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APLICATII ALE RASPUNDERII CIVILE IN CAZUL REGULII "NEMO AUDITUR PROPRIAM TURPITUDINEM ALEGANS"

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Rezumat: *Adagiul "nemo auditur propriam turpitudiniem alegans" (nimeni nu este ascultat cand isi prezinta propria-i indecenta), ca aplicatie a raspunderii civile delictuale are ca origine actiunea numita condictio cu ajutorul careia persoana ce si-a executat o obligatie in temeiul unei conventii imorale (condictio ab turpen causa) putea cere restituirea prestatiei.*

In situatia insa cand atat reclamantul cat si paratul se faceau vinovati de imoralitate actiunea in repetitiune trebuia respinsa in baza adagiului "in pari causa turpitudinis cessat repetitio", ce reprezinta o forma primitiva a regulii "nemo auditur propriam turpitudiniem alegans".

Fundamentul regulii rezulta chiar din formularea sa care lasa sa i se intrevada natura morala, ea reprezentand de fapt un refuz la actiune pentru cei care urmaresc sa se foloseasca in fata justiei de actele lor rusinoase.

Intr-o alta ordine de idei , este de remarcat faptul ca doctrina nu a avut o pozitie unitara cu privire la aplicarea regulii opiniile fiind impartite, unii autori admitand fara rezerve aplicarea regulii, in timp ce altii se declara impotriva aplicarii acesteia .

In ceea ce priveste jurisprudent, daca aceasta este unitara atunci cand afirma ca liberalitatea prin care se urmareste inceperea, continuarea sau reluarea unei relatii de concubinaj are un scop potrivnic regulilor de convietuire sociala, iar sanctiunea unui act juridic cu asemenea cauza este nulitatea absoluta[1], aceasta nu mai este unitara in ceea ce priveste pozitia pe care o are fata de finalitatea unui astfel de demers.

In majoritatea cazurilor, instantele se multumesc sa constate ca obligatia respectiva are o cauza ilicita potrivit art. 968 Cod civil fara a se preciza daca aceasta este sau nu si imorala, pentru a face posibila aplicarea regulii in eventualitatea promovarii unei actiuni in restituire a partii care a primit liberalitatea cu o astfel de cauza.

Or, in situatia in care s-ar considera ca suntem in prezenta unei conventii imorale devenind aplicabila regula nemo auditor propriam

APPLICATIONS OF CIVIL RESPONSIBILITY IN CASE OF "NEMO AUDITUR PROPRIAM TURPITUDINEM ALEGANS" RULE

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Abstract: *The "nemo auditur propriam turpitudiniem alegans" adage (nobody is being listened when he presents his own indecency), as an application of the civil criminal responsibility, has as origin the action called condictio by means of which the person who executed his obligation based on an immoral convention (condictio ab turpen causa) could ask the return of the services.*

But, when both the plaintiff and the defendant were guilty of immorality, the repetition action should have been rejected based on the "in pari causa turpitudinis cessat repetitio" adage that represents a primitive appearance of the "nemo auditur propriam turpitudiniem alegans" rule.

The rule fundament results even from its wording that allows us to see its moral nature that represents actually a refuse to act for the ones who want to use their embarrassing actions in front of the justice.

In other words, we must notice the fact that the doctrine did not have a unitary position regarding the application of the rule and the opinions are shared because some authors accept with no reserves the application of the rule, while others declare to be against its application.

Regarding the jurisprudence, if it is unitary when it affirms that the liberality by means of which we follow the start, the continuation or the restart of a concubinage relation has a purpose against the social cohabitation rules, and the sanction of a juridical act with such a cause is the absolute nullity[41], and this is not unitary anymore regarding its position against the ending of such an approach.

In most of the cases, the courts are happy to find that the respective obligation has an illicit cause according to art. 968 of Civil Code without specifying if it is immoral or not, in order to make possible the application of the rule in the eventuality of promoting a returning action of the party who had received the liberality with such a cause.

But, if we consider we are in the presence of an immoral convention, and the nemo auditor propriam turpitudiniem alegans rule becomes applicable, the

turpitudiniem alegans restiturea prestatiilor nu ar mai fi posibila.

Referitor la aplicarea regulii , este de observat ca aplicarea acesteia reprezinta de fapt o sanctiune civila ce consta in nerecunoasterea accesului la justitie, pe calea actiunii in restituire a partilor vinovate de imoralitatea conventiei lor, care astfel, sunt lipsite de protectia conferita de drept, tocmai pentru motivul insecuritatii ce l-ar produce recunoasterea unei astfel de protectii.

Majoritatea cazurilor in care isi gaseste aplicare regula nemo auditur propriam turpitudiniem alegans se circumscrie obligatiilor care iau nastere dintr-un contract si priveste actiunea in repetitiune sau in restituire.

Cuvinte cheie: *adagiu, reclamant, minor, act juridic, raspundere civila, acţiune*

return of the services is not possible anymore.

Regarding this rule application, we must notice that its application is actually a civil sanction that consists in non-accepting the access to justice, by means of the returning action of the parties that are guilty of the immorality of their convention, that are thus lacked of the protection offered by the law, just because of the insecurity that could be produced by the non-acceptance of such a protection.

Most of the cases where the nemo auditur propriam turpitudiniem alegans rule exists are circumscribed to the obligations that are born from a contract, and regard the repetition action or the returning one.

Key words: adage, plaintiff, minor, juridical act, civil responsibility, action

1. Originea si fundamuentul regulii

Nemo auditur…(nimeni nu este ascultat cand isi prezinta propria-i indecenta), este un adagio latin care se aplica in toate sistemele de drept apartinand familiei romano-germanice si exprima regula de natura morala potrivit careia nimanui nu-i este ingaduit sa traga foloase prin invocarea in justitie a propriei imoralitati.

Originea adagiului se regaseste in actiunea numita *condictio* cu ajutorul careia persoana ce si-a executat o obligatie in temeiul unei conventii imorale(*condictio ab turpen causa*), putea cere restituirea prestatiei. Acest lucru era posibil doar in situatia cand reclamantul nu avea cunostinta de caracterul imoral al conventiei. Daca obligatia avea caracter imoral doar in privinta paratului, actiunea in repetitiune era admisibila. In situatia, insa, cand atat reclamantul,cat si paratul se faceau vinovati de imoralitate,actiunea in repetitiune trebuia respinsa in baza adagiului "*in pari causa turpitudinis cessat repetitio.*"

Asadar, adagiul "*in pari causa turpitudinis cessat repetitio*" este forma primitiva a adagiului "*nemo auditur propriam turpitudiniem alegans*".

Solutia "*in pari causa turpitudinis cessat repetitio*" avea ca fundament, pe langa

1. Origin and fundament of the rule

Nemo auditur…(nobody is listened when he presents his own indecency), is a Latin adage that is applied in all the law systems belonging to the Roman-German family and expresses the moral rule according to which nobody is allowed to have advantages by invoking in justice his own immorality.

The adage origin is found in *condictio* action by means of which the person who executed an obligation based on an immoral convention (*condictio ab turpen causa*), could ask the return of the service. This thing was possible only when the plaintiff did not know the immoral feature of the convention. If the obligation had an immoral feature only regarding the defendant, the repetition action was acceptable. But, when both the plaintiff and the defendant were guilty of immorality, the repetition action should have been rejected based on the "*in pari causa turpitudinis cessat repetitio*" adage.

So, the "*in pari causa turpitudinis cessat repetitio*" adage is the primitive form of the "*nemo auditur propriam turpitudiniem alegans*" adage.

The "*in pari causa turpitudinis cessat repetitio*" solution had also as a fundament, beside the conjunct immorality of the parties,

imoralitatea conjuncta a partilor, si ideea de posesiune (*ubi dantis et accipientis turpitude versatur melior causa erit*). Ideea unui avantaj dobandit prin posesie cu timpul a disparut.

Initial, jurisconsultii romani nu aplicau aceasta regula decat daca plata (*traditito*) era facuta in virtutea unui contract imoral, afirmand ca este greseala lui "*tradens*" caruia astfel ii era ridicat dreptul la repetitie.

De-a lungul secolelor, regula "*in pari causa turpitudinis cessat repetitio*" a prins o noua forma,in timp ce caracterul sau moral s-a conturat mai bine in adagiul"*nemo auditur propriam turpitudiniem alegans*" pe care-l regasim si astazi in sistemul nostru de drept.

Deducem, din cele expuse deja,ca regula s-a conturat treptat, fara sa fie expres consacrata legislativ, fiind de o frumoasa originalitate, care demonstreaza faptul ca dreptul intreg, nu este altceva decat punerea in opera a moralitatii.

Fundamentul adagiului "nemo auditur…"rezulta chiar din formularea sa, care lasa sa i se intrevada natura morala.Regula reprezinta de fapt un refuz la actiune pentru cei care urmaresc sa se foloseasca in fata justitiei de actele lor rusinoase incercand sa obtina astfel un titlu,deoarece faptele contrare moralei nu trebuie sa produca efecte juridice si sa fie ocrotite de drept. Aceasta reprezinta, deopotriva, un fundament si o finalitate a dreptului. In orice ramura de drept ne-am indrepta privirea constatam, asa cum arata M.Djuvara[2] ca "progresul consta intr-o armonizare a dreptului cu morala si o influentare tot mai puternica a lor, in sensul ca orice fapta pentru a avea un efect juridic trebuie sa apara in lumina unei realitati morale".

