A CRITICAL VIEW OVER THE LEGAL TERMINOLOGY OF THE NEW CIVIL CODE

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ABSTRACT

A new Civil Code in Romania is an event long-expected by theorists and practitioners of law. The current Civil Code inspired by the Napoleon Code from 1804, which entered into force on 1 January 1865, has undergone major changes and succesive additions during the 45 years of communist regime. The Revolution of 1989, initiated the process of building the rule of law and powed the way to the adaption of the Romanian legislation to European requirements especially after Romania's accession to EU. All the previous projects of a new Civil Code had to be subordinated to the new overall European design of fundamental human rights and to the general trends of European private law in particular to those relating to contract law, where there have been developed a number of major European projects of codification. The principle of autonomy, as outlined in the Napoleon Code which was under the influence of French Revolution ideals of 1789, is today increasingly gnawed and in the process of replacement with a new vision, solidarism. A set of European initiatives such as Lando Principles, the German vision of a European Civil Code, developed by Professor Christian von Bar, the proposal launched by the Italian Professor Giuseppe Gandolfi, and the French law reform draft and prescription requirements developed by the academic group led by Professor Pierre Catala, envisaged a series of new and modern solutions, which our new Civil Code had to take into account. Influenced by effervescent offers of European private law codification, the new Civil Code authors have reformulated a number of provisions of the first draft of a new Civil Code, approved by the Romanian Senate in 2004, taking over new normative solutions as well as a number of terms used both by new projects and the Civil Codes in the province of Quebec and in Italy. Grafted on the classical "tale quale" terminology of Romanian civil law, a number of new terms, borrowings from other codes affect the accuracy of legal acts. The purpose of this paper is to examine the impact of some new legal terms used in the new Civil Code, on the national law system on the one hand and on the other hand in a series of important materials for the study of civil rights.

Keywords: socio-political processes, civil procedural law

I.Towards a common terminology of European Private Law

The common market of the European Union requires common rules and principles applicable to cross-border contracts, a fact that strongly raises the problem of a European contract law and even the unification of all European private law. By the time a future European Civil Code can be designed, requiring unique regulations in various fields such as civil law, commercial law, labour and social security law, private international law and

civil procedural law - an audacious project, looked at by Eurosceptics with reservation[1] - European Union's objective is the similarity of laws in European countries. In order to achieve this goal, a series of directives have been issued in specific areas and transposed into national law, affecting contract law[2]. Simultaneously, there have been developed several coding projects in this area, starting with UNIDROIT Principles applicable to international commercial contracts (UP), followed by "Principles of European contract law (PECL) elaborated by a team of academics led by Professor Ole Lando and by the proposals of the group of Private Law Academy of Pavia led by Italian Professor Giuseppe Gandolfi entitled "European Code of Contracts". As a response to these projects, an academic team led by Professor Pierre Catala developed the "preliminary draft law reform obligations and the right prescription", also known as Catala preliminary project.

A major difficulty for European contract law codification is the rivalry between the two main competitors on the market of European law, the continental law system and common law, each of these exporters of legal solutions being interested in imposing their own traditions. [3] As the first version of common reference framework was established in an attempt to impose Anglo-Saxon view on April 26th, 2010, by Decision 2010/233 / / EU, European Commission established an expert group aiming at improving the initial structure important to the future European contract law, currently in the process of doctrinal debate. Although there is a convergence of principles and an approximation of the two systems of law - continental and insular – there is a lack of neutral language that can convey a more uniform legal thinking, in a multilingual context in which the language of each EU member states is equal to the others. Unfortunately, Latin, both expressive and concise which was used to impose *ius commune* in Europe, is strictly related to the history of law and the principles established in Roman law under the form of adages that add colour and concision to legal discourse, are too rarely used, while English language has been invading European legal space, driven, among other things, by the generalisation of information on the Internet which has created its language of communication faster than ever. The circulation of terms from a legal system to another, from one civil code to another, faces major difficulties of translation and leads to the appearance of neologisms in translation[4], a kind of "Esperanto" in law.

