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The Loyalty of Evidence in Light of the Romanian and European Doctrine and Case Law

Zasada lojalności dowodowej w świetle doktryny i orzecznictwa rumuńskiego oraz europejskiego

ABSTRACT

This article is a conceptual and scientific study that examines the principle of loyalty in the administration of evidence within civil proceedings. Initially developed in criminal procedural law, the concept is increasingly relevant in civil matters due to the growing complexity and technologization of legal relations. The study identifies loyalty of evidence as a fundamental guarantee of a fair trial, requiring that proofs presented before the court be authentic, reliable, lawfully obtained, and respectful of the parties' rights. The central thesis is that loyalty of evidence must be balanced against the protection of the right to private life under Article 8 of the European Convention on Human Rights. The research aims to highlight the necessity of clear and balanced procedural norms governing admissibility of evidence, particularly where sensitive or confidential data are involved. The originality of the study lies in linking the doctrine of loyalty of evidence in civil proceedings to contemporary challenges in privacy protection and data handling. Its scope is national, with references to European standards. The findings provide cognitive value both for legal science, by clarifying a relatively underexplored principle in civil procedure, and for judicial practice, by suggesting a framework that reconciles fair trial guarantees with the protection of private life.

Keywords: loyalty of evidence; case law; good faith; admissibility of evidence; court; civil proceedings; right to private life

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INTRODUCTION

Comparative legal studies on evidence, while often country-specific, illustrate the great challenges faced by legal systems in adapting procedural rules to modern realities.[1] The concept of loyalty in the administration of evidence likewise occupies an increasingly significant place in contemporary civil procedure. Loyalty can be approached either as a technical feature of evidentiary law or, in a broader sense, as an essential principle underpinning the fairness of judicial proceedings. While the principle of loyalty of evidence has long been established in criminal procedural law, the growing complexity and technologization of civil legal relations have brought it to the forefront of civil procedural scholarship as well.[2]

In its broadest meaning, loyalty requires that evidence presented before the court be reliable, truthful, and obtained both legally and ethically. It imposes on judges the duty to reject any proof gathered in violation of procedural rules or in disregard of the parties' rights, particularly the right to private life. For litigants, loyalty entails the obligation to present authentic and pertinent evidence in good faith, thereby ensuring that disputes are resolved on a foundation of fairness and equity.

This perspective inevitably intersects with the guarantees of Article 8 of the European Convention on Human Rights (ECHR), which protects personal and confidential information against unauthorized interference. The question arises whether disloyally obtained evidence, such as the unauthorized disclosure of private data, may nevertheless be admitted in civil proceedings if it serves to protect a violated right or legitimate interest.

The tension between evidentiary loyalty and the protection of private life highlights the need for a nuanced and balanced legal framework. On the one hand, parties must be free to substantiate their claims and defenses; on the other, the protection of privacy and the prohibition of abusive methods of proof are essential to the integrity of justice. Romanian legislation and case law, therefore, face the challenge of ensuring a just balance between these competing interests, while judicial practice often relies on protective measures and strict admissibility rules to safeguard fundamental rights.

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[1] For example, see K. Badurowicz, *Evidence Taking in Civil Procedure in the Light of the Amendment of the Code of Civil Procedure of 4 July 2019*, "Studia Iuridica Lublinensia" 2020, vol. 29(1), pp. 27–46; M. Nowak, *Electronic Evidence in Civil Proceedings on the Background of Comparative Law*, "Studia Iuridica Lublinensia" 2024, vol. 33(2), pp. 223–237.

[2] For example, see E. Jeuland, *The 'Right to Proof' and the 'Loyalty Principle': A French Perspective*, [in:] *Evidence in Contemporary Civil Procedure: Fundamental Issues in a Comparative Perspective*, eds. C.H. van Rhee, A. Uzelac, Portland 2015, pp. 79–86; G. Vial, C. Lhomond, P. Adam, *Le droit à la preuve et le principe de loyauté de la preuve: quelle(s) articulation(s)?*, "Revue de droit du travail" 2023, no. 3, pp. 156–166; F. Rouvière, *Proportionnalité et casuistique à travers la procréation post mortem et la preuve déloyale*, "Revue trimestrielle de droit civil" 2024, no. 2, pp. 532–544.

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Against this backdrop, the present study examines the relationship between loyalty of evidence and the protection of private life in civil proceedings. Its purpose is to demonstrate that loyalty, far from being a mere procedural requirement, functions as a cornerstone of a fair trial and must be safeguarded with equal rigor as other fundamental principles of justice.