Dreptul incorporeza asadar precepte morale[3], promoveaza, ocroteste, garanteaza valori morale, fundamentale si reprezinta astfel un important mijloc de educare morala[4].

the idea of possession (*ubi dantis et accipientis turpitude versatur melior causa erit*). The idea of an advantage gained by possession disappeared in time.

Initially, the Romanian solicitors applied this rule only if the payment (*traditito*) was made under an immoral contract, affirming that the "*tradens*" mistake was the one whose repetition right was ignored.

Across the centuries, the "*in pari causa turpitudinis cessat repetitio*" rule got a new form, while its moral feature gained a better wording in the "*nemo auditur propriam turpitudiniem alegans*" adage that we find nowadays in our law system.

We deduct, of the things already said, that the rule got shape gradually, without being expressly dedicated to the law, having a beautiful originality that proves the fact that the entire law represents only the application of morality.

The fundament of the "nemo auditur…" adage results even from its wording that allows us to see its moral nature. The rule represents actually a refuse to act for the ones who want to use in front of the justice their embarrassing acts, by trying thus to obtain a title because the actions against the morality must not produce juridical effects and be protected by the law. This represents both a fundament and a finality of the law. Wherever we look in a law branch, we find, as M. Djuvara[42] shows, that "progress consists in a harmonization of the law with the morality and a more and more powerful influencing of theirs, meaning that every act, in order to have a juridical effect, has to be in the light of a moral reality".

So, law incorporates moral precepts[43], promotes, protects, guarantees moral, fundamental values and represents thus an important means of moral education[44].

2. The doctrine position

The "*condictiones*" actions were allowed in the Roman law if there were an

2. Pozitia doctrinei

Actiunile "*condictiones*" erau permise in dreptul roman in caz de existenta a unei cause imorale si a unei cause nedrepte (*ab turpen vel injustam causam*). Digestele[5], atunci cand precizeaza ca "*decondictione ab turpen vel injustam causa*" reproduc, practic, un text din Ulpian care arata ca totdeauna Sabinus a fost de parerea celor vechi ce socoteau ca ceea ce se afla la altul dintr-o cauza nedreapta poate sa fie cerut inapoi printr-o *condictio*, de aceeasi parere fiind si Celsus.

Din cele expuse,rezulta ca dreptul roman nu a fundamentat o teorie care sa priveasca aplicarea regulii.

Domat[6], unul dintre vechii autori ale carui teorii au fost utilizate de redactorii Codului Napoleon, remarca faptul ca "regula nu se poate justifica prin avantajul conferit de posesie, deoarece acest lucru nu ar fi conform cu justitia". El afirma ca, "acela care face plata in baza unei conventii imorale, nu poate cere repetitia, insa cel care a primit-o nu o poate retine", fara sa indice clar de ce trebuie sa se faca restituirea.

In sens contrar, Pothier aduce argumente pentru justificarea regulii sustinand ca "*acela care face livrarea in virtutea unui contract imoral este nedemn de securitatea legilor si, in consecinta,dreptul de represiune nu mai exista conform regulilor autoritatii interioare de constiinta*".

Primii comentatori ai Codului civil au fost aparatorii fideli ai regulii considerand ca, desi este fundamentata pe o idée exclusiv morala si nu este consacrata legislativ,aceasta are totusi forta de lege[7].

O parte a doctrinei, incepand cu Laurent si ajungand la Planiol-Ripert, nu a fost de acord cu aplicarea regulii argumentand,pe de o parte,ca nu exista un text care s-o consacre, iar pe de alta parte, ca efectele nulitatilor nu pot fi subordonate unor conditii de pura morala ce ar fi de natura sa introduca arbitrariul in justitie.

De altfel, pana la inceputul secolului

immoral cause and an unfair one (*ab turpen vel injustam causam*). The digests[45], when they specify that "*decondictione ab turpen vel injustam causa*" they reproduce actually a text from Ulpian that shows that Sabinus always shared the opinion of the old ones who considered that what was at another one because of an unfair cause can be demanded back by a *condictio*, and Celsus agreed with him.

From the exposed facts, it results that the Roman law did not fund a theory that could refer to the application of the rule.

Domat[46], one of the old authors whose theories were used by the editors of Napoleon Code, notices the fact that "the rule cannot be justified by the advantage offered by possession because this thing would not agree with justice". He affirms that "the man who makes the payment based on an immoral convention cannot demand the repetition, but the one who received it cannot keep it", without saying clearly why the returning has to be made.

Contrarily, Pothier brings arguments in order to justify the rule by saying that "*the man who makes the delivery under an immoral contract does not deserve the security of the laws and, as a consequence, the repression right does not exist anymore according to the rules of the interior authority of conscious*".

The first commentators of the Civil Code were faithful defenders of the rule by considering that, even if it is based on an exclusively moral idea and it is not dedicated to the law, it still has law power[47].

A part of the doctrine, starting with Laurent and getting to Planio-Ripert, did not agree with the application of the rule motivating, on one hand that there is no text that can consecrate it, and on the other hand, that the effects of the nullities cannot be subordinated to certain conditions of pure morality that could introduce the arbitrary feature in justice.

Actually, until the beginning of the 19th century, the manifestation of the subjective rights and implicitly of the right to act was dominated by the idea of volunteerism and

al XIX-lea, manifestarea drepturilor subiective si implicit a dreptului la actiune,era dominata de ideea voluntarismului si absolutismului, nefiind de inchipuit ca exercitiul unui drept sa poata fi ingradit.

Astfel, atat Planiol cat si Duguit, Levy si altii nu au putut concepe trasarea unor limite inlauntrul carora sa se realizeze exercitiul drepturilor subiective, considerand ca aceasta ar echivala cu negarea dreptului subiectiv. Daca dreptul subiectiv exista, afirmau acestia, el nu poate fi decat absolut.

Demolombe[8], fidel acestei conceptii, motiveaza ca "justitia este una si aceeasi pentru toti; pare imposibil de admis sa existe o categorie de oratori care sa fie in drept sa spuna: accesul vostru la tribunal este inchis.Nu vrem sa va ascultam (pentru ca sunteti imorali s.n.)".

De asemenea, Laurent si Huc[9] se pronuntau in acelasi fel din teama interventiei judecatorului pe domeniul moralei si astfel introducerea arbitrariului in justitie.

Aceeasi linie de gandire o regasim si in doctrina si in jurisprudenta din tara noastra, opiniile fiind impartite fata de aplicarea regulii, atat in perioada interbelica, cat si la autorii contemporani. Unii autori admit fara rezerve aplicarea regulii, pe cand altii sunt impotriva aplicarii acesteia[10].

Desi nu este consacrata expres in legislatia romana, consideram totusi ca aceasta regula isi gaseste support in urmatoarele texte de lege: art.1 din Decretul nr. 31/1954, potrivit caruia drepturile civile ale persoanelor fizice sunt recunoscute in scopul de a satisface interesele personale,materiale si culturale in acord cu interesul public, potrivit legii si regulilor de convietuire sociala; art.5 Cod civil potrivit caruia nu se poate deroga prin conventii sau dispozitii particulare de la legile care intereseaza ordinea publica si bunele moravuri; art.968 Cod civil potrivit caruia,cauza este nelicita cand este prohibita de legi,cand este contrarie bunelor moravuri si ordinii publice.

absolutism, and they could not imagine that the exertion of a right could be limited.

Therefore, both Planiol and Duguit, and Levy, and others could not conceive to trace some limits inside which they could accomplish the exertion of the subjective rights, considering that this would be equal to denying the subjective right. If the subjective right exists, they said, it can only be absolute.

Demolombe[48], faithful to this conception, motivates that "justice is the same for everybody; it seems impossible to accept that there is a category of orators who have the right to say: your access to the court is closed. We do not want to listen to you (because you are being immoral s.n.)".

Also, Laurent and Huc[49] said the same thing because they feared the intervention of the judge in the moral field and thus the introduction of the arbitrary feature in justice.

The same thinking line can be found both in the doctrine and the jurisprudence of our country and the opinions are different regarding the application of the rule, both in the inter-war period and at the contemporary authors. Some authors totally accept the application of the rule while others are against its application[50].

Even if it is not expressly dedicated in the Roman legislation, we consider though that this rule finds its support in the following law texts: art. 1 of Decree no. 31/1954, according to which the civil rights of the physical persons are recognized in order to satisfy the personal, material and cultural interests according to the public interest, according to the law and the rules of social cohabitation; art.5 of Civil Code according to which we cannot derogate by conventions or particular specifications from the laws in which the public order and the good manners are interested; art.968 of Civil Code according to which the cause is illicit when it is prohibited by laws, when it contradicts the good manners and the public order.

