ABSTRACT

The paper *Donation. Comparative European private law study* aims to analyze in a comparative manner donation in the two families of European Law - continental-European and *common law*. In carrying out the comparative approach, the donation was analyzed in two legal systems belonging to each family, Romanian and French, on the one hand, and English and American, on the other hand,legal systems representative for each of the two families of law.

The paper begins with *Prolegomena* and is a structure divided further into three chapters, the first following the diachronic dimension of the donation in a continental-European and *common law* families of law and the other two consisting of comparisons internal to each family of law between the legal systems chosen.

In *Prolegomena* we are principally focused onthe research object, elucidation of concepts addressed during the paper, and in the absence of academic consensus regarding the optimal method of investigation in compared private law the justification of the method for developing the scope of the paper. In the first of three chapters, *Diachronic dimension of donation as fact and act of private law,*we analyze the common background of European law systems - the Romanian, French, English and American ones, which, though belonging to different law families share some fundamental cultural elements - the categories of Greek thought and Roman law, Christianity and modernity –which constitute*presumptiosimilitudinis*guiding the research, able to provide a common interpretation and comparison horizon beyond the disparities between the two families of law.Starting from this common culturaltrunk, we approached separately the legal profile of donation in the law systems chosen in the two subsequent chapters *Donation in the French law and in the Romanian law*and *Donation in the English law in the American law*, placing ourselves at the level of local history able to account for the peculiarities of each legal system. Finally, in *Conclusions,* the result of the comparison of donation between the two law families is coagulated, articulated in the two intermediate comparative analyses.

The beginning of the work, *Prolegomena* is dedicated to elucidating the concepts around which the researchwas structured, to announcing the contradictory relationship between the meaning of the *gift* as cultural fact and the *donation* as an act of private law, and also to justifying the methodological option.

Starting from the social report towards law, from the presumed relations of *gift* towards the legal relationships subsumed to *donation* in Prolegomena we propose both

understanding donation in terms of legal relations and deciphering the deep meaning of donation by integrating these relationships in the significant level of culture, an approach completed in the first chapter. Such analysis of the *donation* as a *gift* opened along with the epistemichorizon strictly legal a hermeneutical interdisciplinary horizon a possibility suggested otherwise, by the double meaning of the concept of *source of law* - on the one hand, that of cultural determinant in the development of norms, which implies a hermeneutical approach, of discovery of the cultural and, on the other hand, that of source of law, the approach of which is exclusively epistemic, depending on the of positivist dimension of law.

In addressing this dual object, reading *donation* as a fund of the *gift,* and vice versa, we used a variant of the method of analysis in compared European private law - the hermeneutical one of *School of organic law* developed by Professor Valerius M. Ciucă – to which we added some considerations regarding the epistemic and ontological substantiation assumed on law and the relationship between law and legal culture. The constructivist perspective is the one which relative to the object of the paper, offers an adequate palette of categories and analytical tools able to cover relations between culture and legal culture in comparative law, fields to which the donation belongs simultaneously as legal act governed by the private law of each legal system and as a *gift*as cultural fact immersed in the cultural totality and governed by customary law.

The issue announced in Prolegomena and describes in the first chapter is that the dual coding of a single social relationship in the legal terms of the *donation* and in the anthropological terms of the *gift* reveals, apparently, not the complementarity of both concepts, but a fundamental contradiction - whether private law understands donation as a unilateral contract, free and freely consented by the parties, the other field of the social and human knowledge, starting from cultural anthropology, define the *gift* as always bilateral,interested and binding.

The anthropologist Marcel Mauss is first who in the early twentieth century, by examining the gift relationships both in European cultures and in the non-Western ones, noted that the gifts, although they took on the form of gratuity, were exchanged imperatively following a triple obligation to give, receive and respond with a new gift. The gifts mask consciously or not, the interest, desire of participants to form a social link, to obtain a privilege or a symbolic win, cultural anthropology being the one that realizes the extent to which the reciprocity of the gift came in the most intimate spheres. Heavily structured culturally, the gift is the act signified par excellence, governed by implicit rules, which dictate, in addition to the triple invariableMaussian