RESULTS AND DISCUSSION

1. Loyalty of evidence – concept and significance

Having been established earlier within criminal proceedings,[3] the principle of loyalty[4] of evidence represents one of the most important guarantees of a fair trial, serving to ensure the fairness and legality of the means by which evidence is obtained and administered before the court of law. This principle is grounded in the idea that, in order to respect the rights of the parties and ensure a just act of justice, the evidence used before the court must be obtained legally and in good faith, without infringing upon the procedural or fundamental rights of the other parties involved in the litigation.

The relevance of evidence in any litigation is indisputable; therefore, the institution enjoys consistent regulation in most legal systems and, equally, is the subject of complex doctrinal studies.[5] This importance has been attributed to evidence since Roman times, because the person bringing a claim before a court was obliged to prove it, as expressed in the famous adage: *actor incumbit onus probatio ei qui dicit, non ei qui negat* ("the burden of proof rests on the one who affirms, not on the one who denies").[6]

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[3] Regarding the loyalty of evidence in Romanian criminal procedural law, see M. Udroiu (ed.), *Codul de procedură penală. Comentariu pe articole. Art. 1–603*, Bucharest 2023, pp. 627–638.

[4] For more doctrinal details concerning the principle of loyalty of evidence in civil proceedings, see I. Deleanu, *Loialitatea în perspectiva noului Cod de procedură civilă*, "Revista Dreptul" 2012, vol. 12, pp. 11–30. For other opinions regarding the role and importance of this principle, see also L. Zidaru, P. Pop, *Drept procesual civil*, Bucharest 2020, p. 227; A. Stoica, *Loialitatea probelor în procesul civil. Garanția respectării dreptului la viață privată*, [in:] *In Memoriam Ion Deleanu. Magistru al metaforei și ficțiunilor juridice în știința dreptului românesc*, eds. G. Buta, I.V. Varga, M. Voicu, Bucharest 2024, pp. 189–200.

[5] For a broader approach to evidence in Romanian legal literature, see G. Durac, [in:] *Drept processual civil. Curs universitar*, ed. I. Leș, Bucharest 2021, pp. 367–399; V.M. Ciobanu, T. Briciu, C.C. Dinu, *Drept processual civil*, Bucharest 2023, pp. 445–500. For perspectives on evidence in foreign doctrine, see S. Guinchard, F. Ferrand, *Procédure civile. Droit interne et droit communautaire*, Paris 2006.

[6] V. Hanga, *Adagii juridice latinești*, Bucharest 1998, p. 50.

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The current Civil Code of Romania[7] no longer contains provisions regarding evidence, unlike the provisions of the 1864 Code. Due to its more procedural utility, the institution as a whole has found its place in the provisions of the new Civil Procedure Code.[8]

As previously mentioned, the field of evidence has been recognized and treated differently both in legislation and in doctrine, having at the same time "a distinct place among the institutions of civil law".[9] Legal scholarship has equally emphasized the undeniable reality that subjective rights exist independently, but it is through evidence that they acquire manifest authenticity.[10] In this sense, certain legal subjects commit juridical acts that give rise to divergent interpretations, leading either to the contestation of the very civil rights that generated those acts or, implicitly, to the avoidance or creation of a contentious legal relationship.

We nevertheless consider that the most representative definition of evidence remains the one affirmed in the field of civil law and which has been examined by the late Professor G. Beleiu. In this regard, the doctrinal method used by the aforesaid author stressed that evidence means "the legal means of establishing the existence of a juridical act or fact and, thereby, of the subjective civil right and civil obligation".[11]

In the field of civil procedural law, another notable definition is provided by the late Professor V.M. Ciobanu, who described evidence as "the action of establishing the existence or non-existence of a certain fact, the legal means by which the fact to be proven can be established, or the result obtained by using the means of proof".[12]

In our view, the notion of evidence, in a strict sense, designates the means used by the parties in good faith before judicial authorities to prove the existence of the disputed right, whether by documents, witnesses, presumptions, admissions of the

[7] Law no. 287/2009 on the new Civil Code (Official Gazette no. 505 of 15 July 2011), hereinafter: NCC.