II. Imported legal terms in the Romanian New Civil Code

Appeared in this period of ferment of proposals for codification of European contract law and of search for common legal terminology in a confrontation of the two great systems of law, Roman-Germanic system and common law, our new Civil Code fully but sequentially imports both legal regulations of other codes such as Code of Quebec, the Italian Civil Code, the Swiss Civil Code and the solutions adopted by the UNIDROIT Principles, Principles of European contract law. As a result of the hard work of several university teams, new regulatory provisions have been subject to successive interventions on certain institutions and legal norms, being given up a series of statements of the first

[1] An opponent of the draft European codification of civil law, G. Cornu, openly states that "the obsession for fusion is a cultural aberration" [1] ("Un Code civil n'est pas un instrument communautaire", D, 2002, p. 351)

[2] One must distinguish between European contract law and European contract law, the latter being made up of rules of law applicable to border contracts only

[3] www. Cairn.info, Yv. Lequette, *Vers un Code civil européen*?, Sous la direction de G. Wicker, *Droit européen du contrat et droit du contrat en Europe. Quelles perspectives pour quel équilibre*? (Actes du colloque organisé par le Centre d'etude et de recherche en droit des affaires et des contrats (CERDAC), 19 septembre 2007, Éd. Litec, Paris, 2008

[4] I. Busuioc, *Romanian terminologies dynamics under the impact of translating the acquis of the Community* , http://ebooks.unibuc.ro

variant of the new Civil Code Project published in 2004. Others have been reformulated by simply using new terms downloaded from different versions of codes or coding projects and overlapping traditional terminology – a fact that has affected both the original meaning of loan terminology and homogeneity of the new encodings. [5] Our intention is to focus on only some aspects which, although are related to legal language chosen by the authors of the new Civil Code normative texts in several important matters, require certain rigurous points of view on some controversial domains of civil law.

1. "The subjects of civil law." Rule in Art. 25 of the new Civil Code has the marginal name of "subjects of civil law" about which paragraph.1 states that they are ... "natural persons and legal persons. The point of discussion is the difference between the issues of law and law subjects, because the former expression suggests by the name itself the idea that law does not deal simply with a human being but with one endowed with the quality of a person, an actor on the legal stage, a real or virtual bearer of rights and obligations[6]. However, the individualistic ideology that animates the fundamental human rights institution makes civil law get closer to the existential problems of the human beings in their whole status[7], protecting their "human body, organs and tissues detached from it and even physicalor mintal pain"[8], values that are not always the same as no human sensitivity is equal to another and cannot be standardized as in the case of economic rights. *Infans conceptus…* rule tells us that man may be a matter of law only if it is born alive and viable. It might seem that the new Civil Code envisages that this trend as it relates to " respect for the human being" and not to "respect for the natural person". But it is a fortuitous option, which highlights the lack of consistent terminology because only the title of Chapter II of Title II, Legal Person, refers to the rights of the human being while subsequent sections of the same chapter are considering individual rights: the right to life, integrity, privacy, dignity, the right to be respected and the other sections are concerned with the right to life, health and integrity of the individual. Romanian civil law doctrine largely agree to the phrase "matters of law."[9] Still, there are authors who, analysing the structure of civil legal relationship, take into consideration its subjects. Thus, in 2003, Professor Ovidiu Ungureanu, who was mainly focused on the

[5] For other critics of the new Civil Code, see M. Uliescu, *Civil Code adopted by Law 287/2009. A viable prospect in the area of European law?*, in the book" Perspectives of Romanian Law in Europe after the Treaty of Lisbon", Ed Hamangiu, Bucharest, 2010, pp 24-30

[6] The word "person" draws its origins from Etruscan word *phersu*. (See Fr. Létoublon *La personne et ses masques: remarques sur le Développement of the notion of personne et sur l'histoire dans son étymologie from langue grecque*, Faits de langues, 1994 - persee.fr). The author advances the interesting thesis that, in fact, the idea of linking the meaning of the word *person* to a mask belongs to the Greeks and their passion for theatre and not to the Romans who simply borrowed and widely used it. Originally, the term signified appearance - the human figure - then, the Latin word *persona* referred to the mask an actor put on before entering the stage, which, by its grimace announced either the tragic destiny of the embodied character or comic accents of the part that was to be acted. Only later, the word began to signify the character embodied by an actor. The perverse effect of this development is that the term *personne* acquired a bipolar meaning in French, denoting either everything (the person) or nothing (an absolutely negative answer to the question of whom you saw).

[7] D. Alland, S. Rials, *Dictionnaire de la culture juridique*, Ed. Presses Universitaires de France, Paris, 2003, pp 1152-1153

[8] O. Ungureanu in O. Ungureanu, C. Jugastru, C*ivil law. Persons* , Ed Rosetti, Bucharest, 2003, p.18