Some authors[51] have correctly shown that the rule was applicable only to the immoral juridical acts, not to the illicit ones. In other words, the rule is not applicable to those acts

Unii autori[11] au aratat,in mod just,ca regula este aplicabila numai actelor juridice imorale, nu si celor ilicite.Cu alte cuvinte,regula nu este aplicabila acelor acte care incalca o dispozitie legala fara sa fie in acelasi timp si potrivnice regulilor de convietuire sociala. Opinia se motiveaza prin aceea ca termenul de *turpitudine* la care se refera regula pare adecvat numai actelor juridice imorale nu si celor ilicite stricto sensu, iar pe de alta parte, daca aplicarea maximei "*nemo auditur*…" ar fi extinsa si la actele juridice ilicite, efectele nulitatii ar fi practic paralizate in cele mai multe cazuri, validandu-se astfel indirect actele contrare legii.

Trebuie precizat, insa, faptul ca in doctrina noastra nu se face o demarcatie clara intre nulitatea pe motiv de ilicitate si nulitatea pe motiv de imoralitate a conventiilor. Distinctia se impune pentru a putea intelege cum functioneaza regula si care sunt limitele aplicarii acesteia in sistemul de drept.

In primul rand se pune intrebarea potrivit carui criteriu din varitetea normelor morale, care alcatuiesc sistemul de valori al convietuirii sociale, sunt identificate normele susceptibile de incalcare prin exercitarea drepturilor subiective si,prin urmare, sanctionabile juridic. Din perspectiva dispozitiilor art.3 alin.2 al Decretului 31/1954, s-ar parea ca, incalcarea drepturilor subiective poate atrage aplicarea sanctiunilor de drept civil pentru inlaturarea efectelor negative numai daca nesocotirea regulilor de convietuire sociala a avut ca rezultat deturnarea dreptului subiectiv de la scopul sau social economic.

Acest criteriu este insa insuficient, deoarece numai deturnarea dreptului subiectiv de la scopul sau, fara ca prin aceasta sa se ajunga la producerea altor efecte decat cele protejate si promovate de lege, nu justifica actiunea in anulare.

Identificarea *ab origine* a unei cauze ilicite nu poate conduce *eo ipso* la constatarea nulitatii actului incheiat cu astfel de cauza, deoarece nulitatea nu este o sanctiune that disrespect a legal specification without being at the same time against the rules of social cohabitation. The opinion is motivated by the fact that the *turpitude* term to which the rule refers seems to be appropriate only to the immoral juridical acts not to the stricto sensu illicit ones, and on the other hand, if the application of the "*nemo auditur*…" adage would be extended also to the illicit juridical acts, the effects of the nullity would be practically paralyzed in most of the cases, validating thus indirectly the acts that are against the law.

But we must specify the fact that in our doctrine there is no clear demarcation between the nullity based on an illicit reason and the one based on the conventions immorality. The difference is imposed in order to understand how the rule works and what the limits of its application are in the law system.

In the first place, we ask the question according to which criterion of the variety of the moral norms that accomplish the value system of the social cohabitation we identify the norms that could by disrespected by exerting the subjective rights and, as a consequence, the ones that are juridically punishable. From the perspective of the specifications of art.3, paragraph 2 of Decree 31/1954, it seems that disrespecting the subjective rights may attract the application of the civil law sanctions for removing the negative effects only if the disrespect of the social cohabitation rules had as a result the defalcation of the subjective right from its social economical purpose.

But this criterion is insufficient because the defalcation of the subjective right from its purpose, without getting to produce other effects than the ones protected and promoted by the law, does not justify the annulling action.

The *ab origine* identification of an illicit cause cannot lead *eo ipso* to finding the nullity of the act contracted with such a cause because nullity is not a sanction directed against the juridical act itself, but against its effects that contradict the purpose of the disrespected legal specification and the social cohabitation

indreptata impotriva actului juridic in sine, ci a efectelor sale care contrazic scopul dispozitiei legale nesocotite si normele de convietuire sociala[12].

Aprecierea morala, adica actul de estimare a naturii morale a manifestarii subiectului nu este nemijlocita, fiind determinata de o suita de factori economici, politici, culturali si avand ca nucleu totdeauna asa cum s-a spus[13], o judecata de valoare morala.

Regulile de convietuire sociala sunt norme morale pe care reglementarea juridica nu le-a inglobat direct in continutul dispozitiilor sale, dar, considerandu-le necesare in viata juridica face trimitere la ele, reclamand respectarea lor si asigurandu-le eficacitatea prin sanctiune juridica. Cand normele juridice fac trimitere la aceste reguli, ele prelungesc regula, ii determina continutul,dupa cum tot ele determina si precizeaza continutul raporturilor juridice ale drepturilor subiective si al obligatiilor corespunzatoare[14].

Cu toate acestea, aprecierea morala ramane o apreciere reletiva ce se desfasoara asa cum am aratat in functie de o multitudine de factori,intre anumite limite si in circumstante diferite. Dar, asa cum s-a afirmat[15], arbitrariul nu este de esenta unei anumite aprecieri,el putand aparea pretutindeni unde *masurarea* nu este calitativa, ci cantitativa, importante fiind insa mijloacele de ingradire si cele de inlaturare ale lui, atunci cand se produce.

Altfel spus, insasi ideea de moralitate se opune la valorificarea unui drept subiectiv ori, dimpotriva, justifica consolidarea unui raport juridic nul.

3. Pozitia practicii si examinarea jurisprudentei

Trenarile doctrinare ce par sa-si aiba sursa,nu atat in existenta unui text care sa consacre expres regula,cat mai degraba in imposibilitatea gasirii unor criterii pe baza carora sa poata fi operata distinctia dintre

norms[52].

The moral appreciation, namely the act of estimating the moral nature of the subject manifestation is not immediate, being determined by a suite of economical, political, cultural factors and having as a core, as it was said[53], a judgement having moral value.

The social cohabitation rules are moral norms that the juridical regulation did not include directly in the content of its specifications, but, considering them as necessary in the juridical life, it refers to them, reclaiming their respect and providing their efficiency by juridical sanction. When the juridical norms refer to these rules, they prolong the rule, determine its content and it is still them that determine and specify the content of the juridical reports of the subjective rights and of the corresponding obligations[54].

Although, the moral appreciation remains a relative appreciation that develops as shown depending on several factors, between certain limits and in different circumstances. But, as it was affirmed[55], the arbitrary feature has not the essence of a certain appreciation and he can appear everywhere the *measuring* is not qualitative, but quantitative, but its limiting and removing means are very important, when it is produced.

In other words, the morality idea does not agree with the capitalization of a subjective right, but, on the contrary, it justifies the reinforcement of a null juridical report.

3. The position of practice and the examination of jurisprudence

The doctrinaire stagnations that seem to have their source not in the existence of a text which may expressly dedicate the rule, but rather in the impossibility to find certain criteria based on which we may make the difference between illicit, illegal and immoral seem to be even more obvious when we analyse the solutions of the practical application of the analysed rule.

Thus, if the jurisprudence is unitary

illicit, illegal si imoral devin si mai evidente atunci cand analizam solutiile aplicarii practice ale regulii analizate.

Astfel, daca jurisprudenta este unitara atunci cand afirma ca liberalitatea prin care se urmareste inceperea, continuarea sau reluarea unei relatii de concubinaj are un scop potrivnic regulilor de convietuire sociala, iar sanctiunea unui act juridic cu asemenea cauza este nulitatea absoluta[16], aceasta nu mai este unitara in ceea ce priveste pozitia pe care o are fata de finalitatea unui astfel de demers.In majoritatea cazurilor,instantele se multumesc sa constate ca obligatia respective are o cauza ilicita potrivit art.968 Cod civil, fara a se preciza daca aceasta este sau nu si imorala, pentru a face posibila aplicarea regulii in eventualitatea promovarii unei actiuni in restituire a partii care aprimit liberalitatea cu o astfel de cauza. Uneori instantele indica insa expres ca o astfel de cauza este si imorala[17].

Distinctia este importanta, caci, odata cu constatarea nulitatii unei asfel de conventii, instanta ar trebui sa dispuna, prin aceeasi hotarare pe care o pronunta, si restabilirea situatiei anterioare a partilor actului juridic nul si aceasta chiar daca paratul nu a formulat cerere reconventionala[18]

Or, in situatia in care s-ar considera ca suntem in prezenta unei conventii imorale devenind aplicabila regula *nemo auditur*… restituirea prestatiilor nu ar mai fi posibila.

In contractul nul pentru cauza ilicita,cel care ar promova actiunea in restituire, nu este nedemn de exercitarea acestui drept. El nu este nedemn nici macar in contractul immoral,cand imoralitatea nu provine din faptul sau,ci al celeilalte parti.