[8] The new Civil Procedure Code was adopted through Law no. 134/2010 (Official Gazette no. 485 of 15 July 2010; republished Official Gazette no. 365 of 30 May 2012; amended by Law no. 310/2018, Official Gazette no. 1074 of 18 December 2018; republished Official Gazette no. 545 of 3 August 2012), hereinafter: NCPC. The most recent amendment to Law no. 134/2010 on the new Civil Procedure Code was introduced by Law no. 310 of 17 December 2018 (Official Gazette no. 1074 of 18 December 2018). It entered into force under the provisions of Government Emergency Ordinance no. 4/2013 on the amendment of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, as well as for the amendment and completion of certain related normative acts (Official Gazette no. 68 of 31 January 2013).

[9] I.R. Urs, *Drept civil. Teoria generală*, Bucharest 2015, p. 113.

[10] In this regard, Professor A. Ionașcu (*Probele în procesul civil*, Bucharest 1969, p. 56) figuratively highlighted that "evidence constitutes a complement to subjective civil rights, since the enforcement of such rights often depends on the existence of evidence".

[11] G. Beleiu, *Drept civil român*, Bucharest 1995, p. 102.

[12] V.M. Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. 1, Bucharest 1996, p. 147.

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claimant or defendant, expert reports, or on-site inspections. A piece of evidence administered loyally is therefore one employed by the parties in good faith and with full respect for the fundamental rights of the opposing party.

In Romanian law, the principle of good faith finds its primary source in the Constitution (Article 57), which identifies it as a basis for the exercise of all constitutional rights and freedoms. Naturally, this principle is also reflected in civil and civil procedural law. For example, the NCC enshrines good faith in Article 14, regulates good faith in the acquisition of tabular rights under Article 901, and recognizes the acquisition of movable property by possession in good faith under Article 937. Good faith can thus be regarded as creative of rights, provided that individual rights and freedoms are exercised in accordance with it.

In civil procedural matters, things are similar, but for the sake of reason, with other matters, we consider it useful to make a few important clarifications. First of all, we must admit that procedural rights must be exercised in good faith. From this perspective, the first paragraph of Article 12 NCPC highlights the fact that their exercise must be carried out "according to the purpose for which they were recognized by law and without violating the procedural rights of another party". As can be noted quite easily, the legislator has very judiciously highlighted good faith as one of the most important principles of civil procedure. However, this must be the foundation of the legal order of a state, but also of the procedural conduct of the parties involved in a dispute.

At the same time, this principle constitutes an obligation that falls on each party to a civil lawsuit, since the second paragraph of Article 12 NCPC highlights the only situation that can limit the exercise of a procedural right, namely: abuse of law. The aforementioned norm establishes in a clear and simplistic manner that the party who exercises its procedural rights in an abusive manner will be liable for the material and moral damages caused.

It is obvious that we are discussing the possibility of attracting a tortious civil liability of the person in question, who, in addition to these consequences, according to the final thesis of the aforementioned paragraph, may also be required to pay a judicial fine. This provision is welcome because, in practice, there have been quite a few cases in which a procedural right has been exercised abusively, and the injured party has suffered obvious material and moral damages.

The last paragraph of Article 12 NCPC highlights the obligation of the party to fulfill its procedural obligations in good faith, otherwise the sanctions provided for in the final sentence of the previous paragraph will be applied to it. Obviously, when discussing procedural obligations, the legislator refers us to the sphere of the obligations of the parties regulated by Article 10 NCPC.

As we can see, the usefulness of good faith is obvious in the civil process, but proving the abuse of rights will be a difficult task for the interested party, since the

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court must also take into account the respect[13] for free access to justice recognized by Article 21 of the Constitution, for any person.

Therefore, there is an indissoluble link between the loyalty of evidence and good faith. By respecting good faith, the parties to the civil trial do nothing more than honor an important part of the obligations imposed by the provisions of Article 10 NCPC. According to para. 1 of this legal text, in addition to the obligations relating to the performance of procedural acts under the conditions, order and deadlines established by law or by the judge, the parties have the duty "to prove their claims and defenses". This must be done in a loyal manner, that is, in compliance with legal and ethical norms in obtaining and presenting evidence, without resorting to deceptive, abusive or illegal methods. More precisely, evidence cannot be administered through fraud, intimidation, misleading or violating the fundamental rights of the other party, such as the right to privacy or a fair trial.

If we ask ourselves, who assesses whether or not evidence is loyal? Or who determines the limits of the loyalty of evidence? The answer is simple, valid for both questions: the court. However, we identify them in certain legal provisions or even in the current jurisprudence of the High Court of Cassation and Justice.