[9] Gh Beleiu, *Romanian Civil Law. Introduction to civil law. Subjects of civil law*, Eleventh Edition revised and enlarged by M. Nicholas, P. Trusca, Ed Legal Universe, Bucharest, 2007, L. Pop, *Civil Law Treaty. Obligations. Vol I. The general legal regime* C.H.Beck Publishing House, Bucharest, 2006, p. 19, G. Boroi, *Civil Law. General part. People*, Third edition, revised and enlarged, Ed Hamangiu, Bucharest, 2009, p. 58, E. Lupan, Sabau I. Pop, *Civil Law Treaty*. Vol I. General part, Ed CHBeck, Bucharest, 2006, p. 93, Fl Baias, *Simulation. Study of doctrine and jurisprudence*, Ed Rosetti, Bucharest, 2003, p. 129

individual rights referred in his manual to the "subjects of civil law"[10], but later, in 2007, in the course of Introduction to civil law, he speaks of "subjects' juridical relationship"[11] in a formula that he finds it desirable. One can assume that the distinguished author has considered the same reality, noting that the meaning of the term "civil law matters" is totally in disagreement with its usual topics according to which civil law matters can be just legal issues. We may accept the fact that a number of terms in everyday speech can get technical meaning in legal language but we believe the loan of legal terms should not alter the regular meaning to a large extent, especially where there are alternative expressions in national language. Moreover, an argument of authority is given by the Romanian Language Dictionary of Pronounciation, Spelling and Morphology elaborated by "Iorgu Iordan" Linguistic Institute of Romanian Academy according to which the plural of the word *subject*, meaning the person, is *subjects* and *not subject matters* because there is an individual represented by the person, who is subject to all civil rights and obligations. Therefore, the agreement must be made between man and matter and not between the person or party and subject. *Per a contrario*, if every time we related to the quality of various participants in legal relations, we would get to talk about "contract issues", "procedural matters", "payment issues". Last of the phrases is exactly the name that the new Civil Code gives the Section 2 of Chapter I of Title V, "Execution of obligations." The expression is utterly wrong because this time, the phrase "Those who can pay", the marginal name of art. 1472 NCC, refers not to the individual as subject to law, since payment can be made "even by a third party in relation to that obligation," as expressed by the rule.This choice of terminology in the new Civil Code is unique, because the other code, the Code of Criminal Procedure, provides in art. 32 that "the parties are subject to proceedings ...", This are small errors that can have serious consequences,a reason for which we militate for the generalization of the phrase "subjects of civil law" and, on a larger scale, "subjects of legal relationship", both in law and in doctrine. Even though the discussion may seem frivolous, we believe that a legal system, especially one which we claim to have been reformed, must be recommended by the consistency of terminology, mainly when it comes to terms that constitute the primary tools of normative or doctrinal legal discourse.

2. "Respect for human beings and their inherent rights."

This is the title of Chapter II of Title II dedicated to the natural person in the new Civil Code, that contains the most severe interventions on the proposed texts in the first variant of the new Civil Code Project, published in 2004, as far as both the terminology and systematic rules are concerne – aspects that require our attention:

-In addition to the lack of correlation of terminology in which the rights are subject to systematic regulation, the idea of "respect" is a formula imported from the Civil Code of Quebec. In order to get to the respect for individual rights and values, this code taken as a model of regulations, is based on some general statements regarding the usage and function of such rights. But the logical sequence of statements should not begin with „respect" for something that is not firstly defined. Then, the very idea of relying on "respect" in the title of Chapter II, Title II and Sections 3 and 4 in the new Civil Code is questionable. Legally, respect for a person's inherent rights is equivalent to the obligation imposed on those that are binding. It finds its place within the framework of the rule and not in the name of material subject to regulation. Then, supposing that such a formula were

[10] O. Ungureanu, C. Jugastru, *Civil Law. People*, Ed Rosetti, Bucharest, 2003, p. 17

[11] O. Ungureanu, *Civil. Law. Introduction*, 8th Edition, Ed C.H.Beck, Bucharest, 2007, p. 71

more desirable for imperatively advancing respect for the above mentioned rights as stated in the section name under which rules are arranged, then the consistency of terminology would have imposed the repetition of the same expression in all other essential rights of the person. Yet, the authors of the normative texts only partially conformed themselves to the necessary self-imposed requirements, because, while Section 3 is called "respect for privacy and human dignity" and Section 4 "respect due to a human person after its death ", Section 2 is no longer aligned to the idea of respect, being entitled only as " the rights to life, health and integrity of the individual " as the entire chapter ought to have been called.Such designation of Section 2 is also bold because announcing, for example, the right to life as an object of regulation, it leaves room for expected legislation to be conceived, if not exhaustive, at least significant, on a number of current aspects which were subject to interesting debates in law theory and jurisprudence and regulated in various ways by different European civil law, such as the right to life of an unborn child, the right to die, etc.. No article is devoted to the right to life, *inter alia* included in the phrase "inherent human rights," about which Art. 61 states that "are equally guaranteed and protected by law." Thus the attention to the new legislature is unevenly distributed to inherent human rights, being focused on disturbing privacy in complete disagreement with the order of preference of the Code of Quebec which has inspired the new regulations. Privacy that has proven to be a subject of great media impact, being much debated in the press, often with emotional and partisan accents, should not have led to the unequal treatment of other fundamental rights pertaining to individual existence;