Se poate explica, astfel, soarta unui contract in care una dintre parti urmareste un scop immoral pe care cealalta parte nu-l cunoaste sau il ignora. Desi acest contract este nul, deoarece necunoasterea caracterului sau moral de catre una dintre parti nu poate acoperi imoralitatea celeilalte parti,in exercitarea actiunii in restituire trebuie operata o distinctie.

when it affirms that the liberality by means of which it follows the start, the continuation or the restart of a concubinage relationships has a purpose that is against the social cohabitation rules, and the sanction of a juridical act with such a cause is the absolute nullity[56], it is not unitary anymore regarding the position it has for the ending of such an approach. In most of the cases, the courts are happy to find that the respective obligation has an illicit cause according to art.968 of Civil Code, without specifying if it is immoral or not, in order to make the application of the rule possible in the eventuality of promoting a returning action of the party who received the liberality with such a cause. Sometimes, the courts expressly indicate that such a cause is also immoral[57].

The difference is important because, when finding the nullity of such a convention, the court should also dispose, by the same decision it pronounces, the reestablishment of the previous situation of the parties of the null juridical act and this should happen even if the defendant did not make a reconventional demand[58]

But, if we consider we are in presence of an immoral convention and the *nemo auditur*… rule is applicable, the return of the services would not be possible anymore.

In the null contract for the illicit cause, the one which would promote the returning action does not deserve to exert this right. He is not unworthy even in the immoral contract, when the immorality does not come from his act, but from the other party's act.

We may explain thus the destiny of a contract where one of the parties follows an immoral purpose that the other party does not know or ignores. Even if this contract is null, because the non-recognizing of its moral feature by one of the party cannot cover the immorality of the other one, in exertion of the returning action a difference has to be made.

Thus, the one who did not know the immoral feature of the convention may benefit from the juridical consequences of nullity, by refusing to return what he received based on it. The other party cannot obtain the return or

Astfel, cel care nu a cunoscut caracterul immoral al conventiei poate sa profite de consecintele juridice ale nulitatii, refuzand sa restituie ce a primit in baza ei. Cealalta parte nu va putea sa obtina restituirea si nici nu poate sa invoce nulitatea daca este urmarita in executarea contractului. Aceasta nu inseamna ca nulitatea este relativa. Ea este o nulitate absoluta insa aplicarea regulii "*nemo auditur*…" este de natura sa bulverseze efectele normale ale nulitatii,facand ca o conventie nula sa fie totusi producatoare de efecte juridice sau,altfel spus, sa faca posibila mentinerea situatiei juridice, desi s-a constatat nulitatea conventiei pe baza careia s-a creat.

Evident ca exercitiul actiunii in nulitate din partea celui vinovat de incheierea conventiei cu o cauza imorala trebuie admis deoarece, este de principiu ca in cazul nulitatii absolute orice persoana interesata,chiar si cea care nu a luat parte la incheierea actului, are dreptul sa ceara constatarea ei,fara sa i se poata opune prescriptia, ceea ce primeaza fiind interesul general si nu cel personal, ca in cazul nulitatii relative.

Dimpotriva, exercitiul actiunii in repetitie a ceea ce persoana vinovata a platit in baza unei astfel de conventii,nu trebuie admis, facand astfel aplicabila regula"*nemo auditur*…"

Practica consacra, de altfel,expres acest lucru atunci cand intr-o decizie de speta a retinut urmatoarele: "caracterul de ordine publica al nulitatilor absolute ce sanctioneaza actele juridice incheiate cu incalcarea unor prevederi legale imperative trece inaintea principiului potrivit caruia nimeni nu poate sa invoce propria sa turpitudine. Astfel, exceptia referitoare la o astfel de nulitate va putea fi ridicata si de partea care, cu intentie si profitand de nestiinta celeilalte parti,a nesocotit asemenea dispozitii legale"[19].

Cu toate acestea,asa cum am spus deja,in practica instantelor de judecata, nu s-a reusit gasirea unor criterii de distinctie clara intre illicit, illegal si imoral, uneori termenii

invoke the nullity if it is followed in the contract execution. This does not mean that nullity is relative. It is an absolute nullity but the application of the "*nemo auditur*…" rule can upset the normal effects of nullity, making a null convention to produce juridical effects or, in other words, by making possible the maintenance of the juridical situation, even if the nullity of the convention based on which it was created was found.

Obviously, the exertion of the nullity action of the part of the man guilty of contracting the convention having an immoral cause must be accepted because it says that, in case of absolute nullity, every interested person, even the one who did not participate to the contract, has the right to demand its finding, without opposing the prescription because the general interest is the most important, not the personal one, as in case of relative nullity.

On the contrary, the exertion of the repetition action of what the guilty person paid based on such a convention must not be accepted, making thus the *"nemo auditur*…" rule applicable.

Practice devotes expressly this thing when, in a case decision, keeps the following things: "the public order feature of the juridical act contracted by disrespecting certain imperative legal stipulations passes before the principle according to which nobody can invoke his own turpitude. Thus, the exception referring to such a nullity will be able to be removed also for the party who, with intention and benefitting from the lack of knowledge of the other party, disrespected such legal stipulations"[59].

Although, as it was already said, in the practice of the judicial courts, we did not manage to find certain criteria of clear difference between illicit, illegal and immoral because sometimes the terms are being used wrongly one instead of the other and this happens especially when we discuss the disrespect of the social cohabitation norms.

When, while solving certain causes regarding the nullity of the juridical acts, the courts meet situations that lead to the conclusion

fiind folositi in mod gresit unul in locul altuia si aceasta mai ales atunci cand se ia in discutie incalcarea normelor de convietuire sociala.

Cand in solutionarea unor cauze privind nulitatea actelor juridice instantele intalnesc situatii care duc la concluzia ca s-au incalcat normele de convietuire sociala fara a putea insa identifica si incalcarea unor norme juridice imperative se rezuma la a retine ca, de fapt, este vorba de o conventie cu cauza ilicita, asa cum este si cazul actelor juridice incheiate intre partile ce urmaresc determinarea inceperii,continuarii sau reluarii unor relatii de concubinaj.

Alta este situatia cand incalcarea normelor de convietuire sociala sau atentatul la bunele moravuri este si urmarea incalcarii unei norme imperative de drept. Atunci pozitia instantelor este mult mai ferma,iar tonul limbajului se schimba. Asfel,instanta suprema printr-o decizie de speta[20], retine ca restituirea prestatiilor "nu este admisibila in cazul in care reclamantul a urmarit un scop antisocial si vadit immoral prin incheierea contractului potrivnic legii si regulilor de convietuire sociala in sensul art.1-3 di Decretul31/1954. Altminteri ar insemna ca reclamantul sa se bazeze pe propria turpitudine in solutionarea actiunii de restituire a prestatiei,ceea ce nu poate fi ingaduit.

Un asemenea caz il constituie si acela in care s-a urmarit dobandirea unui bun in conditiile savarsirii unei infractiuni cand se impune confiscarea bunurilor ce au format prestatiile actelor ilicite intervenite intre parti. Aceasta masura nu se aplica insa partii catre a fost de buna credinta".

Chiar si numai din analiza solutiilor practice rezumate pana aici se poate deduce ca in aplicarea regulii *nemo auditur*… se ivesc greutati ce par sa fie datorate in principal nelamuririi sensului notiunilor cu care se opereaza.

Dintr-o anumita perspectiva si in aproximarea cea mai larga, tot ceea ce este illicit,si cu atat mai mult ceea ce este

that some social cohabitation norms were disrespected, without being able to identify the disrespect of certain imperative juridical norms, they only keep the fact that it is actually about a convention with an illicit cause, as it is the case of the juridical acts contracted between the parties that follow the determination of the start, the continuation or the restart of certain concubinage relationships.

The situation is different when the disrespect of the social cohabitation norms or the violation of the good manners is also the consequence of disrespecting an imperative law norm. Then, the courts position is much more firm and the tone of language changes. Thus, the Supreme Court, by a case decision[60], keeps the fact that the return of the services "is not acceptable if the plaintiff followed an antisocial and clearly immoral purpose by contracting the document against the law and against the social cohabitation rules in sense of art.1-3 of Decree 31/1954. Otherwise, it would mean that the plaintiff should base on his own turpitude in solving the returning action of the service, fact that cannot be allowed.

Such a case is consisted by the one where we followed to gain a good in conditions of accomplishing a crime when it is imposed the seizure of the goods that represented the services of the illicit acts interfered between the parties. But this measure is not applied to the party who had good faith".

Even only from the analysis of the practical solutions resumed until this moment, we may deduct that in the application of the *nemo auditur*… rule there are some difficulties that seem to appear mainly to the confusion of the meaning of the notions that are used.

From a certain perspective and in the largest approximation, everything that is illicit and especially illegal, is also immoral. Sometimes the doctrine and the practice seem to identify the illicit feature with the illegal one, getting to a more restraint notion in meaning than what it really expresses. Other times, the illicit feature has a larger meaning, representing both the disrespect of the juridical norms and of the social cohabitation rules.

ilegal,este si imoral.Uneori doctrina si practica par a identifica ilicitul cu ilegalul ajungandu-se la o notiune mult mai restransa in semnificatie decat ceea ce exprima in realitate. Alteori, ilicitului i se atribuie o semnificatie mai larga desemnand atat incalcarea normelor juridice, cat si a regulilor de convietuire sociala.

