. The first concerns the relationship between the state and its citizens. Article 4(2) of the Romanian Constitution provides that Romania is the "common and indivisible homeland of all its citizens", without distinction as to race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property, or social origin. The constitutional concept of "homeland" is usually associated with belonging, attachment, solidarity, and patriotism. Yet, once incorporated into a constitutional norm, the concept cannot retain a merely sentimental or psychological meaning. It must be interpreted normatively, as a concept capable of imposing limits on public power.

Under this interpretation, the constitutional provision does not require citizens to demonstrate affection for the state, adherence to a collective conscience, or fidelity to a particular conception of national identity. It requires the state to behave as a homeland towards all its citizens, including those who criticize it, reject dominant political values, or construct their identity outside the categories favoured by the majority. The state may not transform patriotism into a legally enforceable political virtue or use dissent as a ground for exclusion from equal citizenship. The common character of the homeland thus signifies the prohibition of ostracism, while its indivisibility prohibits the fragmentation of the legal order according to the identities and affiliations of the persons governed by it.

The second dimension concerns the relationship between domestic and international law. Classical legal theory has generally approached this relationship through the opposition between dualism and monism. Dualism treats domestic and international law as separate legal orders, while monist theories attempt to integrate them by establishing the priority of one order over the other or by deriving both from a

common foundation of validity. These theories are indispensable for understanding the production and validity of norms, but they remain largely focused on legal sources and on the sovereign wills from which those sources originate.

The development of international human rights law has altered the premises of this debate. International law is no longer exclusively a law governing relations between sovereign states. It increasingly establishes rights, freedoms, guarantees, and procedural entitlements that individuals may invoke directly before national or international jurisdictions. The individual is consequently no longer merely the subject of the domestic legal order and the indirect beneficiary of obligations assumed between states. The individual has become, within important areas of international law, a direct holder of rights.[3]

This transformation requires the relationship between legal orders to be reconsidered from the standpoint of their subjects. From this perspective, the decisive question is not exclusively whether international law is superior to domestic law, whether the Constitution prevails over treaties, or where a particular norm is situated in an abstract hierarchy. The question is whether a norm is applicable to the individual and what degree of protection it provides in the concrete legal situation. A norm that can be invoked by a subject becomes a legal resource, regardless of whether its source is domestic or international.

The central hypothesis of this article is that the indivisibility of the legal order produces a third, subjective legal order, which integrates the domestic and international legal orders without eliminating their objective distinctiveness. Domestic and international law continue to have different sources, procedures of adoption, and conditions of validity. For the subjects of rights, however, the norms arising from these orders form a common network of legal resources. This subjective order is horizontal in the sense that its point of departure is not an a priori hierarchy of sovereign wills or normative sources, but the availability of norms for the protection of persons.

Within such a network, normative conflicts should not necessarily be resolved by mechanically invalidating the norm situated at a lower level in a predetermined hierarchy. The judge must first attempt to interpret the relevant norms concordantly. Where concordant interpretation is impossible, the norm that offers the more effective or favourable protection in the concrete circumstances must prevail in application. Such prevalence does not necessarily remove the other norm from the legal order. It determines which norm is applicable to the parties and to the legal situation before the court.

The Romanian Constitution provides a particularly relevant framework for examining this hypothesis. Article 4 regulates the common and indivisible character of the homeland in relation to all citizens. Article 10 opens Romania's international relations to the principles and generally recognized norms of international law. Article 11 establishes that treaties ratified by Parliament form part of national law, while Article 20 regulates the relationship between constitutional rights and international human

[3] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, trans. Jonathan Huston (Cambridge: Cambridge University Press, 2016), 44–50, https://doi.org/10.1017/CBO9781316687123.

rights instruments by favouring the more protective norm. Article 148 adds the distinct dimension of integration into the European Union. Considered together, these provisions reveal a constitutional system that cannot be adequately described through a rigid opposition between domestic sovereignty and external normative authority.

The article uses a doctrinal and conceptual method. It analyses the normative meaning of constitutional concepts, reconstructs the principal theories concerning the relationship between domestic and international law, and interprets the relevant provisions of the Romanian Constitution in light of their protective function. Its purpose is not merely to determine the abstract rank of international norms within domestic law, but to identify the consequences of constitutional openness for individuals, courts, and the practical application of rights.

The analysis proceeds in two principal stages. The first part examines the constitutional statement that Romania is the common and indivisible homeland of all its citizens. It argues that this provision prohibits the state from imposing an official identity, punishing political dissent, or establishing forms of civic exclusion based on origin, opinion, affiliation, or presumed lack of loyalty. The second part reconsiders the relationship between domestic and international law, first by reviewing dualist and monist theories and then by developing the concept of the subjective unification of legal orders. Particular attention is given to the effects of Articles 10, 11, and 20 of the Romanian Constitution, the direct applicability of ratified treaties, the objective nature of human rights obligations, the judicial selection of the more protective norm, and the possible position of unwritten international law within the domestic legal order.

The study ultimately argues that the indivisibility of the legal order constitutes a substantive guarantee of the rule of law. It prevents the state from dividing citizens according to their identities or political allegiances and prevents the protection of individuals from being fragmented according to the formal origin of the applicable norms. In both dimensions, the legal subject becomes the point of convergence of the legal order. Its unity is therefore not achieved solely through the hierarchy of norms, but through their common function: the limitation of public power and the effective protection of persons as autonomous subjects of rights.

2. The State Is the Common and Indivisible Homeland of All Its Citizens

2.1. The Legal Concept of ‘Homeland’

Art. 4(2) of the Constitution uses the concept of “homeland”. This concept is ambiguous. The State and the homeland are not one and the same thing: the State is a legal reality, the homeland a psychological one. The use of the term “homeland” to designate the indivisible character of the legal order in relation to the criteria of affiliation to primary identification groups, those which can create the same type of attachment as the national group, may lead to abusive interpretations of the text.

How, then, should the concept of “homeland” be interpreted when it is present in a legal norm, not an ordinary one, but one having a constitutional character? It is obvious that the meaning this concept must receive, like any other contained in a legal

norm, is normative. Consequently, it must be able to be part, operationally, of a norm that prescribes something. If the norm is constitutional, the concept must be configured in such a way that it can constitute a means of expressing a secondary norm, i.e. one that frames the way in which behavioural norms are produced and, thus, limits the one empowered to produce them.

The constitutional concept of "homeland" cannot have, under these conditions, a psychological meaning. It cannot be about the sentimental attachment that people have, or do not have, to the space they consider to be their social group's space. It is obvious, on the other hand, that only the state can produce norms in the matter of citizens' relations with the "homeland", so that the target of the norm including the concept is to limit the normative power of the state. The concept must be interpreted, as a result, to impose obligations on the state, not on citizens. And since the purpose of art. 4(2) is equality between citizens, it means that the state cannot create different legal regimes for some, just because they would relate differently to the state.