- the simple translation of phrases used by the Code of Quebec leads to incorrect expressions in terms of Romanian grammar. Instead of expressing the need for due respect for the human person, the current text induces the contrary idea, that human being would be the one that owes respect to someone else[12]. The meaning would have been completely different if the text had referred to "respect for human beings and their inherent rights" or to the phrase" "respect due to human beings and their inherent rights" as it is stated in Section 4 which is called, correctly this time, "the respect due to a person and after death. For the same reasons, the correct expression of Section 3 was "respect of privacy and dignity of a person" and not "respect privacy and (!) human dignity, thus avoiding a contorted expression;

- by a failure in systemising the rights pertaining to individual existence, the new Civil Code introduces a number of questionable distinctions in this matter. Although the entire Chapter II in Title II is dedicated to inherent human rights, in art. 61 para.1, called *inherent human rights guarantee*, there are considered only life, health as well as physical and mental integrity. Then, even though in art. 58 in the new Civil Code there is an inventory of the rights of the person, which includes the right to life, health, physical and mental integrity, the right to privacy and the right to self-image, when referring to protection of human personality, through a general and imprecise expression, Art. 252, New Civil Code, says, this time, that the individual is entitled to protection of the "values closely attached to human being such as life, health, physical integrity, dignity, intimacy of private life, scientific, artistic, literary and technical creation and any other non-property rights." Such statements add more smoke in a fog already existing in the field, especially after being included in the rights of every human being closely linked to creative works and any other non-property rights ... Furthermore, the claim for an exhaustive approach to

[12] Title of the Civil Code of Quebec. For accurate translation of the expression into Romanian would not have the same meaning, the new Civil Code reads Section 4 of Chapter II, "the respect due a person and after death"

personality rights, a matter so delicate and nuanced, is excessive, even beyond the legislation that has inspired the new Civil Code. Title II of the first book of the Civil Code of Quebec, is more cautiously known as "Certain rights of personality" and not "The rights of personality". Let us not forget that the term "personality" is polysemantic. First, it denotes a person's ability of having rights and obligations, on the other hand the term refers to the inherent natural rights, equal among them selves. A third meaning of the concept of personality, usually less in the view of civil law and more in that of criminal law, aims at individual particularities, i.e. everything that makes the person different from all others, the physical, moral, intellectual status within an incomparable, distinctive and unrepeatable individuality. This distinction is found in moral damage issues, the ones that involve harm of strictly personal moral values, areas where sensitivity is always different in people, making legal treatment different in accordance to particular features;

- referring to the right to dignity, normative texts have a different approach: while the art. 58, the new Civil Code includes among the individual rights the right to "honour and reputation" , in art. 72 the same right is called the "right to dignity" and according to par. 2, it refers to ... honour and reputation;

- freedom of expression, although not included among the rights inherent in human nature, as it ought to, is nevertheless included in art. 70, Section 3 of the new Civil Code as "respect for privacy and dignity of human person", without showing the link between freedom of expression and the right to privacy. Such a relationship is to be found in standard art. 30 point 6 of the Romanian Constitution, stating that "freedom of expression can not harm the dignity, honour, privacy of a person and the right to self image." In the absence of limits of free speech, its inclusion in Section 3 of the new Civil Code and its omission in the previous listings are difficult to explain.

3. Infringement by "prejudice", "harm", "damage".

The traditional generic term "infringement" is often replaced by the new Civil Code with expressions such as "encroachment" upon somebody s right or interest or "lesion" of the rights, terms that are sometimes synonymous with "breach" and sometimes with "violation" of personal right. A variety of such formulas can introduce legal terminology distinctions which are either artificial or inaccurate, affecting the accuracy of some regulatory propositions. "Encroachment" / *Atingere (Ro)* is a term that can be encountered in the field of rights to life, health and integrity of the individual, in art. 62 para.1 according to which "no one can encroach upon human species "[13], in art. 64 on "encroachment upon human integrity"[14], in art. 72 in relation to any "encroachment upon honor and reputation", and in art. 74 focused on more "encroachments" upon privacy. In our opinion, the term "encroachment"/ *atingere (Ro*) used by the new Civil Code is inadequate for several reasons:

-firstly, this word designates both facts of violation of rights to privacy and human dignity and their consequences, contrary to requirements imposed by rules of legislative technique that legal terms must be used with the same meaning;