Regarding the answer to the first question, we must bear in mind that in civil proceedings, the loyalty of evidence can concern both the acts of the parties (plaintiff and defendant), as well as the activity of the court, which has the obligation to reject any evidence obtained illegally or unconstitutionally. Precisely for these aspects, evidence must be administered with transparency, giving each party the opportunity to know and challenge the evidence brought by the other party in a contradictory manner, as enshrined in Article 14 (2) NCPC.

At the same time, a pertinent legal solution in the case of this question is offered to us by para. 2 of Article 10 NCPC. Thus, when a party possesses a means of evidence, the judge, *ex officio* or at the request of the other party, may order the appearance of the first party, and when the latter does not appear before the court, the judge may sanction it with the payment of a judicial fine. On this occasion, the judge seeks to ensure the adversarial nature of the trial and, equally, to assess whether the respective means of evidence is loyal. In this situation, the right of the party to propose evidence may become a procedural obligation.

The answer to the second question is provided by the recent jurisprudence of the High Court of Cassation and Justice. More specifically, by decision no. 39/2024, the

[13] Regarding this aspect, the High Court of Cassation and Justice ruled that the exercise of the fundamental right to free access to justice does not constitute an unlawful act. See decision no. 2788 of the High Court of Cassation and Justice, Civil Section, of 30 May 2001 (Pandectele Române 2002, no. 2, p. 62). However, excessive or unfounded exercise of this right may give rise to an abuse of rights against the opposing party. Even in such circumstances, it cannot be considered an unlawful act (see, e.g., decision no. 601 of the Sibiu Tribunal, Civil Section, of 21 June 2017, available at rejust.ro), although the party harmed by this form of abuse may request compensation from the court.

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complaint filed by the Bucharest Court of Appeal, Section VII, for cases concerning labor and social insurance litigation was admitted,[14] and it assessed that the evidence of the recording of a telephone conversation between an employee and another employee or representative of the employer, requested in a dispute against the employer, is admissible, even if the recording was made without the consent and/or prior information of the respective interlocutor. The solution of the High Court of Cassation and Justice is a bold one and can certainly constitute an interesting precedent for other litigious legal situations. Therefore, we consider it useful that several considerations on this decision be evoked in the following sections of this study.

2. The parties' right to submit evidence vs. the loyalty of evidence in the civil trial

The current civil procedural provisions enshrine a genuine right of the parties to propose evidence. Specifically, the evidence is proposed by the plaintiff through the summons (Article 194 (e) NCPC) and by the defendant through the defense (Article 205 (2) (d) NCPC).

Under these conditions, the plaintiff, in the content of the summons, will have the opportunity to refer to all the evidence on which each of his claims is based. In a contradictory manner, the defendant, in the content of his defense, will indicate the evidence with which he defends himself against each claim mentioned by the plaintiff in his summons.

Practically, by means of the evidence or evidence, the party or parties try to convince the judge of the existence of an indubitable reality regarding the violated or contested subjective civil right. In other words, the existence of a subjective civil right is attested by its recognition and non-contestation by other subjects of law. Moreover, when a right is contested, the one who claims to be its holder will have the right, but also the obligation, to prove by a legal means of proof, on what his claims are based.

It must be remembered that the right of the parties to propose evidence generates the evidentiary framework or ensemble of a civil trial. This framework generates the circumstances necessary to induce in the judge's opinion the conviction that the judicial truth invoked by a party is justified by a plausible and undisputed act or fact. To be much more precise, we can say that each party to the civil trial tries to convince the judge about the effect that is most favorable to them in their attempt to have their right recognized in the judgment.

In this regard, the role of evidence and at the same time its administration are essential in terms of the judge's delivery of a sound and legal decision. Only in this

[14] See decision no. 39 of the High Court of Cassation and Justice, Panel for the resolution of certain questions of law, of 16 September 2024 (Official Gazette of Romania no. 1047 of 18 October 2024).

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way can the judge discern the real relationships between the parties, the acts and facts that generated the conflict between them, and then, based on the administered evidence, correctly apply the legal norms in the litigious case.

Therefore, it must be borne in mind that evidence administered correctly from the beginning of the judicial activity, on the one hand, can constitute the guarantee that a solution obtained on the merits based on it can withstand the control exercised through appeals, and on the other, that the legal order will be restored within that litigious legal relationship.

The right of the parties to propose evidence involves a series of subsequent activities such as proposing, approving and presenting evidence, taking cognizance of it and its evaluation by the judge.