When the constitutional norm stipulates that "Romania is the common homeland of all its citizens", it requires the Romanian state to be the homeland for all its citizens, regardless of their ideological position towards the state, it does not impose an obligation of love on the subjects and, therefore, of fidelity, which is imposed by other constitutional norms. Romania must behave as a homeland towards all citizens of the state, regardless of all criteria of non-discrimination, including opinion, even if the opinion concerns the very attachment to the homeland. In other words, from a legal standpoint, Romania cannot treat differently the citizens who criticize the state, because they are not psychologically attached to it. What matters is the *legal* attachment to the state, not the psychological attachment. Art. 4(2) therefore states that, for the Romanian state, when it produces regulations, only the legal attachment to the state matters, not the psychological attachment to any value system, even if this value system is patriotism. Only if configured in this way does the concept of "homeland" impose normative obligations on the regulatory authority, namely the state, thus becoming a concept which can be operationally contained in a secondary, constitutional norm.

The concept of "homeland" is specified in art. 4(2) of the Romanian Constitution. Romania must be the "common" homeland of all citizens, but this cannot mean, as I think has clearly resulted from the argumentation so far, that it imposes on citizens any obligation to constitute a community, but only that it cannot exclude some of the citizens, punishing them for not wanting to participate in the constitution of such a community, as it is shaped by the common conscience.

What the provision obliging the state to regulate as a common homeland of all its citizens requires is that the state should not "ostracize" some of the citizens. Ostracization was used in the cities of Greco-Roman antiquity to remove from the city those whose political opinion differed from that of the common conscience. It was a punishment inflicted as a result of a criminal procedure. The purpose of this criminal procedure was to guarantee the non-splitting of the common conscience, in order to ensure peace. It proceduralized the responsibility of those who were different and who were presumed guilty of dissent from the 'flawless' unity of society, precisely because they were different.

Civilized society is built, through opposition, on the perpetuation of flaws, of social cleavages that polarize people into parts of the whole, whose difference from primitive factions is marked by the fact that different groups are constitutive of the social whole, are intrinsic parts of the whole, not fractions of it[4]. These structured parts of common conscience must not be eliminated, but, on the contrary, preserved. They are parties, and without parties modern society cannot function as a democracy. No one can be punished for being a member of a party (that is, being on one side or the other of a political cleavage), for not conforming, for being partisan, complying with the requirements of some 'flawless' common conscience. Criminal proceedings can no longer play the role of eliminating diversity. Social peace must be achieved in a different way. No person who acts differently from others is considered *a priori* guilty of acts against the common conscience (in-fractions, specifically the acts that are favourable to fractionation), but only legitimately situated 'on one side' of a cleavage, situated differently.

When the Romanian Constitution obliges the Romanian state to be the common homeland of all its citizens, regardless of opinion or political affiliation, it prohibits it from using collective procedures to punish political dissent. Or, dissent is 'political' when it concerns the very fundamental structure of society, of the state and their relations with those who are their members. In other words, when the Constitution prohibits the state from not being a homeland for all, it prohibits the imposition of political virtues, including patriotism, when it is understood as an absolute and exclusive obligation of love.

The homeland common to all citizens, regardless of whether or not they are sentimentally attached to the state, is the area of validity of the legal order in relation to the groups to which such an attachment subsists. It is, as such, "indivisible". As a result, it is prohibited for the state to divide legal order in relation to the identity affiliation of individuals, either to the majority group (conceived in the objectivist version, as an identity nation) or to minorities (which are, in turn, conceived in the same identity way), regardless of the criterion of constituting the majority or minority. In other words, the norms of the Romanian state must not be validated according to the identities to which its citizens adhere in their space of autonomy.

2.2. Romania Is the Homeland of All Its Citizens

The Romanian Constitution stipulates that "Romania is the homeland […] of *all* its citizens" (our emphasis). The constitutional norm thus determines its purpose: the prohibition of excluding citizens.

The first prohibition should, consequently, be that of using the withdrawal of citizenship as a *punishment*. The modern subject is free in terms of participating in the establishment and exercise of public power. Modern public power is of a different

[4] See some reflections in Bertjan Wolthuis, Ben Crum, Alvaro Oleart, and Patrick Overeem, "Democracy and Pluralism after European Integration: Incorporating the Contested Character of the EU," *Critical Review of International Social and Political Philosophy* 28, no. 6 (2025): 1136–60, https://doi.org/10.1080/13698230.2023.2216043.

nature than the power of a common conscience. It is a power which represents individuals. Of course, they are associated in various parties, and voters often elect the party and its doctrine, not directly those who will represent them, but this does not make the elected ones the representatives of a common conscience, although some Constitutions, including that of Romania, stipulate that parliamentarians represent the people. People are free in modern societies, which inevitably evolve towards democracy, because they participate, through their representatives, in the creation of the rules that will constrain them.

In this type of society, to annihilate a person's right to participate means to annihilate his/her freedom, and a person without freedom is no longer a subject. The withdrawal of the general and abstract capacity to participate is equivalent to the killing of the subject of public law, the citizen. But this punishment with civic death affects not only the existence of the subject, but also the existence of political society itself, for the modern community is no longer a gathering of people who together satisfy their lives' needs, but a community of citizens.

Civic death punishes dissent from the common conscience, juridicalized as an obligation of fidelity to it. It represents the metamorphosis of a political sanction into a criminal sanction. Such a metamorphosis was practiced in Greco-Roman antiquity, as a 'natural' reminiscence of primitive communities. The ancients used it to exclude from the city those unworthy of it. The dignity or honour of the City, Republic, Kingdom, Empire, etc. had to be defended against those who, through their actions, dishonoured these institutions. The sanction was the withdrawal of the dignity of being a member of the community. In Athens, "tribunals sent into exile the authors of a multitude of acts directed against the state, religion or general interests of the country"[5]. Expulsion from the city for such acts was perpetual and affected the legal existence of the subject. Whoever did not leave the city within the term established by the tribunal or returned was killed. From the point of view of the community, of the city, the subject was 'dead', no longer existed from the 'civic' perspective. The consequence of civic death is not only the prevention of participation, but also the lack of the correlative obligation of legal protection, which is owed by the political power to citizens. As Aristotle said, an individual who "cannot or does not need to associate within society is either a beast or a god"[6]. Now, since deification is not the usual result of punishment, the one who is no longer a member of the city, is no longer a citizen, can be appropriated and used, like any animal. A political animal from which the quality of being political is withdrawn, remains just an animal, fit for the yoke.