obligation,features referring to who may provide, in what manner and what constitutes a gift appropriate to the context. All these rules governing the exchange of gifts are related to the implicit field, the two speeches seemingly contradictory around which the first part of the work was organized, on the binding, interested and bilateral gift, and on donation as a voluntary, free and bilateral act, being placed in dialogue in a complementary manner - although the cultural, customary rules require a particular profile of the gift, as long as these rules remain implicit, the donation may have contrary legal characteristics imposed by private law - unilateralism and gratuity.The *gift* and *donation*, seemingly contradictory concepts are found in a genealogical order, the gift representing the fund legally modelled by donation, so the latter being decipherable from the perspective of the former - ingratitude, as grounds for revocation of the donation is what the French and Romanian systems of law, unlike the *common law* ones, extracted from cultural profile of the binding gift, and the cause of the contract, to the extent that it cannot be tested, can hide the donor's interest, not altering the unilateral and free nature of the donation. However, for the parties involved in the social report marked on one hand as *gift* and on the other hand as *donation*, the rules to follow, although seemingly contradictory, overlap progressively into a non-exclusive manner - before being conscious of its integration in law, people internalize individual entry in a world with meaning, and, as such, before having a representation on the legal connotation of the act concluded as donation, the parties have the profound meaning of the gift.

The relationship between *gift*as a cultural fact and *donation*as legal act is one of gender-species, the gift being found both as donation and as business practices in which gratuities are used in various marketing strategies in the form of acts prohibited by criminal rules as gifts aimed by corruption offenses, or as organ and tissue donation.

The donation, as private law legal act under a relationship of inclusion with social relations underwritten to the *gift* involves only those transfers by means of whichthe donor, with the intent to gratify, transfers free of charge and irrevocably a good to the donee who accepts it.

The legal profile of donation in French and Romanian legal systems, unlike the systems of the *common law*, considers the affiliation of donation in the category of gift and the role that such acts have in interpersonal relationships - both French Civil Code and the Romanian Civil Code provide for the possibility of revocation of donation for certain ingratitude cases, the obligation of gratitude being assumed by the donee upon

acceptance of the donation and the prohibition of certain donations to certain categories of persons by establishing relative incapacities to receive.

Continuing the analysis of the relation between donation and gift, Chapter I,*Diachronic dimension of donation as fact and act of private law* follows the analysis of the common cultural fund donation in European law systems, in the Greekancientculture, in Roman law and cultureRoman, as well and the influence that Christianity had in order to impose a certain practice to dispose by means of gifts, by also advancing a particular conception, religiously motivated, that of gratuity.

The gift driving a counter-gift, generating a spiral of gifts between the parties, occupied a central position in Greek ancient society, and included not only free transfers of goods, but also services, in ancient Greek the word *evergesia*meaning acts of charity including material transfers and services.

In Roman culture, of a society deeply stratified and marked by the importance given to the acquirement of recognition and avoidance of loss of honour, gifts and donations all took place at all levels of society, fulfilling various functions in the social, political and economic area. Each social category benefited from the gifts, and this vision of gift relations existing in all the dimensions of Roman society are confirmed by Cicero and Seneca, who found that the gift relations were the binder of Roman society.

The first consecration of donation in the Roman law aims to prohibit a category of donations- a first restriction of donations is brought by *Lex Publicia de cereis* in 209 BC, forbidding employers to receive from their clients goods other than candles during Saturnalia, being considered that, given the relation ofsubordination between patron and client, the former would subject the latter to pressure in order to dispose by donations in its favour, and*Lex Cincia de donis et muneribus*, plebiscitum adopted during the Republic in 204 BC under tribune CinciusAlimentus, forbade on the one hand the donations *ob causa oranda*, and on the other hand, all *ultra modum* donationsexceeding a certain value.

Before addressing limitations or legally prohibiting certain donations, the research oriented towards the analysis of donation in the old and classic Roman law where gratuitous transfers were made in derived conventionalists ways of acquisition of property and by solemn contracts and in the Roman postclassical law where the donation pact is recognized and various forms of donation are contained, such as a stipulation for another as exception to the principle of *res inter aliosacta*, endow and *ante nuptias*, donations between spouses or exemption of debt.

Christianity would impose donation in the European area as an expression of generosity, in the form of two new types of gifts - *eulogiai*, priestly gifts to the clergy and church institutions, and philanthropic gifts, by virtue of*officiumpietatisergaproximos*. The gift of charity introduced by Christianity, and which was gradually establishing itself in the 3rd century in the Empire works according to principles other than mandatory public gifts in the Greek-Roman antiquity as *evergesia* or patronage by means of which the wealthy elite contributed from their personal property for financing events or public works - monuments, temples, public baths, amphitheatres, banquets, festivals, military campaigns, gladiator fights, athletic games, etc. Unlike charitable gift, the antic gift can be offered only by the elite, the aristocrats being the only ones called to make such gifts, the recognition of the statute, the glory being fully granted to them. The basis for this practice was entirely secular, the gifts being arranged by virtue of civic obligations in the achievement of the wellbeing of the city and of the citizens. In contrast to elitism specific to the Greek-Roman world, the gift of charity is universal and is addressed to all Christians regardless of wealth or status, the city and citizens as preferred target to which the public gifts were headed being replaced by a more general category, which extended beyond the borders of the city throughout the empire, the poor. In the Greek-Roman antiquity, although they offered gifts to the poor, favouring this category as favourite gratified, as main done of the public gifts, is totally foreign to the practice of the aristocratic gift.