Ilicitul semnifica un fapt oprit, nepermis, nelegal, adica mai mult decat infrangerea unei norme juridice (ilegalul). Ilicitul consta deci, in primul rand in aceea ca fapta este potrivnica legii, dar el inseamna in general o comportare nepermisa, neigaduita adica asa cum in mod correct s-a spus o "contrarietate cu o norma de conduita"[21]

Solutia problemei in discutie nu sta in lipsa de fermitate a terminologiei, deoarece nu atat masurarea sferei de cuprindere a acestor notiuni ne va indica cand anume cauza unui act juridic este imorala, cat mai degraba receptarea ca immoral a acelei cause in raport cu bunul simt comun.

Evident ca acest lucru se face de la caz la caz si tine de o multitudine de factori, insa nu trebuie pierdut din vedere ca aprecierea cauzei ca imorala trebuie facuta intotdeauna prin raportare la criteriul bunelor moravuri, indicat de dispozitiile art.968 C.civ. Prin aceasta dispozitie se asigura conformitatea actului juridic cu legea si cu regulile de convietuire sociala.

Asadar, daca din probele administrate, judecatorul constata ca scopul imediat al unui act juridic, adica motivul determinant la incheierea lui, a fost immoral, intrucat era de natura sa nesocoteasca normele de convietuire sociala care pretend ca obligatiile asumate sa fie respectate si ca drepturile subiective sa fie exercitate cu buna-credinta, intr-un cuvant ca este contrarietate intre scopul mediat al actului si buneleoravuri, trebuie sa-l declare nul pentru cauza imorala.

Numai judecatorul, prin administrarea de probe, poate stabili raporturile reale dintre parti si daca este morala sau imorala cauza conventiilor incheiate de acestea.

Neintelegerile care domina asupra

The illicit feature means a forbidden, non-allowed, illegal fact, namely more than breaking a juridical norm (that is illegal). So the illicit feature consists in the first place in the fact that the action is against the law, but it generally means a non-allowed behaviour as it was correctly said "a contrariety with a behaviour norms"[61]

The solution of the discussed problem is not represented by the lack of solidity of the terminology, because not the measurement of the sphere that contains these notions shows us when the cause of a juridical act is immoral, but rather receiving that cause as immoral reported to the common good-breeding.

Obviously, this thing is made depending on the case and it is related to several factors, but we must not lose the fact that the appreciation of the cause as being immoral must always be done reporting to the criterion of the good manners indicated by the stipulations of art.968 of Civil Code. By this stipulation, it is provided the concordance of the juridical act with the law and with the social cohabitation rules.

So, from the administrated proofs, the judge finds that the immediate purpose of a juridical act, namely the reason that was determinant when it was contracted, was immoral since it disrespected the social cohabitation norms that pretend that the assumed obligations should be respected and that the subjective rights should be exerted with good faith, in other words there is contrariety between the mediated purpose of the act and the good manners, they have to declare it as being null for the immoral cause. Only the judge, by administrating evidences, is able to establish the real reports between the parties and whether the cause of the conventions contracted by them is moral or immoral.

The confusions that dominate the *nemo auditur*… rule come from the fact that it is not a juridical rule, but a moral one.

This does not mean that the effects of the nullity are subordinated to some pure morality conditions, as it was affirmed, and neither that the intervention of the judge in the

regulii *nemo auditur*… provin chiar din faptul ca ea nu este prin ea insasi o regula juridical, ci o regula morala.

Aceasta nu inseamna ca efectele nulitatii ar fi subordinate unor conditii de pura morala cum s-a afirmat si nici ca interventia judecatorului de domeniul moralei ar da curs arbitrariului, deoarece, dupa parerea noastra, demersul facut de acesta pentru identificarea cauzei imorale nu este cu nimic diferit de cel facut pentru identificarea cauzei ilegale sau ilicite. Exista aceleasi riscuri in toate cazurile de a ne supune arbitrariului.

Analizand practica, constatam, in mod surprinzator, ca inexistenta unui text de lege care sa consacre aplicarea regulii nu a dus la o aplicare arbitrara a acesteia, ci chiar la o prudenta nejustificata, ceea ce a facut ca pozitia instantei supreme in rezolvarea unei probleme de drept sa ramana oarecum izolata.

Astfel, confruntata cu urmatoarea problema de drept: daca – si in caz afirmativ, in ce conditii – poate fi anulat sau declarat nul un contract cu titlu oneros comutativ, in care se constata o vadita disproportie intre prestatiile partilor, prin decizia nr.73 din 22 mai 1969, instanta suprema a statuat ca " in caxul in care, contrar regulilor de convietuire sociala, un contractant a profitat de ignoranta sau de starea de constrangere in care s-a aflat celalalt, spre a obtine avantaje disproportionate fata de prestatia pe care a primit-o acesta din urma, conventia respective nu va putea fi considerate valabila intrucat s-ar intemeia pe o cauza imorala in sensul art. 968 C.civ.

Trebuie retinut ca, sectia civila a aceleiasi instante se marginise anterior in rezolvarea problemei de drept in discutie, doar sa enunte principiul inadmisibilitatii actiunii in resciziune intre majori, invocand dispozitiile art, 25 alin.1 din Decretul nr. 32/1954.

Instanta suprema, a statuat, insa, ca un act juridic lezionar intre majori poate fi declarat nul daca a fost incheiat prin exploatarea starii de constrangere in care se morality field would accept the arbitrary feature because, in our opinion, the approach made by him in order to identify the immoral cause is not different of the one made in order to identify the illegal or illicit cause. There are the same risks in all the cases of being liable to the arbitrary feature.

By analysing the practice, we surprisingly find that the inexistence of a law text who could consecrate the application of the rule did not lead to its arbitrary application, but to a non-justified prudence, that made the position of the Supreme Court in solving a law problem remain kind of isolated.

Thus, we confront the following law problem: if – and in affirmative case, in what conditions – a contract having an onerous commutative title, where we find a clear disproportion between the services of the parties may be annulled or declared as null by decision no. 73 since May 22nd, 1969, the Supreme Court affirmed that "if, against the social cohabitation rules, a contracting party benefit from the ignorance or of the constraining status of the other party in order to obtain disproportioned advantages compared to the service he received, that convention cannot be considered as valid because it is based on an immoral cause in sense of art. 968 of Civil Code.

We must keep the fact that the civil section of the same court was previously limited at solving the discussed law problem only by using the principle of unacceptability for the rescission action between major people, invoking the stipulations of art. 25, paragraph 1 of Decree no. 32/1954.

But the Supreme Court affirmed that a juridical harmful act between major people may be declared as null if it was contracted by exploiting the constraining status of the harmed contracting party, against the social cohabitation rules, but not based on the lesion, but on the immoral cause that funds such an act.

By the same decision, by promoting the idea that in the respective cause the harmed party may mainly find the absolute nullity of

afla cocontractantul lezat, contrar regulilor de convietuire sociala, darn u in temeiul leziunii, ci al cauzei imorale care sta la baza unui atare act.

Prin aceeasi decizie, promovand ideea ca in cauza respectiva partea lezata, poate, in principiu, obtine constatarea nulitatii absolute a conventiei pe temeiul cauzei imorale si, pe cale de consecinta, restituirea prestatiei efectuate in baza actului nul, instanta suprema a statuat implicit asupra inadmisibilitatii opunerii, in cazul dat, a exceptiei deduse din regula " *nemo auditor*…. " , sau din regula inrudita cu aceasta " *in pari causa turpitudinis*, *cessat repetitio* " . Intradevar, beneficiarul conventiei morale ar fi putut invoca, eventual, inadmisibilitatea actiunii partii lezate, deoarece aceasta se prevaleaza de propria turpitudune pentru a obtine restituirea prestatiei. Nesocotind o atare aparare posibila, instanta suprema a decis implicit ca in situatia cercetata regula " nemo auditor …. "nu este aplicabila.

Dupa cate stim, solutia la care a ajuns instanta suprema s-a aplicat cu foarte multa prudenta, in practica mergandu-se de regula pe ideea ca stabilirea unui pret inferior valorii de circulatie nu are drept consecinta nulitatea actului incheiat, motivul invocat constituind viciul de consimtamant al leziunii, aplicabil in dreptul roman numai contractelor la care au participat minori[22].

4. Exceptii de la aplicarea regulii

In afara exceptiei mentionate mai sus, create de jurisprudenta, exista si o exceptie consacrata legislativ, care reprezinta de fapt, prima unei denuntari.

Astfel, potrivit art. 255 alin 3 Cod penal, mituitorul nu se pedepseste daca denunta autoritatii fapta, mai inainte ca organul de urmarire sa fi fost sesizat pentru acea infractiune , iar banii, valorile sau lucrurile care au facut obiectul infractiunii se restituie persoanei care le-a dat.