-this term in French is different from the Romanian counterpart. According to the Explanatory Dictionary of Romanian Language, the word "encroachment"/ *atingere* means, first, the action of "taking direct (but shallow) contact, slightly or in passing, with one thing or area, unlike the ordinary meaning of the word French *"atteinte"* which has a

[13] The text is taken from Art. 16-4 , French Civil Code stating that "nobody can harm the integrity of the human species"

more offensive meaning[15]. Here it means action that leads to injury, harm, damage and the harmful result, a meaning which the Romanian equivalent term can acquire only by a metaphorical expression. In the definition given by a French legal dictionary, frequently used by civil law doctrine[16], the term "atteinte" means "action directed against something or someone by direct means, action that may be" material (degradation), immaterial (offence), injury (lesion), legal (robbing) as well as the injurious result of these actions, damage, prejudice."[17] As it is polysemantic, this term should have been avoided, or if it had been considered preferable to the traditional terms of "violation" or, as appropriate, "harm" it would bave been necessary a preliminary definition of the term as required by the legislative technique according to which "if a concept or a term is not established or may have different meanings, its significance in the context is established by legislative act which put them in the general provisions or in an annex for that vocabulary, thus becoming binding regulations of the same material"[18];

- the new Civil Code uses only sequentially the ambiguous term "encroachment"/ *atingere* avoiding it in the above mentioned related materials, which, again, is questioning the homogeneity of legal language, contrary to the provision of art. Art. 35 para. 1 of Law no. 24/2000 on the rules of legislative technique normative acts according to which "in legislative language the same concept is expressed only by the same terms." Thus, art. 253 of the new Civil Code refers to "the individual whose non- patrimonial rights have been violated or threatened..." and not encroached or upon which encroachment have been made and the same situation is in Art. 255 para. 6 that refers to "... defence against violation of patrimonial right " and not to the encroachment upon this right. The evidence is clear that these texts belong to different authors and that they were not linked;

-the inclusion among other "encroachments"/ *atingeri* upon privacy in art. 74. a, "taking any object from it (*n.*dwelling) without the consent of the person who lawfully occupies it" [19] after the model of art. 36 Section 1 of the Civil Code of Quebec, is questionable, given that such a deed is called theft, about which it could hardly be said to be directed towards and against privacy. The right to privacy is infringed upon since the momemt of entrance or entry or of refusal to leave the dwelling, so that subsequent actions merely duplicate the interference;

- "encroachments"/ *atingeri* can be both harmful to the interests of victims, as in the case provided by art. 1359 of the new Civil Code and independent of any prejudice, such as those in art. 74 making the newly introduced term ambiguous and thus affecting the accuracy of expression in regulations;

- before listing them in Art. 74 n.C.c., it would have been preferable a statement of principle to define such "encroachments"/ *atingeri*, stating their illicit nature and avoiding the repetition of the phrases "no right" or "without consent" in all ten inventoried situations . The option is in disagreement with the provision of Art. 69 n.C.C., which this time considers "unlawful encroachment", which can by itself entitle the court to take measures to end it. Because this rule establishes a principle regarding not only the rights to the integrity of the human body but also all non-property personal rights, it should have been

[15] In French, crimes such as espionage, assassination, conspiracy to are grouped under the title *des atteintes aux intéréts fondamentaux de la nation* and phrases such as *atteinte à la Constitution, atteinte à la pudeur, atteinte sexuelle, atteinte mortelle*, have no counterpart in Romanian language

[16] G. Cornu, *Vocabulaire juridique*, Presses Universitaires de France, Paris, 2007, p. 88-89

[17] Ibid

[18] Article 35. 2 of Law no. 24/2000 on the rules of legislative technique normative acts

[19] It is a less elaborated text that also lacks good grammar. In order to make sense, the text could have referred to "taking any object from the housing without the consent of the legally responsible person

included in the "common provisions" for personality rights. The same consistency was supposed to determine the name of art. 74 n.C.C.as "unlawful encroachments"and not to any detriment to the rights, an expression that is too general and ambiguous;