Such a civic 'killing' of the subject is prohibited in modern constitutional systems. Withdrawal of citizenship, and therefore of state protection, cannot be applied as a *punishment*.[7] The first reason is that in a modern political society, withdrawal of

[5] Jean-Joseph Thonissen, *Le droit pénal de la République athénienne, précédé d'une étude sur le droit criminel de la Grèce légendaire* (Brussels: Bruylant; Paris: Durand & Pedone, 1875), 103.
[6] Aristotel, *Politica* (Bucharest: Paideia, 2020), bk. 1, chap. 1, sec. 12.
[7] On citizenship revocation as a mechanism that transforms the citizen into an alien and produces differentiated categories of citizenship, see Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no. 1 (2014): 9, 53–54.

citizenship means withdrawal of human dignity. The second is that a modern political society cannot be based on the obligation of participation; it is a voluntary, not natural, association in which participation is a right, not an obligation. Therefore, the modern Constitution, necessarily understood as a contract, implies, by nature, an obligation correlative to the right of the subjects to participate: the obligation to ensure legal protection for those who constitute power and, at the same time, are its subjects. This is the reason why the modern constitution includes, materially, if not formally, a norm stating that "citizenship cannot be withdrawn".

The 1991 Romanian Constitution unfortunately added "if acquired by birth"[8] and thus introduced degrees of citizenship and the competence of the legislator to regulate the withdrawal of citizenship from those who acquired it upon request. The Constitution thus gives priority to birth over will, which is exactly the opposite of the normative principles of the modern Constitution.

The first inevitable result of the use of the civic death penalty is the transformation of an individual from subject to object. Now, modern human beings cannot be treated in this way. Therefore, all civilized states must consider that they are worthy of being subjects, i.e. from the point of view of their freedom understood as participation, citizens. The Universal Declaration of Human Rights makes this dignity inherent in all human beings "the foundation of freedom, justice and peace in the world". Now, to be worthy means, first of all, not being able to be treated as an object, in the hands of others or in the hands of the state.

The second effect of the use of the civic death penalty is, as implied by the Universal Declaration of Human Rights, the establishment of a power that is the master, not the representative, of the people. A power which can no longer fulfil its obligation to protect, transforming the fundamental right to participate into an obligation of fidelity, is a power which is no longer modern and civilized. However, to establish obligations correlative to an obligation cannot be legally valid in a society constituted on the basis of a social contract. In modern society, if the institutions, political or legal, including the established freedom, are a "response to the challenge that constitutes the set of natural conditions"[9] (such as the power of domination and the social condition acquired by birth), the principle of dignity is a response to the challenge of the human condition, to the barbarity included in it[10]. If we want to overcome barbarity, we therefore must not be able to punish with civic death, that is, with the withdrawal of the dignity of being a citizen.

The second consequence of the fact that "Romania is the homeland […] of *all* its citizens" is that all the criteria listed in art. 4(2) must be configured starting from the purpose of prohibiting exclusion. Consequently, it is not a question of seeing what the essence of race, ethnicity, gender, etc. is, but of seeing what exclusions could be operated on their ground and, based on their understanding, of reshaping the concepts, in order to avoid them. The exclusion in question is, first of all, exclusion from the

[8] Art. 5(2).
[9] Jean-Louis Gardies, *L'erreur de Hume* (Paris: Presses Universitaires de France, 1987), 119.
[10] See Muriel Fabre-Magnan, *Instituția libertății* [*The Institution of Freedom*], trans. Diana Dănișor, foreword by Dan Claudiu Dănișor (Bucharest: Universul Juridic, 2024), 75.

public space, namely from the space of freedom-participation, because the constitutional norm provides for equality between *citizens*, between people located in the public space. What is sought by prohibiting exclusion, i.e. discrimination, in this first sense, is the elimination of the possibility of a relationship of domination if it is based on something other than the expression of political freedom, the elimination of the possibility of the 'natural' domination of one group over another.

Equal treatment is not regulated to equalize people, but to free them from any domination established because of some 'nature' – of things, society or people – in the public space. Only in this way can they preserve their autonomy (i.e. to constitute their own norms, directly or through representation), to be free even though they are constrained. The price of this autonomy is that they must decide, when they autonomously regulate or autonomously participate in norming, without taking into account the 'natural' differences between them, as if they did not know how they were born (man or woman, white or black, Romanian or Roma, Christian or Muslim, etc.). The problem of equality presupposes the elimination of 'origin' from the act of norming. It is therefore situated upstream of the constitution of the individual as a legal institution, in order to determine the manner of this constitution. Individuals cannot be determined on the basis of origin. They have an existence without origin, without cause, that is, they are, from a legal perspective, a normative principle.

Thirdly, from the fact that Romania must be the homeland of "all its citizens", regardless of their private identity, it follows that the state must not try to exclude any private identity, regardless of whether this involves a group or individual identification. Therefore, the enumeration of the criteria of identification that cannot be the basis for discrimination must necessarily be interpreted as illustrative. The scope of the criteria must remain open, in order to eliminate all acts of power that could establish any domination, regardless of its criterion and over whom it would be established: group or individual. The subsequent idea is that "if it were for the whole nation, minus the citizen it oppresses, oppression would not be, thereby, more legitimate."[11]

Art. 4(2) of the Romanian Constitution requires Romanian society and the political power that directs it, according to the modern revolutionary model, to let people position themselves freely, according to talent and effort, in a social hierarchy, which results only from their will, not from any 'natural' order. Society, thus hierarchized, cannot annihilate the autonomy of its members from itself, an autonomy supported by their adherence to a diversity of groups, constituted regardless of what criteria their members might believe they should be. From this affiliation to certain value systems – and to the groups that support their realization – there results an identity of each one constructed by themselves, a personality, which can be distinct from the standard of common conscience. The state, as an institutionalization of political power resulting from the exercise of political freedom, must treat its subjects differently, in order to allow them the free development of their personality.

But this different treatment is prohibited if its norming (re)institutes some 'natural' hierarchy of people, based on criteria that have served or could serve such

[11] Benjamin Constant, *Œuvres politiques de Benjamin Constant*, ed. Charles Louandre (Paris: Charpentier et Cie, 1874), pt. 1, chap. 1, "De la souveraineté du peuple," 4–5.

institutionalization, because they are of their 'nature'. From this dialectic of the prohibition of the imposition of identity and the prohibition of the use of difference for the purpose of 'natural' domination, an equality in difference results, justly founding society. Therefore, any legal norm must be produced in such a way that the imposition of identity or difference is justified.

3. The Unity of National and International Legal Orders from the Standpoint of the Subjects

The relations between national law and international law have always given rise to discussions. The doctrine has conceived several solutions that could order these relations. It is either a dualist conception, which makes domestic and international law two separate legal orders, or a monist one, which unifies them, and which involves three variants: monism with the priority of domestic law, monism with the priority of international law and monism that presupposes a unification of the two orders made in a "hypothetical third order, which integrates the first two"[12].