The evaluation of evidence by the judge represents the most important activity specific to determining the evidentiary body specific to the civil dispute because the judge, as the authority administering the act of justice and through the principle of ascertaining the truth[15] (in French: *le principe de la recherche de la vérité*), but also based on the principle of the loyalty of evidence (in French: *le principe de la loyauté des preuves*), can assess the evidence proposed by the parties or even he himself can suggest that they administer new evidence, even if this aspect was not mentioned in their requests.

The scope of evidence regulated by the NCPC is quite cohesive, and Article 250 states enumeratively that "proof of a legal act or a legal fact can be made by documents, witnesses, presumptions, the confession of one of the parties, made on their own initiative or obtained during interrogation, by expertise, by means of material evidence and on-site investigation". At the same time, it would be useful to remember the fact that according to Article 137 NCPC "In the event of a declaration of lack of competence, the evidence administered before the non-competent court remains gained by the judgment and the competent court entrusted with resolving the case will not order their re-examination except for solid reasons". We therefore note a particularly important guarantee that the legislator offers in the matter of the right of the parties to propose evidence. Therefore, it is important to remember that "the institution of evidence is qualified as a central institution of the civil process".[16]

In principle, evidence considered by the judge to be disloyal[17] or illicit is inadmissible in the application of the principle of loyalty in the administration and

[15] For further details on the role and significance of this principle, see the authoritative work I. Leș, *Descoperirea adevărului în cadrul procedurilor judiciare. Cu referire specială la procesul civil*, Bucharest 2024.

[16] V.M. Ciobanu, *op. cit.*, p. 147; E. Mihuleac, *Sistemul probelor în procesul civil*, Bucharest 1970.

[17] Although it is quite difficult to draw a clear line between loyal and disloyal evidence, examples of the latter may include: personal data obtained by a person without authorization; an unauthorized video surveillance system; an audio recording obtained illegally; falsified documents or false statements obtained by vitiating a person's consent, etc.

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evaluation of evidence. This evidence will be declared inadmissible if it was obtained or produced in an illicit or abusive manner. Now, we ask ourselves whether unfair or illicit evidence could be declared admissible when it would be essential for protecting the subjective right of the party proposing it, and when it is directly proportional to the purpose pursued in the claim?

In fact, we can identify the answer in the content of the provisions of Article 341 NCPC, which include in the scope of material evidence, in particular, a series of things that the judge must take into account, namely "things that by their properties, by their appearance or the signals they retain serve to establish a fact that may lead to the resolution of the trial". Also among the material means of evidence, the cited text also includes "photographs, photocopies, films, discs, sound recording tapes, as well as other such technical means, if they were not obtained by violating the law or good morals".

That is why the loyalty of evidence in civil proceedings is of particular importance, especially since it can guarantee the fairness of the entire judicial activity. Thus, through the loyalty of evidence in civil proceedings, we consider:

1. Protection of fundamental rights. The loyalty of evidence protects the fundamental rights of the persons involved in the process, including the right to a fair trial (Article 6 ECHR) and the right to private life (Article 8 ECHR). By applying this principle, it is ensured that evidence is obtained without violating privacy, without illegal interceptions or violations of the secrecy of correspondence, among others.
2. Fairness of the trial. The principle guarantees that the trial is conducted in a fair manner, based on facts and evidence obtained legally. Without the loyalty of the evidence, the court's decision could be based on manipulation or compromising evidence obtained by illegal means, which would undermine confidence in the act of justice.
3. Fairness between the parties. The principle contributes to equality of arms between the parties, giving each party the opportunity to combat the evidence presented by the other party and to defend its interests fairly. Any evidence obtained or administered unfairly can be eliminated so as not to affect the procedural balance.
4. Legality of the administration of evidence. Civil courts are obliged to verify the legality of the way in which the evidence was obtained. For example, if evidence was obtained by violating the right to privacy (e.g. through an illegal wiretap or an audio-video recording made without consent), that evidence will be declared inadmissible, even if it is relevant to the case in question.
5. Prevention of abuses. By imposing loyalty in the administration of evidence, abuses and unfair tactics that could vitiate the process are prevented. Any evidence obtained by force, intimidation, fraud or violation of legal norms is excluded from the process, in order to protect its fairness.

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The principle of loyalty of evidence plays an essential role in civil proceedings, ensuring that the resolution of a dispute is based on evidence obtained legally and correctly. It contributes to respecting the fundamental rights of the parties and guarantees a fair trial. Courts are called upon to ensure compliance with this principle in order to prevent abuses and to maintain the integrity of the act of justice.