- another objection concerns the elliptical character of the marginal title, "Limits." in art. 75 n.C.c. Does the point of discussion regard the limits to the rights provided in this section as one might be inclined to consider when reading paragraph 1 of the norm or the limits of the rule violation of these rights, resulting from the provision of paragraph 2? The question could have been avoided if the stext had adopted the solution under the provision of art. 8 paragraph 2 of the European Convention on Human Rights, which uses the term "interference"[20]. In Romanian, the term "interference" has, this time, the same meaning and is in present use of the new Civil Code in art. 71, regarding privacy, para. 2, that "No one shall be subjected to an interference in private, personal or family life ...". In this regulatory context, it is not clear why art. 75, instead of some generic reference to "limits" has no reference to lawful or legitimate interferences. Provided that the text authors had wanted to *tale quale* take the terminology of Quebec Code, they could have used the syntagm lawful or legitimate encroachment. Therefore, in order to be considered as encroachment to privacy, interference must be unlawful, or, if one prefers a more general formula, illegitimate, while its opposite, the legitimate interference, although violation of privacy, is not penalized. If we accept that, in the case of interception of conversations, we are faced with a breach of privacy simply because the law allows interference, we will accredit the idea that human rights are to be left to the discretion of the authority, when in fact they are natural rights, binding authority. Any limits or conditioning concerns the exercise of law and not its existence as appropriate, as stated in paragraph 2 of Art. 8 in European Convention on Human Rights;

- in other situations, "encroachment"/ *atingere* is equated with injury. The preference of the authors of the new texts for this term is also present in the field of liability in tort. Under provision in art. 1359 n.C.C., which has as marginal name "compensation for prejudice consisting of violation of a personal interest," the author of the illegal act is obliged to compensate for the caused injury even when this is a result of "encroachment"/ *atingere* upon an interest of another.[21] Not even here the word "encroachment"/ *atingere* does not give more precision to the normative expression. On the contrary. What else would the "encroachment"/ *atingere* upon an interest consist of if not in its violation? Consistency of legal language requires the use of the same legal terms, even with the risk of recurrence, as it happens with another legislative text, the one in art. 1360 n.C.c. on self-defense, when the designating syntagm appears both in name of regulation and in the case described by the rule;

- another regrettable distinction introduced by the new Civil Code is that between and to damage." The legal definition of abuse as in art. 15 n.C.C. is that "No right can be exercised in order to harm or injure another person, or in an excessive and unreasonable manner, contrary to good faith." It is hardly understandable the fact that the meaning of the term "harm" in Romanian has been ignored. According to the Explanatory Dictionary

[20] The official version of the translation of the Convention, takes the term "interference" (ingénce), while Professor C. Bîrsan in the paper The European Convention on human rights work. Comments on articles. Vol I. The Rights and Liberties, Ed All Beck, Bucharest, 2005, p. 591, uses the Romanian term "mixture" and the new Civil Code uses the term "interference" (Article 71 para. 2). It is a happy example when Romanian terms have approximately the same meaning as those in French, which is not the case of "to encroach"(atteinte)

[21] Because the standard regards "damage repair ..." , its natural place was in the 6th section of the same chapter, called "compensation for tort liability"

of Romanian language, "to harm" means to inflict upon personal health and body integrity or to cause damage, to injure[22].

Probably the intention of the authors of the text to distinguish between moral and material damage is not supported by the terms used, because to harm means to cause not only moral lesion but also material damage. Furthermore, the wording itself is not beyond all criticism. The expression in the text related to the exercise of the right "in order to harm or damage another person or in an excessive and unreasonable manner, contrary to good faith" does not communicate clearly enough the solid distinction between two ways of exercising the right so that a superficial reading of the text could induce the idea that both forms of exercise of the right "to harm or damage" and "excessive and unreasonable .." would be subsumed to the aim in view of the holder, when in fact, the authors intention was to combine two conceptions of abuse as well as to distinguish between them: the subjective concept, which seeks evil intention of the holder and the objective conception, which is focused on abuse in any exercise unreasonable, excessive exercise of right. In order for this distinction to be as clear as it is necessary, both concepts should have related to the exercise of this right, even at the risk of repeating this phrase;

- in the new Civil Code, a substitute term for "harm" is "lesion". Rule in Art. 253 n.C.C. entitled, "Defence measures" in para. 1 refers to "the individual whose non-property rights have suffered lesion or have been threatened, can any time ask the court..." the consequent measures. The same term is used in par. 2 of this rule, at art. 254 para. 2 n.C.c.

Even if the term "lesion" seems more appropriate in matters of personal non-property rights because it mainly suggests moral consequences of their violation, it remains subordinate to the generic idea of "harm", which means, among other things, "lesion". Another term " infringement" is sometimes used with the same meaning as "encroachment/ *atingere* upon the right", sometimes with a different meaning. The same meaning of the two term is found in art. 253 para. 3 n.C.c. that ".. the one who has suffered an infringement of such rights (in art. 252) may petition the court to force the author of the crime to perform any action deemed necessary by the court in order to restore the encroached right.. "[23]. Although it was not necessary, the authors of the text doubled the term " infringement" with "encroached right.. " without any rational explanation. In a logical expression, restoring refers to the infringed right, the one envisaged by rule and not to the . "encroached right". The concern for avoiding a possible repetition of the phrase " infringed right" cannot be persuasive, given the fact that in the same text, another word "court", is repeatedly used, although it could have easily been avoided.