As a rule, Constitutions are not very clear on this matter[13]. First, because they do not opt for the unequivocal normative transposition of one of the theories. Then, because, even when they opt for one of them, this option usually concerns the relations between conventional international law and the law, but not the relations between the Constitution itself and international law, or the relations between domestic law and other sources of international law. Things become even more complicated with the evolution of international law from a law of states to a law that directly concerns the subjects of these states. The emergence of human rights treaties, which acquire an objective character, undermines the classic grid of analysis of the relations between domestic law and international law, as does the emergence of institutional international treaties and a genuine international 'legislation'.

The Romanian Constitution has regulated international relations separately, in art. 10, from the issue of international treaties in general, which it regulates under art. 11, reserving a separate article (art. 20) for the relations between human rights treaties and domestic law and one concerning the relations between national law and that resulting from Romania's integration into the European Union (art. 148).

For now, what interests me is how these constitutional norms ensure the unity of legal order from the standpoint of the subjects. In order to clarify this aspect, I must first review the theories of the relations between national and international law.

[12] Michel Virally, "Sur un pont aux ânes: les rapports entre droit international et droits internes," in *Mélanges offerts à Henri Rolin: Problèmes de droit des gens* (Paris: Éditions A. Pedone, 1964), 492.

[13] On the solutions adopted by the former communist European states, see Jiří Malenovský, "Dix ans après la chute du Mur: les rapports entre le droit international et le droit interne dans les constitutions des pays d'Europe centrale et orientale," *Annuaire français de droit international* 45 (1999): 29–54.

3.1. Theories of the Relations Between National Law and International Law

3.1.1. The Theory of Dualism

The dualist theory of the relations between domestic law and international law considers that the two legal orders are separate. This means that they are distinct, each being closed to the other and that they do not, as a consequence, maintain any kind of relations between them.

The closure is, first, the result of the fact that the two legal orders have different subjects; the domestic legal order concerns the subjects of states, while the international order has the states as its subjects. Then, the mutual closure of the two legal orders means that the rules of one cannot create effects in the other. Thus, an internal legal norm cannot create any effect at the international level, which means that a rule produced to regulate the relations between the subjects of a state cannot be validly translated to the relations between states. Conversely, an international rule cannot produce any effect on the legal subjects governed by the domestic legal order of a state. In order for the prescription in the international rule to become applicable to these subjects, it must be *re-produced* in an act of domestic law, usually a law. The law that *re produces* the rule established by the treaty is, then, the one applicable in the internal order of the state, and not the international treaty. The rule is therefore no longer international, but internal, and is located in the internal normative hierarchy in the position corresponding to the act that reproduces it. The internal norm is introduced into the legal order through a new procedure of production. Even if it has the same content as the norm in the international treaty, it is a new legal norm, the production of which is determined by the fact that the state is a party to a treaty, but is not confused with it. What is transposed into the internal order is the *content* of the treaty, not the treaty as such[14]. "The most obvious consequence of this doctrine is that […] a subsequent rule in domestic law can amend, or even abrogate, the international rule: *Lex posterior derogat priori*."[15] Also, "if the state denounces the treaty, the rules of domestic law which have an identical content with the provisions of the treaty remain in force as long as they have not, in turn, been repealed"[16].

This theory is different from the one transposed into constitutional norms that require the ratification of treaties so that they can produce effects in the internal order of the state, because in the latter case it is the treaty that remains applicable, not the law, and a law subsequent to the treaty can neither modify nor repeal it. Therefore, in the case of the dualist theory, the ratification of incorporation must be clearly distinguished. They are two distinct legal acts, with different effects.

The dualist conception assumes the existence of two normative hierarchies, one

[14] See Christian Behrendt, "Les notions de monisme et dualisme," in *Liber amicorum Michel Melchior* (Limal: Anthemis, 2010), 869.
[15] Vlad Constantinesco and Stéphane Pierré-Caps, *Drept constituțional*, trans. Diana Dănișor (Bucharest: Universul Juridic, 2022), 288–89.
[16] Christian Behrendt, "Les notions de monisme et dualisme," 869.

of domestic norms and the other of international norms, which have no connection with each other, so wondering (as those who are used to a monist system do) about the place of an international treaty in the hierarchy of legal norms of the respective state is useless, because they have no place, because they are in *another* legal order. Therefore, in states that opt to normatively transpose this theory there can be no conflict between domestic norms and international norms. Simply put, international norms can never be applied by domestic jurisdictions, which thus have no normative conflict to resolve.

Dualism has an ancient history. Its modern roots can be found in the philosophy of J.-J. Rousseau, who argued: "War is […] not at all a relationship from man to man, but a relationship from state to state, in which individuals are enemies only accidentally, not at all as men, and not even as citizens, but as soldiers, not as members of the homeland, but as defenders. Finally, each state can only have other states as enemies, and not people, as it is self-evident that no true relationship can be established between things of different natures."[17]. It was transposed into law especially by German and Italian theorists of the late 19th and early 20th centuries.

This type of separation of international law from domestic law seems untenable in the current international context, in which the relationships between international law and national law are multiplying, in which states have admitted the quality of individuals as subjects of legal relations of international law, and in which international organizations have evolved from the coordination of sovereignties to their integration.

The criticism of this theory is inextricably linked to the name of Hans Kelsen, who shows that its fundamental premise leads it to self-destruction: "Because of the need to conceive of international law as a complex of valid legal norms, the dualist conception sees itself pushed towards self-destruction, because of the idea, which cannot be dispensed with, that the validity of international law for a state depends on its recognition by this state. For, if international law can only exist as an integral part of a state legal order, it cannot be a legal order distinct from the latter, independent of it in terms of its validity and, then, there can be no conflicts between two orders, for the obvious reason that both are based (as the traditional doctrine expresses it) on the will of one and the same state."[18] The consequence of dualism would be that instead of one international law we would have as many international legal systems as there are states in the world.

3.1.2. The Theory of the Unity of Legal Order Understood as a System of Validation of Norms

In order to avoid the undesirable consequences of the dualist theory of international law and its inevitable consequence, the use of force in international relations, it is necessary that legal orders be conceived unitarily, with priority being given, in the event of a conflict between norms, to international norms, because,

[17] Jean-Jacques Rousseau, *Du contrat social; ou, Principes du droit politique* (Amsterdam: Marc-Michel Rey, 1762), bk. 1, chap. 4.
[18] Hans Kelsen, *Théorie pure du droit*, trans. Charles Eisenmann (Paris: Dalloz, 1962), 439.

otherwise, we fall back into a parcelling of international law that denies its existence[19].

Monism with the priority of international law seems, in this logic, to be self-evident. In the view of H. Kelsen, this implies the complete reversal of the reasoning of dualist theories, which consider that the validity of international law must be based on a constitutional rule, therefore, on domestic law. For this type of monism, with the priority of international law, state legal orders "must be conceived as partial legal orders *delegated* by international law and, by this very fact, subordinate and inferior to it" (our emphasis)[20].