Along with the association of the gift with divine grace in Christianity for the first time in Western history a concept of the pure, gratuitous, selflessly gift appears outlined, with the hidden intention of awaiting a counter gift but from third parties or from the person of the gratified. Unlike Roman Stoicism, which in turn promoted the selfless gift, the Christian gift has its origin in a human act, it is not consumed entirely in this world and it does not pursue a utilitarian calculation subsumed to certain virtues that drives social recognition.

Along with the Reformation in the sixteenth century, Protestantism encouraged a different type of behaviour in relation to the disposition by donations for charitable or philanthropic purpose, closely related to the emergence of a rationality and tools specific of the market economy. Introducing the relation to divinity, Christianity turn every Christian into a potential donor, encouraging detachment from material accumulation, the imitation of the divine example by conditioning salvation by the good works in this world, turning the gift to those in need into a means to acquire salvation .

The reform centred on the doctrine of predestination, favours the one hand the rational guiding of the acquisitive impulse towards gaining the success-profit as a sign of divine grace, and on the other hand it keeps the relationship with divinity, but, unlike Catholicism, removes any religious significance of the charitable gift which becomes rather a reckless act than a moral gesture.

The second chapter of the paper,*Donation in the French law and in the Romanian law*, is dedicated to the comparative-historical analysis of the donation in the two legal systems. The legal profile of donation was analyzed in its development, from the initial impulse printed by Roman law, both in the Gallo-Roman antiquity and in the Dacian-Roman onesup to the forms enshrined in the current French and Romanian civil codes. Although the Roman occupation of Antiquity of the current French territory had as a correlative effect the legal unit due to the wide application of the Roman law, alongside the local customs in the territories conquered and transformed into provinces, barbarian invasions led to a fragmentation of law according to a personal and subsequently territorial criterion. Roman law continued to be applied in the southern provinces where written law was applicable, and in the northern provinces, where they applied customary laws strongly influenced by the Roman law, such as*Lex Burgundionum, Lex Gundobada*, *BreviariumAlaricianumand Lex Visigothorum*.

Customary plurality ended along with the issuing of the *Order on donations* from 1731, by Henri-François d'Aguesseau, chancellor of King Louis XV, ordinance which is an important source of influence on the donation profile from the Napoleonic codification. *Intermediate French law*, one of transition between the *Old law* and modern law is the one applicable during Revolution, between two significant moments –transformation of *General states* in the *Constituent National Assembly* and adoption of the Napoleonic Code. Transmission property by gratuitous acts was considered by the participants in the Revolution as the main method of reproduction of feudal inequality. Therefore, the National Convention during the Terror, by a decree in 1793, prohibited any transfer free of charge from parents to progeny, subsequently any donations being prohibited, regardless of the quality of the parties.

The Roman law was also imposed on the Dacian population during the Roman occupation. Until the 15th century when the rulers, with the support of the Church, introduced the first written laws, *the law of the country*, represented by customs, was the sole source of law applicable in the Romanian space.

If the Roman law was received by a first synthesis in the Dacian-Roman Antiquity, representing the basis of unwritten law of the country, the second reception

of Roman law took place in the medieval period, when for the drafting of the rites legal Byzantine institutions, especially those of the postclassical Roman law were retrieved, keystone of which is the work developed by Justinian, taken over and adapted by the Byzantine emperors. In the second half of the eighteenth century the western influence began to be felt, several royal decrees regulating different subjects of private law. The donation was regulated in *SobornicesculHrisov al Moldovei* (Charter of Moldova) from December 28, 1785, during the reign of AlexandruMavrocordat, a charter which contained a number of provisions applicable to the contract, where, along with those on exchanges and sales, we can also find some texts governing the donations in *Calimach Code* of 1817 which included a detailed regulation of the donation according to the model of the Napoleonic Code, and in *Caragea's Law* in 1818. The adoption of the Civil Code in 1865 after the model of the Napoleonic Code of 1804 had the effect of regulation of donation in a manner similar to that of the Romanian and French law system.