3. Jurisprudential recognitions of the loyalty of evidence in the civil trial

As mentioned above, the principle of the loyalty of evidence is a fundamental element in civil proceedings, requiring that evidence administered in a dispute be obtained and used in a moral and legal manner. Naturally, the principle is closely linked to the respect for the fundamental rights of persons involved in a civil proceeding, including the right to privacy, guaranteed by various international and national norms, such as the ECHR (Article 8), but also by the national constitutions of democratic states.

In the recent practice of the High Court of Cassation and Justice is the decision no. 39/2024, pronounced by the Panel for the resolution of certain questions of law. This Court was competent to judge the complaint filed by the Bucharest Court of Appeal, Section VII, for cases regarding labor conflicts and social insurance in order to clarify a particularly interesting legal issue, namely: "Can audio recordings of telephone conversations between an employee and other employees or other identifiable representatives of the employer, which the employee requests as evidence in the adversarial trial against the employer, be considered evidence, regardless of whether or not the person with whom the employee had the conversation was informed and expressed consent to the recording of that conversation?"

As a preliminary matter, it is useful to recall that through the introductory action before the Bucharest Court of Justice, Section VIII, for labor disputes and social insurance, the plaintiff, a natural person, requested in adversarial proceedings against the defendant, a legal person, to oblige it to pay the amount of EUR 10,000 representing moral and compensatory damages for the damage caused, as a result of alleged inappropriate actions by the defendant, which were considered to fall under the notion of harassment. On the occasion of the trial of this case, the Court, on 13 December 2022, by civil judgment no. 7679/2022, partially admitted the action and obliged the defendant to pay the plaintiff the amount of RON 22,500 as material damage and RON 1,000 as moral damage caused to him by the employer's unlawful act.

In the reasoning of the first instance, it was held that a conduct was proven by which the plaintiff was "harassed" at work, in order to determine him to submit his resignation, and an important part of the solution of this instance was based on the content of the telephone conversation recorded without the consent of the person with whom the conversation was held, being mentioned in the considerations of the aforementioned sentence, in order to justify the solution pronounced. From the

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content of these recordings submitted to the case file, it emerged the defendant's intention to cease collaboration with the plaintiff, even though the same recordings reveal that this intention is justified by the plaintiff's refusal to fulfill his job duties. At the same time, it results that the defendant proposed to the plaintiff various variants of termination of employment relationships that would be acceptable to both parties, but these were refused by the plaintiff, with the motivation "that no one is hiring him one year before retirement".

It is important to note that these discussions related to a possible termination of the employment contract were generated by the plaintiff, who, the first instance court says in its reasoning, "said to have had provocative behavior towards his superior, with the obvious purpose of pre-establishing evidence". Even though the conversations held and the employer's clear intention to obtain the termination of the employment relationship with the employee were likely to create a hostile work environment, and the plaintiff himself was clearly at fault in creating this situation, the fault consisting, on the one hand, in the failure to fulfill his job duties and, on the other hand, in the provocative behavior adopted in all discussions with the employer's representative, the trial court admitted this means of evidence.

Both the plaintiff and the defendant appealed against the decision of the lower court. In the context of this legal appeal, the defendant contested the granting of probative value to the recorded telephone conversation, claiming that it was made without the plaintiff's interlocutor being informed of the circumstances of the recording, respectively without his consent, an aspect that was not denied by the plaintiff.

As such, on the occasion of the resolution of the appeals, the Bucharest Court of Appeal, Section VII, for cases concerning labor and social insurance litigation ordered the referral of the High Court of Cassation and Justice to resolve the legal issue indicated above, assessing it as a new one.

This legal issue also generates an obvious difficulty of interpretation, consisting in establishing the situation in which, "a telephone conversation, recorded without the consent of the interlocutor, who acts on behalf of or is perceived to act on behalf of the employer, may or may not constitute a means of evidence, being limited to evidence obtained without violating the law or good morals".[18]

In the context of the case deduced from the clarification of the legal issue under discussion, the interpretation of the phrase "good morals" in the content of Article 341 (2) NCPC, to which corresponds in the particular context of the case, the circumstance of recording, "without consent, a telephone conversation with a representative of the employer (or of a person perceived by the employee as speaking on behalf of the employer, regardless of the position of that person in the employer's organizational

[18] See decision no. 39 of the High Court of Cassation and Justice, Panel for the resolution of certain questions of law, of 16 September 2024 (Official Gazette of Romania no. 1047 of 18 October 2024), para. 21 (final thesis).