Kelsen, however, thinks of the system in the logic of the superiority of one norm over another, which, according to his theory, means that the norm that *enables* the production of another norm is superior to the latter. It is not a question of the superiority of the material sources of law, of the superiority of one normative will over another normative will, but of the superiority of the form of introducing the norm into the system, therefore of the hierarchy of the norm *validity*. By doing so, Kelsen and those who followed him can integrate international law into domestic law without destroying its international specificity and without placing any will above the sovereign will of the states.

In this *logic*, a norm introduced by the mutual *agreement* of the states is produced in a *form superior* to that which presupposes a *unilateral* manifestation of will. A state can never unilaterally modify or avoid executing a norm based on a convention with another state, just as no private individual can unilaterally modify or refuse a contract to which s/he is a party. Conventionality always *logically* takes precedence over unilateralism, therefore over legality, including constitutionality. To the objection that states are prior to international law and that they create it, Kelsen responds that this "is based on a failure to distinguish between historical relations between facts and *logical* relations between norms" (our emphasis)[21].

3.1.3. The Theory of the Unity of Legal Order Based on the Hierarchy of the Material Sources of Norms

Although intellectually seductive and most often adopted naturally by international courts, this idea of the *formal* superiority of international norms encounters fierce resistance from the idea of the *material* superiority of the Constitution over any other norm, an idea at the heart of which is the superiority of the will of the nation over any other will and the supremacy of state sovereignty, understood as its exclusive competence to autonomously establish its own competences, including external ones.

In this light, the state, through its Constitution, sovereignly determines the position of international law over domestic law. The result, if the state admits, is a monism with the priority of international law over laws, doubled by one with the priority of the Constitution over treaties. Typical of this ambiguous position is the possibility of

[19] Phil Edwards, "Hans Kelsen, International Law and the 'Primitive' Legal Order," *Jurisprudence* 16, no. 4 (2025): 691–720, https://doi.org/10.1080/20403313.2025.2457805

[20] Kelsen, *Théorie pure du droit*, 440.

[21] Idem, p. 443.

invoking the specifics of the national Constitution to avoid the prevailing application of a treaty.

3.2. The Subjective Unification of Legal Orders

The way out of the indecision of the option between the systems described above can be done by adopting a particular form of unification of the national legal order and the international legal order. They must be unified, from this perspective, only in terms of the applicability of their rules to particular subjects.

This time, it is not a matter of unity obtained at the level of the wills that constitute the material sources of the norms, nor of the procedures for their production, of the validities, but of one obtained at the level of the *personal applicability* of norms. Subjects can claim before the jurisdictions the application of all legal rules, both the rules produced unilaterally by the state and the international rules. In order to demand the application of the rules produced at the international level, individuals do not have to wait for their reproduction as acts of domestic law, as happens in dualistic systems.

The question is no longer which legal order will integrate the other, so as to achieve this unity, a question that would imply an *a priori* hierarchy of orders and their norms, but only the *prioritization* of the application of the norms that will be the basis for resolving conflicts between subjects. Those norms are *applicable as a priority*, and ensure, in the given legal situation, the most efficient protection for those involved in it. It is no longer a question of an *a priori hierarchy*, but of a *prioritization of the application* in relation to the primary function of any legal norm – the protection of subjects –, *in casus* and with *inter partes* effects[22].

For a rule produced at the international level to be applicable to private subjects, it must be possible for it to be applicable to them, i.e. it must 'concern' them. Only under this condition can it have direct effect. But, in this monist system, if the international norm has a direct effect, then private individuals can use it. For them, the international norm becomes a legal *resource*, which they can use to protect their rights and freedoms, prevailing over any domestic norm that provides less effective protection, including the Constitution of the state to which they are subject. This type of monism makes human rights superior to any norm, not one norm to another. The result is, in practice, a third subjective order, which integrates the first two objective ones. This third order, unlike the other two, is no longer conceived as a hierarchical order of sources of objective law, but as one constituted horizontally, of *legal resources available* to the same extent and with the same title to the subjects of rights. This third order is constituted as a *network of norms*.[23]

[22] For a comprehensive discussion, see Csongor Kuti, "The Romanian Constitutional Court: Layers of Constitutional Adjudication," in *Constitutional Review in Central and Eastern Europe: Judicial-Legislative Relations in Comparative Perspective*, ed. Kálmán Pócza (London: Routledge, 2024), 218–43, https://doi.org/10.4324/9781003399483-9.

[23] For a related legal-pluralist account of overlapping normative communities and interactions among legal systems, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012); Ralf Michaels, "Global Legal Pluralism," *Annual Review of Law and Social Science* 5 (2009): 245–50, https://doi.org/10.1146/annurev.lawsocsci.4.110707.172311.

3.3. The Systemic Option of the Romanian Constitution

3.3.1. A Constitution Open to International Law, but a Practice That Tends to Resist Openness

In 1991, the Romanian Constitution devoted three articles to the relations between the international and national legal orders. Through art. 10, which remained unchanged following the constitutional revision of 2003, the Constitution regulated Romania's attachment to the principles of international law and its generally accepted norms, that is, essentially, to international customs, that is, to norms that do not have as their source the expressly manifested will of states, breaking the tradition of socialist state regimes, which had promoted reluctance towards customs, preferring conventional sources, because they undoubtedly marked the express consent of the state. Referring to international law as the basis of Romania's international relations, the Constitution "respects international law in its systemic unity and in its logic"[24].

Through art. 11, the Romanian Constitution, in its 1991 version, included international treaties in domestic law and gave them priority over domestic law. Art. 11(2), which remained unchanged by the 2003 Revision Law, provided that "treaties ratified by Parliament, according to the law, are part of national law". Two fundamental ideas are imposed by this norm: the first is that ratification introduces the norms of the international treaty as such, in their capacity as norms of international law, into the national law of the Romanian state; the second is that the Legislator is only empowered to establish the ratification procedure, but is not empowered to regulate its effect – the inclusion of the treaty in domestic law –, which is directly imposed by the Constitution.

Art. 11(1) obliges the Romanian state to fulfil, first, "as such" the obligations incumbent on it from the treaties to which it is a party, which obviously means that the Romanian state cannot unilaterally modify, through acts of domestic law, the provisions of the treaties, nor can it create doubts regarding the source of the norm and its corresponding position in the hierarchy of domestic norms, by taking over the provision from the treaty in a law, which means that "as such" signifies the fact that the Romanian state respects the obligations incumbent on it in their capacity as *international* norms and, then, obliges the Romanian state to fulfil the obligations in the treaties "in good faith", which means that acts of national law cannot unilaterally interpret the conventional clauses; the ratification law may make mention of reservations and interpretations, but these must be permitted by the treaty itself, for this is not a unilateral discretionary competence of the Romanian state.