Donation in the current French Civil Code and the Romanian Civil Code in force was further analyzed accordingly, pursuing in a first stage, the concept of donation, legal characters, interpretation and delimitation of the donation contract in both systems of law. Both French law and the Romanian law operate with an identical concept of the donation contract - that solemn, unilateral and free of charge contract by means of which the donor with liberal intention, actually and irrevocably disposes of a good or a property in favour of the donee who accepts it. The legal characteristics of the donation contract were analyzed successively, starting with the unilateral nature, gratuitous character, indicating simultaneously to the donation as liberality, distinct from other gratuitous transfers by means of which a decrease of the donor's heritage does not take place, and towards the smoothing of the gratuitous character in case of the donation with encumbrances, the commutative character, and continuing with the solemn character, the ownership translative ones and the irrevocable character.

The comparison was based on the analysis of the conditions of donation contract validity, substantive conditions, related to capacity, consent, object and cause, and form which must be observed at the conclusion of the contract. Subsequently we analyzed in a comparative manner the principle of special irrevocability of the donation and the exceptions to this principle, the consequences of the donation contract and atypical donations represented by the manual gift, simulated and indirect donation.

The third chapter*Donation in the English law and in the American law*is organized into two sections, the first one concerning the concept and essential

elements of donation in *common law*, and the latter analyzingthe conditions of validity and ways of achievement of donation in English and American legal systems. Definition of donation made in the *common law* doctrine provides that the donor must submit the ownership or other real right (*ownership interest*) to the donee without consideration and with *donative intent*. Therefore, in *common law*, donations (*gifts*) present essential characteristics similar to those of the donation contract analyzed in French and Romanian law - firstly, the transfer must take place *inter vivos*, secondly it should be a free transfer (*without consideration*), thirdly this transfer involves a subjective element consisting in the intention to donate (*donative intent*), and, lastly, the transfer involves an objective element, which consists of the ownership or other real right (*interest*), transferred from the donor to the donee.

Although these essential elements are common to donation in two families of law, continental-European and *common law*, and for the valid conclusion of a donation, the donor's acceptance is required, the place that the donation occupies in the Anglo-American right is not next to contracts and the continental-European family, but is treated as an aspect of *property law*. Thus, while in continental-European law donation, as agreement of will, is implicitly a contract in *common law*, although there is an agreement of wills to be in the presence of a contract the transfer must be *with consideration*. As such, the donation, as a transfer *without consideration* and without having a contractual nature, is treated in the Anglo-American law as *donative transfer*.

The gratuitous element involved the delimitation of the concept of donation from that of contract in *common law* researching the perspective advanced by the jurisprudenceon the *consideration doctrine*. The variants of the doctrine specific to the English law under the form of *nominal consideration* and to the American law as *pretense doctrine* revealed the fact that if a donation is always free and never a contract, a contract may be used in carrying out the operations which in French and Romanian law represent donations with encumbrances or indirect donations.

The subjective element involved the analysis of the *donative intent* and the investigation of the objective elements allowed the delineation of donation from other free agreements in *common law* and an analysis of the *donative transfer* in English law and American law.

Validity conditions of the donation in *common law* implied the investigation of the capacity and consent in achieving a transfer free of charge. Unable to give under *common law* are the minors, the persons placed under protection, and, on the capacity of the legal persons, companies in English law and corporations in American law were analyzed separately. Regarding the incapacityto receive, we analyze the situations of

the unborn child, minor and legal persons in the English and American law. In the jurisprudence of *common law* some situations where it is presumed that certain categories of people have influenced the donor (*presumed undue influence*) to dispose with free title in their favour were crystallized setting for physicians, priests, lawyers and people assimilated, tutors and legal representatives the incapacity to receive from those whom they assist or for whom they are caring.

The consent to make a free transfer must be uncorrupted, in *common law*finding the same vices of consent as in French or Romanian law - error (*mistake*), *undue influence and fraud*, under the two alternatives of English and American law, and *duress*.

As embodiments of donations, they can be made either by transfers governed a*t law* or transactions governed by*equity*. Free transfers governed *at law*are the ones achieved through the preparation and remittance of a document subject to certain formalities (*deed*) or those that are made by *delivery*. Donations governed by *equity* are made through a *trust* or the ones protected by *estoppel* doctrine, in both its forms, *promissory estoppel* and *equitable estoppel.*