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chart)", reveals the need to know whether the respective employer also enjoys a similar protection to that of the employee in the event that, through a means of monitoring (telephone recording), the employee also carries out this activity.

At the same time, the provisions of Article 341 NCPC include a series of things in the sphere of material means of evidence, and the High Court of Cassation and Justice, before pronouncing the solution in this application, carried out an exhaustive analysis[19] of the national jurisprudence regarding the admissibility of telephone conversations as means of evidence.

Therefore, the evidence of a recording of a telephone conversation between an employee and another employee or representative of the employer, requested in a dispute against the employer, was declared admissible from the point of view of the High Court of Cassation and Justice. This evidence was admitted even if the recording was made without the consent or prior information of the respective interlocutor. Through this solution, consideration was given to observing the condition of a fair balance between the right to evidence, on the one hand, and the right to private life, on the other, in the sense that the approval of the material evidence subject to judicial activity must be indispensable for the exercise of the right to evidence and strictly proportional to this purpose.

It is also important to remember that the High Court's solution is fully consistent with the European Court of Human Rights (ECtHR) case law, which, as we will note in the content of some reference decisions on this matter, "the moment of the approval of the evidence is necessary to carry out the proportionality test assumed by Article 8 (2) of the Convention, and it cannot be considered that the violation of the right to private life concerns only the resolution of the case on the merits".[20]

In the content of the High Court's decision mentioned above, the Court invokes an important justification to support its solution. This reminds us, first of all, that in the case law of the "ECtHR, the inadmissibility of evidence that is considered to be unfair is not accepted, in principle". Starting from this aspect, we recall that European judges stated – at least initially – that "in the hypothesis that the Convention guarantees in its Article 6 (…) the right to a fair trial, it does not regulate the admissibility of evidence and as such, this aspect falls primarily under the aspect of domestic law, and therefore also under that of national jurisprudence".[21]

However, the ECtHR later clarified the role of national courts, stating that "adversarial proceedings entail the obligation for the parties, in disputes in which

[19] For further details on these issues, see *ibidem*, para. 75.

[20] For further details, see judgment of the ECtHR of 5 September 2017, *Bărbulescu v. Romania*, application no. 61496/08.

[21] For further details, see judgment of the ECtHR of 12 July 1988, *Schenk v. Swiss Confederation*, application no. 10862/84, para. 48.

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private interests are at stake, to be afforded a reasonable opportunity to present their case under conditions which do not place them at a disadvantage to each other".[22]

The provisions of Article 6 ECHR thus establish the obligation for national courts "to engage in an effective examination of the parties' submissions, arguments and evidence, without assessing their relevance to the decision which they are about to give". Should the High Court of Cassation and Justice only consider these issues?

If the ECtHR recognises[23] the judge's competence to admit evidence from hidden cameras, then perhaps national courts can be invited to consider, at least in the sphere of employment relations, the following aspects: Was the employee informed of the possibility that the employer may take video surveillance measures and the implementation of such measures? What was the extent of the surveillance carried out by the employer, as well as the degree of intrusion into the private life of the employee concerned? What were the consequences of the surveillance for the employee who was the subject of it? Were the employee offered adequate guarantees, especially when the employer's surveillance measures were intrusive or even indiscreet?[24]

Although the decision of the High Court of Cassation and Justice that we have discussed in this section concerns many issues of a procedural-civil nature, not only the disputed employment relationship, we can only regret that the use of factual and legal grounds is limited only to ensuring proportionality between a fair balance of the right to evidence recognized to the parties to the civil trial, on the one hand, and the right to private life on the other, without referring, e.g., to other correlative provisions of evidence of the same value, which could be presented to the national courts in the event of future disputes.

CONCLUSIONS

Throughout this study, we have strived to highlight the importance of the principle of the loyalty of evidence. This principle, for the civil process, plays an essential role in guaranteeing a fair and transparent trial, ensuring the protection of the fundamental rights of the parties involved.

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[22] See judgment of the ECtHR of 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, application no. 14448/88; judgment of the ECtHR of 9 December 1994, *Stran and Stratis Andreadis v. Greece*, application no. 13427/87; judgment of the ECtHR of 22 October 1997, *Papageorgiou v. Greece*, application no. 24628/94.

[23] In this regard, see judgment of the ECtHR of 19 April 1994, *Van de Hurk v. Netherlands*, application no. 16034/90, para. 59; judgment of the ECtHR of 12 February 2004, *Perez v. France*, application no. 47287/99, para. 80; judgment of the ECtHR of 13 May 2008, *N.N. and T.A. v. Belgium*, application no. 65097/01, para. 44.