In legislatia franceza, in cazul simulatiei pentru fraudarea legii, in special

the convention based on the immoral cause and, as a consequence, the return of the service accomplished based on the null act, the supreme court implicitly took a decision regarding the unacceptability of the opposition, in the given case, of the exception deducted from the " *nemo auditor*…." rule, or from its related rule " *in pari causa turpitudinis*, *cessat repetitio* " . Indeed, the beneficiary of the moral convention could eventually invoke the unacceptability of the action of the harmed party because it avails of its own turpitude in order to obtain the return of the service. Without considering that such a defence is possible, the supreme court implicitly decided that in the researched situation the " nemo auditor …." rule is not applicable.

As we know, the solution to which the supreme court got was applied with a lot of prudence and in practice, they usually used the idea that the establishment of a price inferior to the circulation value has not as a consequence the nullity of the contracted act and the invoked reason represents the consent vice of the lesion, applicable in the Roman law only to the contracts where there were minors[62].

4. Exceptions from applying the rule

Beside the exception that was mentioned above, created by jurisprudence, there is also a legally consecrated exception that actually represents the bonus of a denouncement.

Thus, according to art. 255, paragraph 3 of Criminal Code, the bribe giver is not punished unless it denounces the fact to the authorities, before the following organ was informed about that crime and the money, the valuables or the things that were the object of the crime are given back to the person who offered them.

In the French legislation, in case of simulation for law fraud, especially price simulation, if the debtor paid the amount agreed in the secrete document, he could demand the return of the supplement of the occult price

simulatia pretului, daca debitorul a platit suma convenita in actul secret, va putea cere restituire suplimentului din pretul ocult desi este complice la frauda, tocmai pentru a fi stimulat astfel sa denunte frauda.

Cazul donatorului care cere anularea liberalitatii consimtita pentru o cauza imorala , impunand astfel persoanei gratificate , restituirea bunului , reprezinta o alta exceptie de la aplicarea regulii in discutie. Doctrina si jurisprudenta admit ca in cazul donatiei deghizate, unde se pune problema cauzei imorale, donatorul poate cere anularea donatiei , caz in care donatorul nu poate invoca in beneficiul sau regula " *nemo auditor…"*, pentru a pastra liberalitatea, desi dovedeste ca donatorul a urmarit un scop imoral[23].

5. Efectele aplicarii regulii

Recunoasterea regulii presupune operarea unei distinctii intre efectele nulitatilor, de la caz la caz, pe un criteriu moral. Mai exact , s-ar putea spune ca aplicarea acestei regulii , bulverseaza efectele normale ale nulitatilor.

Este bine cunoscut ca nulitatea reprezinta o sanctiune civila constand in desfiintarea cu efect retroactiv a unui act juridic incheiat cu incalcarea cerintelor legale, fiind un mijloc prevazut de lege de a nu permite ca vointa individuala sa treaca peste ingradirile ce-i sunt impuse prin normele dreptului pozitiv, si are drept consecinta, repunerea partilor in situatia anterioara , care implica restituirea reciproca a prestatiilor facute.

Mai mult decat atat, practica a statuat ca, odata cu constatarea nulitatii contractului, instanta trebuie sa dispuna prin aceeasi hotarare in care se pronunta asupra nulitatii si restabilirea situatiei anterioare a partilor contractante, chiar daca paratul nu a formulat cerere reconventionala[24].

Atat doctrina, cat si jurisprudenta admit fara rezerve dreptul la actiune al partilor, care au incheiat conventii ilicite, even if he is an accomplice to fraud, in order to stimulate him to denounce the fraud.

The case of the donor who demands the annulment of the liberality consented for an immoral cause, imposing thus to the gratified person to return the good, represents another exception from applying the rule in discussion. The doctrine and the jurisprudence accept that, in case of disguised donation, where there is the problem of immoral cause, the donor may demand the annulment of the donation, situation where the donor cannot invoke in his benefit the "nemo *auditor…"* rule in order to keep his freedom, even if it is proved that the donor followed an immoral purpose[63].

5. The effects of applying the rule

The action of recognizing the rule supposes the operation of a distinction between the effects of the nullities, depending on the case, based on a moral criterion. More specifically, we may say that the application of this rule unsettles the normal effects of nullities.

It is well known that nullity represents a civil sanction consisting in retroactively abolishing a juridical act contracted by disrespecting the legal demands, being a means stipulated by the law in order not to allow the individual will to pass through the limits that are imposed to it by the norms of the positive law and it has as a consequence the restoration of the parties in the previous situation that involves the mutual return of the services that were made.

Moreover, the practice affirmed that, at the same time with the contract nullity, the court must dispose by the same decision where it pronounces regarding the nullity the restoration of the previous situation of the contracting parties even if the defendant did not formulate a reconventional demand[64].

Both the doctrine and the jurisprudence accept with no reserves the right to act of the parties who contracted illicit conventions because, as we have already shown, the public order feature of the absolute nullities that sanction the juridical acts contracted by

deoarece, asa cum am aratat deja, caracterul de ordine publica al nulitatilor absolute ce sanctioneaza actele juridice incheiate cu incalcarea unor prevederi legale imperative, trebuie sa treaca inaintea principiului potrivit caruia nimeni nu poate sa invoce propria turpitudine.

Daca este de inteles motivul pentru care se recunoaste dreptul la actiune sau de a ridica exceptia referitoare la o atare nulitate, partii care cu intentie a incalcat dispozitiile legale, este dificil de argumentat din ce considerente se recunoaste si dreptul pentru promovarea actiunii in repetitie aceleiasi parti.

Spre deosebire de cadrul conventiilor nule pentru cauza ilicita, unde actiunea in restituire este admisibila fara exceptie , atunci cand cauza se constata a fi imorala, atat doctrina, cat si jurisprudenta, considera insa, ca actiunea in restituire este inadmisibila.

Practic, aplicarea acestei reguli, reprezinta de fapt o sanctiune ce consta in nerecunoasterea dreptului la actiune in repetitie, celui care ar invoca, in fata instantei propria sa imoralitate.

Se pune problema, daca acest refuz al actiunii in restituire, nu este de natura sa creeze, la randul sau, o injustitie, deoarece una dintre parti pastreaza prestatia obisnuita in baza unei conventii nule de drept pentru cauze imorale.

Acesta este motivul pentru care Domat a apreciat ca aplicarea regulii este injusta, impunandu-se restituirea prestatiilor in toate cazurile in care se constata nulitatea conventiilor, fara a mai invoca alte argumente, si netinand cont de avantajele pe care le confera posesia.

Demolombe, considera ca aplicarea regulii, reprezinta de fapt, o violare a justitiei distributive. Intradevar, se pune intrebarea cu ce justificare, partea care a primit o prestatie in baza unei conventii imorale o pastreaza si in situatia cand ar fi la fel de vinovata ca si cealalta parte, careia nu i se recunoaste dreptul la restituire.

Regula, poate parea, asadar, ca este de disrespecting some imperative legal stipulations must pass in front of the principle according to which nobody can invoke his own turpitude.

If we may understand the reason for which they recognize the right to act or to remove the exception referring to such a nullity for the party who intentionally disrespected the legal stipulations, it is difficult to say what are the reasons for which they recognize the right to promote the repetition action of the same party.

Unlike the frame of the null conventions for the illicit cause, where the returning action is acceptable with no exception, when the cause is found as immoral, both the doctrine and the jurisprudence consider that the returning action is unacceptable.

Practically, the application of this rule represents actually a sanction that consists in non-recognizing the right to repetition action for the one who would invoke in front of the justice his own immorality.

We have to discuss the problem whether this refusal of the returning action can or cannot create, in its turn, an injustice because one of the parties keeps its usual service based on a null law convention for immoral causes.

This is the reason why Domat appreciated that the application of the rule is unfair, imposing the return of the services in all the cases where there is found the nullity of the conventions, without invoking any more arguments and without considering the advantages offered by possession.

Demolombe considers that the application of the rule actually represents a violation of the distributive justice. Indeed, we may ask what the justification of the party who received a service based on an immoral convention is to keep it also in the situation where it is as guilty as the other party to whom we do not recognize the returning right.

Therefore, the rule may seem as having a rude morality, leaving the ones who contract immoral conventions to solve their business by themselves. We appreciate thus that the best way to hinder the immoral acts is to exclude them from the juridical life, by non-recognizing

o moralitate grosolana, lasandu-i pe cei care incheie conventii imorale sa se descurce intre ei. Se apreciaza astfel, ca cea mai buna modalitate de a impiedica actele imorale este aceea de a le exclude din viata juridica, prin nerecunoasterea actiunii in restituire, celor care au participat la incheierea unor conventii imorale, acestia urmand sa suporte consecintele lipsei lor de loialitate reciproca, si implicit lipsa de securitate datorita interzicerii accesului la justitie, realizandu-se totodata si scopul preventiv pe care il are aplicarea regulii.