In 1991, art. 20 established, without exception, the prevalence of international treaties on human rights over laws and the obligation to interpret constitutional provisions in the matter in accordance with the treaties. The text referred, as it does now, in the first paragraph, to the obligation to interpret constitutional provisions in compliance with the Universal Declaration of Human Rights, although this is not a treaty and is not binding as a conventional obligation. It is additional proof of the fact that Romania gives effect to all international law, not only to treaties.

[24] Kelsen, *Théorie pure du droit*, p. 34.

In 2003, through the Law on the Revision of the Constitution, the tendency of resistance to the prevalence of international law becomes obvious. Now, art. 11 is supplemented with the idea that a treaty to which Romania is to become a party and which contains provisions contrary to the Constitution cannot be ratified until after the revision of the Constitution, and art. 20 renounces prevalence without exception of treaties, in favour of the application of the norm more favourable to the protection of the person, without however the provision being accompanied by a change in the hierarchical understanding of the legal order, in which what is hierarchized are the wills that underlie the norms, not the norms as such, in relation to their function, as in the last unifying theory outlined above.

Therefore, the relations between national and international human rights law imply, in the view of the Romanian magistrates, as well as that of most theorists, a 'control of the conventionality of the law', and when the question of the application of a constitutional norm arises, a control of the constitutionality of the law or the treaty. The hierarchical relations between the sources of law must therefore be resolved in this hierarchical perspective on the legal order, by relating one norm to another norm, and not, as in the theory of prevalent application, by relating the concrete protection offered by one norm to the concrete protection offered by the other norm, which determines only the choice of the applicable norm, and not a judgment on the position of the norm in an *a priori* hierarchy. After this revision, some Romanian jurists consider that "art. 11 of the Romanian Constitution has established a dualist vision on the relations between national law and public international law, even if a much attenuated dualist vision"[25].

I believe that the system of articles in the Romanian Constitution that refer to the relations between domestic and international law, schematically analysed above, regulates a *monist* system, which excludes in principle any duality between the domestic and international legal order. The Romanian state opens its domestic order to international legal norms, making these legal norms rules of domestic law. This monism means that the need to adopt domestic law norms through which the state re-produces international norms is removed[26].

Ratification is only a stage in the procedure for concluding international treaties by the Romanian state, through which Parliament controls the way in which the Executive has exercised diplomatic functions and expresses, by law, the definitive consent of the Romanian state to be a party to a treaty[27]. But the ratification law does

[25] Ștefan Deaconu and Elena Simina Tănăsescu, "Comentariul art. 11 din Constituția României [Commentary on Article 11 of the Romanian Constitution]," in *Constituția României. Comentariu pe articole [Constitution of Romania: Commentary by Articles]*, 3rd ed., ed. Ioan Muraru and Elena Simina Tănăsescu (Bucharest: C.H. Beck, 2022), 108.

[26] Cristina Elena Popa Tache and Cătălin-Silviu Săraru, "Dual Mandate of Digital Leadership or Upholding International Law Within Sovereign Constitutions," in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Cham: Springer, 2025), 1–14, https://doi.org/10.1007/978-3-319-31739-7_236-1.

[27] Art. 1, f) of the Law on treaties, no. 590/2003, defines ratification in the following terms: "ratification means the way of expressing consent to become a party to a treaty that was signed by the Romanian side, by adopting a ratification law by Parliament or, as provided by law, by emergency ordinance of the Government".

not repeat the provisions of the ratified treaty.

Consequently, the treaty as such is applied in the domestic legal order of the Romanian state, and not the ratification law. When, for example, a Romanian judge applies a norm from the European Convention on Human Rights, ratified in Romania by Law no. 30/1994, s/he directly applies the treaty, not this ratification law. International treaties to which Romania is a party have *direct effect.*

The Constitution of Romania establishes, in this way, the unity of the legal order. All the norms of this order, regardless of their source, constitute legal resources for the subjects of rights.

3.3.2. The Priority of All Treaties over National Law

Pursuant to art. 11, the Romanian State undertakes to fulfil "as such" the obligations incumbent on it under the treaties to which it is a party. This provision must be interpreted in the sense of the Vienna Convention on the Law of Treaties, of 1969, to which Romania is a party and according to which the State cannot invoke the provisions of its national *law* to justify the *non-performance* of a treaty (art. 27). Although the third paragraph of art. 11, introduced by the Law on the Revision of the Constitution of 2003, provides that "if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution", this does not mean that the international treaty acquires an infra-constitutional position in the Romanian national legal system, because if the treaty has been ratified, the Constitution can no longer be invoked to justify a failure to perform the treaty, because the Vienna Convention speaks of the impossibility of invoking domestic *law*, which also includes the Constitution. The term "as such" used by art. 11(1) of the Constitution has a strict meaning: it establishes a monist system.

By establishing a monism without any doubt, art. 11(1) of the Constitution implies an extensive interpretation of art. 20, according to which "covenants and treaties on the fundamental human rights", which in principle prevail in case of contradiction with national laws, should be understood as *all treaties containing provisions which are sufficiently precise to create rights for individuals*. Otherwise, doubts would be created with regard to the position of the treaty which establishes rights for individuals, but which does not directly concern or does not have as its main object fundamental human rights, in the hierarchy of the application of norms, it no longer being clear which is the applicable norm – the legal one, or the one in the treaty – which is contrary to art. 1(3) of the Constitution, which imposes the rule of law.

3.3.3. The Objective Nature of Rights Resulting from Treaties

Art. 11(1) of the Constitution does not impose a general condition of reciprocity for treaties ratified and thus made part of domestic law to be binding. This means that, in principle, the application of treaties "as such and in good faith" does not depend on the attitude of the co-contracting state, except in the situation in which the obligation of the Romanian state is caused by the correlative obligation of the other state. Treaties

which do not imply such dependence become objective in nature.

Such treaties are those concerning human rights. These rights no longer depend on the reciprocal conduct of states, they are objective in nature, so they must be observed by the Romanian state even if other states party to the treaty containing them do not respect them. Art. 11 therefore imposes the objective nature of human rights, a result of their universality, a feature imposed by art. 15 of the Romanian Constitution.

By stipulating that ratified treaties are part of domestic law, the Romanian Constitution makes them applicable to subjects, since this is the meaning of their introduction into the domestic legal order, the one applicable to the subjects of the state, and not to the state solely. Hence, subjects can claim the rights arising for them from the treaties to which Romania is a party before the domestic jurisdictions, which have the obligation to apply them, even against the practice or norms of the Romanian state. Therefore, viewed from the perspective of the subjects, all ratified international treaties, as part of domestic law, are treaties on the rights of these subjects, they are treaties on human rights[28].