Similarly, Art. 69 n.C.c. uses the phrase "unlawful encroachment upon" with the same meaning as "infringement of the right". Otherwise, art. 75 of the new Civil Code provides that "encroachments permitted by law or international conventions and pacts regarding human rights to which Romania is a party do not constitute an infringement of the rights provided in this section."[24] The elliptical nature of the marginal name of art. 75 n.C.c., "Limits." is worth being highlighted. Does it refer to the limits to the rights

[22] The current regulation has been conceived as different from the version of the Project draft published in 2004 that used together the words "loss" and "injury" without providing a criterion of distinction. Thus, in civil liability the new Civil Code exclusively envisages injury. Under these conditions, the term "damage" in the definition of abuse is an unusual presence in the general legal language of the new Civil Code. To distinguish between the two concepts, see S. Neculaescu, *Critical remarks about the moral damage compensation legislation in the new Romanian Civil Code*, Law no. 5 / 2010, pp 42-43

[23] The text could have been more carefully conceived, avoiding the repetition of the word 'court'

[24] gfnnvbnvb

provided in this section as one would be inclined to believe reading paragraph 1 of rule or to the penalty limits of infringement of those rights, resulting from the provision of paragraph 2? The question could have been avoided if the text had adopted the solution under art. 8 paragraph 2 of the European Convention on Human Rights, which uses the term "interference"[25] which is translated into Romanian language as "interference" with the same meaning this time. It can also be found using the new Civil Code art. 71, regarding privacy, para. 2, that "No one shall be subjected to an interference in private, personal or family life...". In this regulatory context, it is difficult to understand why art. 75 n.C.C., instead of referring rather generically to some "limits" has no focus on lawful or legitimate interferences. And if the authors of the text had insisted on *tale quale* taking the terminology from Quebec Code, they could have used the syntagm lawful or legitimate encroachments, as in the Swiss Civil Code art. 28 index 1, par. 1 which states that "the one who suffered an illicit encroachment upon his/her personality may sue any person who participated." Paragraph. 2 of the same text states that " encroachment is unlawful when it is not justified by the victim consent, by a predominantly private or public interest or by law." Once the encroachments upon privacy had been listed in Art. 74, part of the art. 75 n.C.C., establishing the exceptions, harmonizing the two statutory provisions required clarifying of the ones which "do not constitute encroachment upon privacy" and not " infringement of the rights provided in this section ...". Another questionable expression in the new Civil Code is the one in art. 253 para. 3 that "... the one who has suffered an infringement of such rights may require ..." This time, the violation stems from the fact, and the idea that the owner would "suffer" infringement is inappropriate. The distinction made by the authors of the texts between "encroachment" and "infringement" is counterproductive. The assertion that " encroachments which are permitted by law or international conventions regarding human rights to which Romania is a party do not constitute an infringement of the rights, is in my view, partly true. On a careful examination of the facts of art. 74 new Civil Code, one can see that a majority of them relate to offenses that violate the rights the holder may have, where the rule *Volenti non fit iniuria* is verified. Thus, entering, staying in a house, with the consent of a legal representative, capturing the image or voice of a person with their consent and all the other acts which are committed with the consent of the holder cannot be considered encroachment upon privacy. But when it comes to the interception without consent of a private conversation, referred to in Art. 74 letter *b*, the new Civil Code or keeping privacy under observation by any means, provided in letter *e* of the same text, facts that require the approval of competent organs other than the holder of the right, they are infringement of privacy, even though the law broadly accepts such an interference with this right. In our view, any interference, whether justified or not, means a violation of privacy, so that the idea of opposing encroachment upon the right to infringement of the right, unnecessarily complicates the legal terminology in this field.

[25] The official version of the translation of the Convention uses the term "interference" ("ingénce"), while Professor C. Bîrsan in his work *The European Convention on Human Rights. Comments on articles. Vol I. The Rights and Liberties*, Ed All Beck, Bucharest, 2005, p. 591, uses the Romanian term "intrusion" and the new Civil Code uses the term "interference" (Article 71 para. 2). It is a happy example of an instance where the Romanian words have approximately the same meaning as those in French, which is not the case of "encroachment/ *atingere*" (atteinte)

4. "Guilt of the debtor."