Se poate pune intrebarea daca nu ar fi mai potrivita atat legiferarea regulii, cat si confiscarea prestatiilor efectuate in baza unei conventii imorale. Codul nostru civil nu contine nicio consacrare a acestei reguli traditionale, insa in alte coduri, se admite printr-o exprimare foarte generala ca actiunea pentru restituirea unei prestatii facuta in virtutea unui contract illicit sau imoral este interzisa. Se merge astfel pe ideea, ca " este de netolerat ca prerogativele legale sa poata servi drept arme ale relei intentii, rautatii si relei credinte. Frauda care viciaza toate actele, care face sa inceteze aplicatia tuturor regulilor juridice, nu trebuie, cum spune L. Josserand, sa-si dea frau liber sub egida preabinevoitoare a drepturilor civile"; ea trebuie sa fie inlaturata fara mila caci altfel, dreptul insusi – fiind pus in serviciul unor scopuri antisociale, parodiat in mod nedemn de cei ce il folosesc – ar risca sa sucombe sub lovitura acestei profanari[25].

Apreciem ca, astfel de consacrari legislative ale regulii, fara a distinge intre simpla ilicitate a cauzei si ilicitatea cauzei pe motiv de imoralitate, nu ar fi de natura sa creeze avantaje in plus, putand chiar conduce la rezultate injuste, daca nu s-ar legifera si confiscarea prestatiilor, deoarece atunci aplicarea regulii s-ar extinde, constituindu-se intr-un fel de sanctiune civila impotriva oricui ar transgresa legile civile, ceea ce ar face ineficienta institutia nulitatii, si la mentinerea situatiilor juridice , care ar putea sa profite, unor parti ce la randul lor au transgresat, de the returning actions to the ones that had participated to contracting some immoral conventions and they will suffer the consequences of their mutual lack of loyalty and implicitly the lack of security due to this interdiction of the access to justice, accomplishing in the same time the preventive purpose of the application of the rule.

We may wonder if it would be more appropriate both the promulgation of the rule and the confiscation of the services bade based on an immoral convention. Our Civil Code contains no consecration of this tradition rule, but other codes accept by a very general wording the fact that the action for returning a service made under an illicit or immoral contract is forbidden. We use thus the idea that "it is intolerable that the legal prerogatives serve as weapons of bad intention, of meanness and of dishonesty. The fraud that vitiates all the acts, that makes the application of all the juridical rules stop, must not, as L. Josserand says, be set free under the good-willing aegis of the civil rights"; it has to be removed immediately because, otherwise, the law itself – by being put in the service of certain antisocial purposes, unworthily parodied by the ones who use it – would risk to disappear under the stroke of these profanations[65].

We appreciate that such legislative consecrations of the rule, without making a difference between the simple illicit feature of the cause and the one based on immorality, cannot create additive advantages and they even may lead to unfair results if there was not the proclamation and the confiscation of the services, because then the application of the rule would extend, consisting some kind of civil sanction against any person who would transgress the civil laws, that would make the nullity institution inefficient and at the maintenance of the juridical situations that could represent a benefit for certain parties that had transgressed at their turn the civil laws, too.

Otherwise, as long as on the legislative way there is possible no identification of all the immoral convention, the judge is still the one who has to make this approach, and also the

asemenea, legile civile.

De altfel, atata vreme cat pe cale legislativa, nu este posibila o identificare a tuturor conventiilor imorale, tot judecatorului ii va reveni sarcina acestui demers, dupa cum tot judecatorul trebuie sa distinga intre situatia cand conventia este numai ilicita, sau cand aceasta contravine si bunelor moravuri, in functie de care aplica sau nu regula " nemo auditor… ".

Criteriul moralei, pentru aprecierea situatiilor in care se aplica regula, nu este cu nimic diferit de situatia abuzului de drept. Intradevar, nu s-ar putea considera, ca prin aplicarea regulii " nemo auditor… " se da curs arbitrarului datorita interventiei judecatorului pe criterii pur morale, si in consecinta din respect pentru morala s-ar incalca regulile tehnice ale dreptului civil, deoarece in aceeasi situatie, ne gasim si in cazul abuzului de drept, unde de asemenea, se accentueaza criteriile morale, in baza carora urmeaza a se aprecia, incalcarea dreptului subiectiv ajungandu-se in cele din urma tot la afirmarea factorului psihologic, ca singur reper pentru aprecierea abuzului de drept.

Trebuie sa remarcam ca definirea notiunii bunelor moravuri implica serioase dificultati. Facand o analiza a doctrinei referitor la notiunea bunelor moravuri, J. Boncasse constata aceasta dificultate atunci cand a spus : " Ripert considera ca numai idealul moral este de natura sa permita judecatorilor sa aprecieze bunele moravuri; Huc crede ca bunele moravuri exista numai in masura in care sunt protejate de legea pozitiva: Demolombe include notiunea bunelor moravuri, in aceea de ordine publica si toate acestea intr-un drept public nedefinit; Laurent confunda bunele moravuri cu interesul general, in timp ce Aubry si Rau sustin ca exista contrarietate la bunele moravuri din moment ce prestatia promisa consta in indeplinirea unui fapt ilicit in sine, ceea ce inseamna a raspunde la problema prin aceeasi problema" [26].

Trebuie apreciat ca arbitrariul provine in mod necesar din aceea ca suntem in judge has to make the difference between the situation when the convention is only illicit, and the one when it contradicts the good manners depending on which he applies or not the "nemo auditor…" rule.

The criterion of morality, in order to appreciate the situations where the rule is applied, is not at all different from the situation of the law abuse. Indeed, we cannot consider that by applying the " nemo auditor…" rule we accept the arbitrary feature because of the judge's intervention based on purely moral criteria, and as a consequence, because of our respect for the morality, we could disrespect the technical rules of the civil law because we are in the same situation as in case of law abuse where we emphasize the moral criteria based on which we will appreciate and the disrespect of the subjective right will finally get to the affirmation of the psychological factor as an only reference point for the appreciation of the law abuse.

We must notice that defining the good manners notion involves some serious difficulties. By making an analysis of the doctrine referring the good manners notion, J. Boncasse found this difficulty when he said: " Ripert considered that only the moral ideal may allow the judges to appreciate the good manners; Huc thinks that the good manners exist only as long as they are protected by the positive law: Demolombe includes the good manners notion in the one of public order and all of them in an undefined public law; Laurent mistakes the good manners by the general interest while Aubry and Rau say that there is contrariety for the good manners since the promised service consists in accomplishing an illicit fact, that means to answer the problem by the same problem" [66].

We must appreciate the fact that the arbitrary feature necessarily comes from the fact that we are in presence of a conflict between the civil law and the moral rule. The civil law authorizes the action of returning the services also when the nullity is the consequence of an illicit cause. Morality forbids this action when, in supporting it, there

prezenta unui conflict intre legea civila si regula morala. Legea civila autorizeaza actiunea in restituirea prestatiilor si atunci cand nulitatea este urmarea unei cauze ilicite. Morala interzice aceasta actiune atunci cand in sustinerea ei s-ar invoca un act atat de imoral incat nu ar putea fi admis de bunul simt comun pentru a apara un interes personal.

Teoria subiectiva asupra abuzului de drept, apreciaza ca acesta nu este de fapt decat un caz de conflict intre drept si morala[27], ignorarea datoriei morale de a nu cauza din rautate un prejudiciu altuia sau sanctionarea greselii care este o notiune morala pentru a da satisfactie echitatii.

Activitatea de estimare a naturii morale a cauzei unei conventii apartine, asa cum am aratat, judecatorilor si presupune identificarea scopului imediat care a stat la baza incheierii acelei conventii. Descoperirea scopului mediat este destul de dificila implicand o investigatie psihologica care se face in concret de la caz la caz, pentru a stabili care din mobilele individuale ale partilor au fost impulsive si determinante pentru nasterea unui act juridic.

Este insuficient, spre exemplu, sa afirmam ca o liberalitate si-ar avea cauza in vointa libera a celui care a facut-o, atata vreme cat se poate demonstra, ca declansarea acestei intentii liberale, a fost determinata de impulsuri psihologice imorale, spre exemplu a face daruri unei concubine pentru a determina sa continue starea de concubinaj, inseamna a consimti o donatie nu din spirit liberal pur , ci pentru atingerea unui rezultat imoral. De asemenea, a conveni plata unei sume de bani pentru prestarea unui serviciu odios, din partea cocontractantului, inseamna a infesta negotul juridic, de un mobil determinant imoral sau chiar ilegal.

Asadar, aprecierea morala, adica actul de estimare a naturii morale a manifestarii subiectului nu este nemijlocita ci mijlocita, determinata de o multitudine de factori.

Tot referitor la efectele aplicarii regulii " nemo auditor… " trebuie observat ca is invoked such an immoral act that it cannot be accepted by the common sense in order to protect a personal interest.

The subjective theory regarding the law abuse appreciates that this is only a conflict case between law and morality[67], ignoring the moral duty of not causing a prejudice to another person by meanness or sanctioning the mistake that is a moral notion in order to satisfy the equity.

The activity of estimating the moral nature of a convention cause belongs, as we have shown, to the judges and it supposes the identification of the immediate purpose that represented the basis of that convention contracting. The discovery of the mediated purpose is quite difficult, involving a psychological investigation that is concretely made depending on the case, in order to establish which of the individual mobiles of the parties were impulsive and determinant for the birth of a juridical act.