3.4. Ratified Treaties Are Part of National Law

Art. 11(2) of the Romanian Constitution provides that "treaties ratified by Parliament, according to the law, are part of national law". Several issues need to be clarified in order to explain this rule: the meaning and effects of transforming the ratified treaty into a part of national law, what happens to international normative acts for which ratification is not required, and the location of non-conventional international norms in national law.

3.4.1. Meaning and Effects of Transforming the Ratified Treaty Into a Part of National Law

As explained above, the inclusion of the treaty in national law, through ratification, does not mean its transformation into a law. The treaty remains an international source of law. Its inclusion in the domestic legal order does not change its nature as a source, but only means that it becomes applicable to subjects with the same title as the norms of domestic law. It is thus a matter of the unification of legal orders from the point of view of the subjects of rights, a subjective unification, not a unification of the sources of objective law. Therefore, art. 11 of the Constitution does not provide regulations on the superiority of laws or treaties, but simply states that treaties are part of national law. They "are part", they are not "taken over" into domestic law. I believe that Romania opted, through the 1991 Constitution, for the third solution mentioned at the beginning of this study, the one reuniting the two objective legal orders, international and domestic, in a third, subjective legal order.

For subjects there is only one legal order, although objectively we are still in the presence of two. For them, all the norms of this order are valid in the same way and

[28] Horatius Dumbrava, "The Rule of Law and the EU's Response Mechanisms in Case of Violation: A Romanian Case Study," *ERA Forum* 22 (2021): 437–52, https://doi.org/10.1007/s12027-021-00682-6.

produce effects in the same way. They are *not* located, from the point of view of the subjects, in an *a priori* hierarchy, in which either domestic law prevails over international law, or vice versa, in the abstract, but in a normative network, in which the norms are located in positions of formal equality and in which the norm that is most protective for the subjects in a given legal situation prevails in application, in concrete terms. In this type of understanding of the normative system, it is useless to search for the position of the norms, national and international, in the normative hierarchy, because there is no normative hierarchy, since the norms are all related, from the same position, as internal law, to the protection of the subjects, and not to each other.

The judge has the duty to enforce the provisions of the treaties ratified by Parliament. This is not a faculty, but an obligation. Treaties are, for the judge who has the power to protect holders of rights, internal law. This concerns all treaties that may be applicable to subjects, not only treaties that have as their direct object the regulation of human rights, to which art. 20 of the Constitution refers[29]. Which norms are applicable is not decided in the abstract and *a priori* by the legislator, but in the concrete and *a posteriori* by the judge. The legislator cannot decide not to give direct effect to a ratified treaty, just as the judge cannot do so either. This direct effect is regulated by the Constitution.

The judge chooses the norm applicable in the case to be decided. The applicability *in concreto* is what the judge has in mind, not the positioning of the norm in relation to another norm, judged *in abstracto.* Therefore, it is not, in reality, a question of any 'control of the conventionality of the law' or any 'control of the constitutionality of the treaty', or of its 'legality', made by comparing the norms in the abstract, but a question of comparing the protections granted by the respective norms to the subjects in the legal situation referred to the court. It aims at the effect of the norm on the subjects, the *direct* effect of the norm on them, and not its *indirect* effect, obtained by relating the norm to another norm, which would, in principle, be applicable, because it would be superior in the normative hierarchy. Of course, the judge chooses a norm, but not because it is *superior* to another in the normative hierarchy, but because it *prevails* in terms of application. And it prevails because it is more protective, not because it is superior. Art. 20(2) of the Romanian Constitution, which is an application of the principle regulated by art. 11, is, in my opinion, very clear in this regard, when it states that in the event of inconsistencies between treaties on fundamental human rights and national laws, the former or the latter shall take precedence, depending on which of them contains more *favourable* provisions.

The interpretation that the judge must give to the norms is one that ensures *concordance* between them, not one that *eliminates* one, in order to apply the other, because one would be superior. Only if the judge cannot obtain this concordance through interpretation, if there is, despite all efforts at concordant interpretation, inconsistency between the treaties and the norms of national law, may s/he decide to apply a norm which takes precedence over the other.

[29] For a discussion of these issues, see Benoit Mayer, "Climate Change Mitigation as an Obligation under Human Rights Treaties?," *American Journal of International Law* 115, no. 3 (2021): 409–51, https://doi.org/10.1017/ajil.2021.9.

But this *does not mean that the judge eliminates the norm from the legal order*, because its existence is incompatible with a higher norm, that the norms are controlled, but only that s/he applies one of the norms as a priority, in that case, with regard to those subjects. In the following case, the priority norm may be the other.

What art. 11 of the Constitution provides is that, by making this direct application of the treaty, the judge does not give priority to an external will over the internal will contained in the law, because the basis of the applicability of the treaty is the will of Parliament to ratify it and the will of the Constituent Assembly to give it, through this ratification, the character of an internal norm.

3.4.2. Exclusion of Agreements Approved by the Government

Only treaties ratified by Parliament are part of domestic law. What is excluded from direct application are treaties for which ratification by Parliament is not required. The distinction between these categories of international agreements is made in the Constitution in art. 91(1), which regulates the powers of the President of Romania in the field of foreign policy: "The President shall, in the name of Romania, conclude international treaties negotiated by the Government, and then submit them to the Parliament for ratification, within a reasonable time limit. The other treaties and international agreements shall be concluded, approved, or ratified according to the procedure set up by law." It is obvious that these agreements cannot have as their object, directly or indirectly, the creation of rights for individuals, otherwise their non-transposition into domestic law would be more than problematic.

These treaties which, by their object, are not subject to ratification, but to approval (as a rule, approval is made by the Government; but the Romanian Constitution does not expressly impose any competence in this area) are not part of domestic law.

Of course, if such a treaty contains provisions that create direct effects on the subjects, it will be directly applicable by the judge, even if it has been approved, not ratified, because what prevails is the object of the treaty and, according to it, the fact that *it should have been ratified*, not approved, and not the legal procedure. Otherwise, the rights of the subjects guaranteed by the treaty would be deprived of legal protection, which cannot be admitted.

3.4.3. The Situation of Unwritten International Law in the National Legal Order

The monism imposed by art. 11 of the Romanian Constitution opens the domestic order of the Romanian state to treaties, but the situation of unwritten norms of international law seems to remain somewhat unclear, because, even if part of the problem is solved by art. 10 of the Constitution, which obliges Romania to base its international relations on the "principles and other generally recognized provisions of international law", art. 11 does not expressly stipulate the integration of all international law into national law, but only the integration of treaties.

This normative system has been interpreted as indicating that the state did not want the customary norms of international law to be part of domestic law, starting from the idea that the constitutional provisions on international relations would only bind the state and its bodies in their relations with other states, and not in their relations with the subjects of rights[30].