The new CivilCode introduced in civil legal terminology the concept of "guilt", defining it in art. 16, after the model of the Criminal Code but the responses to it followed very soon. The lady author of a recent study rightly writes that "borrowing the definitions of criminal law matters does nothing else but reopens "Pandora's box "of already existing controversies over the content of this concept."[26] The only clear effect of this "innovation" is making traditional legal terminology confusing. The prospect of a principle of "liability for guilt", as it would be named in the newly established order of terminology, is in disagreement with the general development of civil liability, which is more and more objective and therefore less interested in investigating the subjective side of the act, with all the nuances supposedly associated with it to determine whether or not the offender has foreseen, intended, accepted the injurious outcome. Liability remains oriented to the interests of the victim to be repositioned *status quo ante*, while criminal liability is concerned with the most appropriate punishment of the perpetrator.

The new regulation is different from all projects of coding European law of obligations, even from the main envisaged, the Civil Code of Quebec. Thus, European law principles of liability (Principles of European Tort Law - PETL) preserve the traditional concept of "fault" ("faute ")/ mistake, in the wording of art. 4:102 that "any person who violates, intentionally or negligently the required standard is liable to fault ", while Art. Article 1457. 2 CcQ considers as responsible the person who defying the custom or law, causes another person bodily, moral or material injury by mistake.

Imposing *guilt* in civil legal language seems to have the same effect of rejecting a graft failure by the body. The effect seems to be felt also by the authors of the new Civil Code, who simply introduced a new concept, without integrating it into the general economy of the new legal texts . How could their position be otherwise interpreted when, after establishing liability for fault, which would have required reformulation of all tort liability rules, they continue to refer to *fault* and not to *guilt* ? Thus, art. Article 1357. 2 n.C.c. states that "The author of the prejudice is liable to the slightest fault" by updating the famous adage "*In Lege Aquilia et culpa levissima venit*"? Even more evidence for our prior assertion is in art. 1358 n.C.c. that sets forth " particular criteria for assessing fault." Why should such criteria be needed as long as the author is liable to the slightest fault?

Moreover, the formal aspect requires that bringing forth a new matter and introducing new "particular" criteria should have been worth mentioning. On the contrary, reading the rule, one can learn that the discourse "circumstances under which the prejudice took place, unrelated to the person who is the author of the act..." , being too general and imprecise, cannot be considered satisfactory. In fact, the relevance of such circumstances unrelated to the author, called "external circumstances"[27] in the French doctrine, such as legal provision, superior orders, victim's consent, concerns in fact, the extent of compensation and not "the assessment of fault". If in the criminal law such an investigation is important for the individualization of punishment, in civil law rule, the extent of compensation is usually given by the extent of damage suffered by the victim, not to mention contractual liability, which, according to art. 1548 n.C.c. 'Fault of the debtor of a contractual obligation is assumed by the mere fact of non-performance." Our doctrine tends to use a single terminology in the field of liability, borrowing solutions and terms of

[26] L.R. Boilă, *Guilt - "the eternal lady" of tort liability*, Romanian Private Law Journal, no. 2 / 2010, p. 38
[27] *Fr. Terré, Ph. Simler, Y. Lequette*, op. cit., pp. 657-661

criminal law seem to be inappropriate with regard to the different goals of both kinds of liability. A more powerful example for the lack of consistency of the new texts, which are uncorrelated, is art. 1371 n.C.c. regarding common fault and fault competition with other causes exemption. Examining the two paragraphsit is obvious that they actually require establishing compensation criteria in relation to the causal contribution of the victim, the author and the grounds of exemption. The text is inspired by French law where the errorincorporates the deed. And in order for this idea to be fairly evident, paragraph 1 of the above mentioned rule, referring to "common fault, describes the situation in which "the victim intentionally or negligently contributed to cause or increase damage ..", which is a non sense, not to mention that placing fault with "other cases exempting" , the text focuses on the deed of the author and not on the actual fault, as this time, it is explicitly mentioned in the text.

In the field of contractual liability, "the guilt of the debtor" is treated separately, together with injury, suggesting that it would be only one of its conditions, while Art. 1547 n.C.C. states that "the debtor is obliged to repair damage caused by his/her fault", and then we learn from reading the following rule, art. 1548 of the same Code that, in fact, the guilt is presumed.

The last sample of terminological inconsistency in a wide range of unfit expressions, is the collision of two important civil law rules: although in art. 16 n.C.C. *guilt* is defined by a statement in Chapter III, called "Interpretation and effects of civil law", therefore a choice of principle that should have been followed by all subsequent rules, Art. 1457 in the same code has as a marginal name"the guilt of the debtor" and the statement is "The debtor is bound to repair damage caused by his/her fault ."

These are just some of the reasons why we consider that the new Romanian Civil Code has to undergo a certain process of revising, even avant la letter.