[24] See judgment of the ECtHR of 5 September 2017, *Bărbulescu v. Romania*, application no. 61496/08, para. 121.

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In the future practice of the courts, there will certainly be many cases in which new technologies will be used more and more often as material means of evidence, and the courts will be faced with other jurisprudential challenges. However, the most difficult thing will be to make a pertinent distinction between loyal and unfair evidence. Evidence is unfair when it is obtained without the knowledge of a person or has been collected using deceptive maneuvers, in violation of "good morals".

Therefore, it may be useful for the High Court of Cassation and Justice to establish certain criteria so that judges of lower courts can determine much more clearly the unfair nature of some evidence. Undoubtedly, this aspect would not affect the independence of judges, moreover, it would be an important step in the necessary approximation of judicial truth to the truth of fact.

At the end of these considerations, we can admit that the loyalty of evidence is essential for civil proceedings and thus we should bear in mind that:

1. It ensures a fair trial. The principle of loyalty of evidence is crucial for respecting the right to a fair trial. The parties must have access to evidence obtained legally and in good faith, without abuse or fraudulent methods, in order to protect the proportionality of the trial between the right to evidence and the right to privacy of the parties.
2. It offers real protection of fundamental rights. The loyalty of evidence is closely linked to the protection of fundamental rights, such as the right to privacy and human dignity. Evidence obtained by violating these rights (such as illegal interceptions or unauthorized access to personal data) cannot be admitted in the trial.
3. It allows the judge to exclude certain evidence obtained illegally. Evidence obtained by illegal means or by violating the principle of loyalty is excluded from civil proceedings, thus preventing the use of abusive means to influence the outcome of the dispute. This rule ensures a balance between the parties and prevents one party from obtaining unjustified advantages.
4. It ensures trust in the judicial system. Respecting the loyalty of evidence contributes to maintaining public trust in the judicial system. A fair trial, based on correctly obtained evidence, strengthens the guarantee that a democratic state can offer to the judiciary, court decisions will be perceived as fair and impartial, and at the same time ensures the right of the parties to propose evidence in civil proceedings.

Even if *de lege lata* the principle of loyalty of evidence does not enjoy a regulation *in terminis* in the Civil Procedure Code, it will remain a fundamental principle for the conduct of civil proceedings in a fair and transparent manner. By protecting fundamental rights and excluding evidence obtained illegally, this principle contributes to maintaining a fair and trustworthy justice system.

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ABSTRAKT

Niniejszy artykuł stanowi opracowanie koncepcyjne i naukowe poświęcone zasadzie lojalności w przeprowadzaniu dowodów w postępowaniu cywilnym. Pojęcie to, pierwotnie rozwinięte na gruncie prawa karnego procesowego, zyskuje coraz większe znaczenie również w sprawach cywilnych, co wynika ze wzrastającej złożoności i technicyzacji stosunków prawnych. W opracowaniu wskazano, że lojalność dowodowa stanowi fundamentalną gwarancję prawa do rzetelnego procesu, wymagającą tego, aby dowody przedstawiane przed sądem były autentyczne, wiarygodne, legalnie pozyskane oraz respektujące prawa stron postępowania. Główną tezą jest konieczność zachowania równowagi między zasadą lojalności dowodowej a ochroną prawa do prywatności wynikającego z art. 8 Europejskiej Konwencji Praw Człowieka. Celem badania jest podkreślenie potrzeby ustanowienia jasnych i wyważonych norm procesowych regulujących dopuszczalność dowodów, zwłaszcza w przypadkach dotyczących danych wrażliwych lub poufnych. Oryginalność opracowania polega na powiązaniu doktryny lojalności dowodowej w postępowaniu cywilnym ze współczesnymi wyzwaniami w zakresie ochrony prywatności i przetwarzania danych. Zakres artykułu ma charakter krajowy, z odniesieniami do standardów europejskich. Wyniki badań mają wartość poznawczą zarówno dla nauki prawa, poprzez doprecyzowanie stosunkowo mało zbadanej zasady postępowania cywilnego, jak i dla praktyki orzeczniczej, proponując model umożliwiający pogodzenie gwarancji rzetelnego procesu z ochroną życia prywatnego.

Słowa kluczowe: lojalność dowodowa; orzecznictwo; dobra wiara; dopuszczalność dowodu; sąd; postępowanie cywilne; prawo do życia prywatnego