However, I believe that art. 10 is a general norm, which, regulating the way in which Romania must approach international relations, manifested primarily by the way in which the state will be able to conclude international treaties, makes all international law a system of binding rules, to the same extent and with the same title, for the Romanian state, while art. 11 and 20 are special norms, which refer to international treaties, respectively to those on human rights.

These special norms do not exclude the direct application of other norms of international law, provided, of course, that they are sufficiently precise to be applicable to the subjects of rights. As international relations no longer involve only relations between states, but also include the relations of states with the subjects of rights, since these rights have become internationalized, and private subjects are no longer only subjects of domestic law, but also subjects of international law, art. 10 of the Romanian Constitution can be the basis for a direct application of the unwritten norms of international law, of course, if they are sufficiently precise to be applicable.

This idea is also supported by the fact that in the Theses of the draft Constitution, adopted by the Constituent Assembly, it appeared, in Title I, thesis 15, with the following wording: "The unanimously accepted international principles and rules and those that arise from ratified treaties, in accordance with the law, are part of national law". The provision was removed from the draft, although it had been voted as a thesis with 298 votes in favour, five abstentions and no opposition[31]. The provision would have been much clearer than the current texts, as it would have introduced unwritten international law into national law as well.

4. Conclusions

The indivisibility of the legal order in relation to its subjects is not merely a descriptive characteristic of the state legal system, but a constitutive requirement of the rule of law. It expresses the obligation of public power to recognize every person governed by law as a subject entitled to equal consideration and protection. Understood in this manner, indivisibility operates simultaneously at the level of the relationship between the state and its citizens and at the level of the interaction between domestic and international legal norms.

The constitutional statement that Romania is the common and indivisible homeland of all its citizens must therefore be interpreted as establishing an obligation incumbent upon the state, rather than an obligation of emotional, ideological, or patriotic attachment imposed upon citizens. The concept of homeland acquires a

[30] Malenovský, "Dix ans après la chute du Mur," 29–54.

[31] Dumitru Ioncică, ed., *Geneza Constituției României 1991: lucrările Adunării Constituante* (Bucharest: Regia Autonomă „Monitorul Oficial", 1998), 108.

genuinely normative meaning only when it limits public power. The state must act as a homeland for all its citizens, regardless of their political opinions, ideological commitments, identities, or attitude towards the state itself. It cannot condition legal protection upon adherence to a dominant conception of national identity, collective consciousness, or patriotic virtue.

Consequently, the indivisibility of the homeland prohibits the division of the legal order according to the identities of the persons to whom it applies. Neither affiliation with the majority nor membership of a minority may justify exclusion from the equal protection of the law. The state may recognize and accommodate differences, but it cannot transform them into grounds for domination, civic inferiority, or exclusion from political participation. Equality does not require the elimination of differences between persons; it requires that such differences should not be used to construct supposedly natural hierarchies or to deprive individuals of their legal and political autonomy.

This understanding also excludes the possibility of transforming dissent into a ground for civic punishment. A modern constitutional state cannot treat criticism, political disagreement, or the refusal to adhere to an officially promoted conception of patriotism as manifestations of disloyalty capable of diminishing citizenship. Citizenship is the legal status through which the person participates in the constitution and exercise of public power and benefits from the protection of that power. Its withdrawal as a sanction would amount to a form of civic death: it would transform the individual from a participant in the legal and political community into an object subjected to public power. Such a result is incompatible with human dignity, political freedom, and the representative character of modern government.

The second dimension of indivisibility concerns the relationship between domestic and international law. The traditional opposition between dualism and monism remains focused mainly on the sources, validity, and hierarchical position of legal norms. However, this approach does not fully explain the contemporary situation in which international law increasingly creates rights directly available to individuals and in which domestic courts are required to apply international norms in concrete disputes.

From the standpoint of the subjects of rights, the relevant question is not which legal order incorporates or dominates the other, but which norms are legally available to protect them. Domestic and international norms form, in this respect, a third, subjective legal order. This order does not abolish the objective distinction between domestic and international sources. Rather, it integrates the norms arising from both orders into a common network of legal resources accessible to individuals.

The unity thus achieved is not necessarily based on an abstract and predetermined hierarchy. The norm to be applied as a priority must be identified in relation to the concrete legal situation and to the protection that it affords to the subjects involved. The decisive criterion is therefore not solely the formal superiority of one source over another, but the effectiveness and favourability of the protection provided. Human rights become prevalent not because one category of norms is invariably superior to every other category, but because the function of the legal order is to

guarantee the person's status as a subject of rights.

The Romanian Constitution can be interpreted as supporting this subjective unification. Article 11 provides that treaties ratified by Parliament form part of national law. Ratification does not reproduce the treaty as a domestic legislative act and does not alter its nature as a source of international law. It makes the treaty directly applicable within the domestic legal order. The courts must therefore apply the treaty itself whenever its provisions are sufficiently precise and capable of producing effects for individuals.

The direct applicability of treaties is not limited to instruments whose exclusive or principal subject matter is human rights. Any treaty provision capable of creating rights or legal protection for individuals becomes a resource that may be invoked before domestic courts. Human rights treaties possess an objective character because their application does not depend upon reciprocity between states. Their purpose is to protect persons subject to jurisdiction, including against the state that has undertaken the relevant international obligations.

Within this model, the judge occupies a central position. The judicial function does not consist merely in reconstructing an abstract hierarchy of legal sources. The judge must first seek an interpretation capable of ensuring concordance between the applicable domestic and international norms. Where such concordance cannot be achieved, the judge must apply the norm that offers the more effective or favourable protection in the concrete circumstances of the case. This is an application-based prevalence with inter partes effects, rather than the general invalidation of one norm because of the abstract superiority of another.

The same logic may extend, under Article 10 of the Constitution, to sufficiently precise rules of customary international law and generally recognized principles of international law. The development of international law beyond exclusively interstate relations supports the conclusion that unwritten international norms capable of directly governing the position of individuals cannot be excluded solely because Article 11 expressly refers to treaties. The internationalization of rights necessarily entails a corresponding openness of the domestic legal order.

The indivisibility of the legal order is thus both an anti-exclusion principle and a method of legal integration. It prevents the state from fragmenting the legal status of citizens according to identity, opinion, origin, or presumed loyalty, while also preventing the fragmentation of the legal protection available to individuals according to the national or international origin of the applicable norm. In both situations, the point of reference is the subject of rights.

Ultimately, the rule of law requires more than the formal organization of public power and the hierarchical ordering of legal sources. It requires a legal order capable of treating every person as an autonomous subject and of mobilizing all applicable legal resources for their protection. The legal order is indivisible because the protection owed to the person cannot be divided according to political identity, citizenship status, or the formal origin of the norm. Its unity is achieved through the common function of law: limiting public power, preventing exclusion, and guaranteeing the most effective protection of the subjects governed by it.

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