For example, it is enough to affirm that a liberality would have its cause in the free will of the one who made it, as long as it can be proved that the unleashing of this liberal intention was determined by immoral psychological impulses, such as making gifts to a concubine in order to determine her to continue the concubinage status means to consent a donation not because of the pure liberal spirit, but in order to reach an immoral result. Also, the agreement regarding the payment of a money amount in exchange of an odious service of the co-contracting party, means infesting the juridical commerce by an immoral or even illegal determinant.

Therefore, the moral appreciation, namely the action of estimating the moral nature of the subject manifestation is not immediate, but mediated, determined by several factors.

Still related to the effects of the application of the "nemo auditor…" rule, we must notice that this makes the *actio de in rem verso* inefficient, specific to the unmotivated enrichment, because one of the parties will conserve the benefit of the service based on an immoral convention.

aceasta face ineficienta *actio de in rem verso* specifica institutiei imbogatirii fara just temei , deoarece una dintre parti va conserva beneficiul prestatiei obtinuta in baza unei conventii imorale.

Dupa cum stim, nulitatea implica intoarcerea prestatiilor, dar care este justificarea restituirii prestatiilor si in ce limite se va face aceasta restituire, deoarece, asa cum s-a spus o obligatie ilicita poate foarte bine fi , o obligatie naturala de vreme ce obligatia naturala este ea insasi o obligatie ilicita[28].

Referitor la justificarea restituirii prestatiilor in vechiul drept roman, un act nul se socotea ca si cand nu ar exista, ca si cand nu ar fi fost intocmit vreodata , potrivit principiului *nullum est negotium nihil actum est.*

Doctrina moderna a abandonat de mult conceptia clasica a nulitatii totale si iremediabile, consacrand conceptia nulitatii partiale si remediabile, in sensul ca nulitatea nu ataca actul juridic ci il apara, desfiintand numai ce este imperios necesar. Cu toate acestea, justificarea restituirii prestatiilor facuta in baza unui act nul pentru cauza ilicita ramane tot in ideea de inexistenta a actului nul[29].

Principiul retroactivitatii efectelor nulitatii ca si principiul *restitutio in integrum*, intr-un anumit sens nu fac decat sa demonstreze ca desfiintarea actului pe motiv de nulitate , urmareste aducerea acestuia in neantul juridic, pentru a da eficienta principiului, *quod nullum est nullum producit efectum*. Restituirea prestatiilor facute in baza unui astfel de act, este ceva natural, deoarece, daca partile nu ar fi puse in situatia anterioara ar insemna ca o conventie nula absolut sa-si produca totusi efecte, ceea ce de principiu, este inadmisibil in drept[30].

A doua problema referitor la limitele in care se face restabilirea situatiei anterioare tine de institutia imbogatirii fara justa cauza.

Solutiile la care a ajuns jurisprudenta sub acest aspect, sunt contradictorii. Unele instante considera ca restabilirea situatiei

As we know, nullity involves the return of the services, but what the justification of the return of the services is and what are the limits of this return because, as it was said, an illicit obligation may be a natural obligation as long as the natural obligation itself is an illicit obligation[68].

Referring to the justification of the return of the services in the old Roman law, a null act was considered as not existing, as if it was never accomplished, according to the principle *nullum est negotium nihil actum est.*

The modern doctrine abandoned a long time ago the classical conception of total and irremediable nullity, by consecrating the conception of the partial and remediable nullity, meaning that nullity does not attack the juridical act, but it defends it, abolishing only what it needs to. Although, the justification of the return of the services made based on a null act for the illicit cause remains still in the idea of inexistence of the null act[69].

The retroactivity principle of the effects of nullity, as the *restitutio in integrum* principle, they only prove that the abolishment of the act because of the nullity wants to bring it in the juridical nothingness in order to give efficiency to the *quod nullum est nullum producit efectum* principle. The return of the services made based on such an act is natural because, if the parties were not put in the previous situation, it would mean that a null convention should produce its effects, and this fact is mainly unacceptable in law[70].

The second problem referring to the limits of the reestablishment of the previous situation is related to the institution of the enrichment with no fair cause.

The solutions to which the jurisprudence got under this aspect are contradictory. Some courts consider that the reestablishment of the previous situation must be made "*ad literam*", namely, the return of the mutual services of the parties must represent exactly their services as they were when they contracted the juridical act whose nullity was declared[71] .

On the contrary, other courts decided that the reestablishment of the previous situation

anterioare trebuie facuta " *ad literam* " adica , restituirea prestatiilor reciproce ale partilor trebuind sa reprezinte exact prestatiile acestora asa cum au fost ele in momentul incheierii actului juridic a carui nulitate s-a declarat[31] .

Alte instante au decis, dimpotriva, ca restabilirea situatiei anterioare comporta o actualizare a situatiei juridice in sensul reactualizarii pretului care a fost achitat.

Astfel, s-a apreciat ca trebuie avut in vedere drept criteriu de determinare a pretului ce trebuie restituit cumparatorulu , valoarea actuala a imobilului, pentru ca altfel ar insemna ca valoarea pretului achitat sa nu mai fie aceeasi cu cea din momentul platii, ori aceasta , ar echivala cu o imbogatire fara cauza a vanzatorului. Deci, pentru ca hotararea prin care se dispune restabilirea situatiei anterioare sa fie temeinica si echitabila, adica sa nu fie nici profitabila nici prejudiciabila pentru una dintre parti, instanta va trebui sa determine valoarea actuala a pretului achitat de cumparator pe baza principiului *restitutio in integrum*.

Este firesc sa fie asa, deoarece altfel, una dintre parti s-ar imbogati fara cauza. Actiunea in *restituire de in rem verso* are ca scop restabilirea echilibrului patrimonial intre parti. La fundamental acestei actiuni au fost asezate rand pe rand, ideeile de echitate, echilibru, echivalenta si de morala.

Analiza teoriilor elaborate pentru fundamentarea *actio de in rem verso,* exced temei analizate. Important de retinut este faptul ca, aceasta institute isi gaseste aplicabilitatea, ca finalitate, in restabilirea echilibrului patrimonial , nu numai atunci cand acest dezechilibru s-ar datora faptelor ilicite, ci si in situatia anularii unui act cu ocazia restabilirii situatiei anterioare.

Daca se face, insa aplicarea regulei *nemo auditor... ....* pentru ca se constata imoralitatea cauzei conventiei, practic, *actio de in rem verso* este paralizata . Rezulta din cele expuse ca aplicarea regulii *nemo auditor* ….. este o sanctiune civila ce consta in nerecunoasterea accesului la justitie, pe calea contains an upgrade of the juridical situation in the sense of upgrading the price that was paid.

Thus, they appreciated that we have to consider as a criterion of determining the price that has to be returned to the buyer, the current value of the real estate because otherwise, it would mean that the value of the paid price is not the same as the one when it was paid and this would represent an enrichment with no cause of the seller. Therefore, for the decision by means of which we dispose the reestablishment of the previous situation to be reasonable and equitable, namely to be neither profitable, nor prejudicial for the parties, the court will have to determine the current value of the price the paid by the buyer based on the *restitutio in integrum* principle.

This is natural because, otherwise, one of the parties would get rich with no cause. The *restituire de in rem verso* action has as a purpose the reestablishment of the patrimonial poise between the parties. At the basis of this action, there were put, one of a time, the ideas of equity, poise, equivalence and morality.

The analysis of the theories elaborated for the *actio de in rem verso* funding, exceed to the analysed theme. It is important to keep the fact that this institution finds its applicability, as an ending, in the reestablishment of the patrimonial poise, not only when this lack of poise happens due to the illicit facts, but also in the situation of annulling an act with the occasion of re-establishing the previous situation.

But, if we make the application of the *nemo auditor... ....*rule because we find the immorality of the convention cause, practically *actio de in rem verso* is paralyzed. It results from the things exposed above that the application of the *nemo auditor* ….. rule is a civil sanction that consists in non-recognizing the access to justice, by means of the returning action, to the parties that are guilty for the immorality of their convention, that are lacked thus of the protection offered by the law, just because of the insecurity that could be produced by the recognizing of such a protection.

actiunii in restituire, partilor vinovate de imoralitatea conventiei lor, care astfel sunt lipsite de protectia conferita de drept, tocmai pentru motivul insecuritatii ce l-ar produce recunoasterea unei astfel de protectii.

6. Domeniul de aplicare a regulii "*nemo auditur ....***" .**

In primul rand este necesar sa raspundem la intrebarea daca domeniul de aplicare al acestei reguli, cuprinde si raspunderea civila delictuala, mai exact daca atunci cand actiunea in despagubiri este formulata de victima care ar invoca propria turpitudine, i s-ar putea opune regula *nemo auditor ...* . Mai mult trebuie sa raspundem la intrebarea daca autorul faptului prejudiciabil, n-ar putea la randul sau sa invoce aplicarea regulii pentru a conserva, folosul realizat prin comiterea unei infractiuni.

Atunci cand insasi victima a participat la actul sau la activitatea ilicita ce a provocat paguba in mod natural, am putea sa ne gandim ca isi gaseste aplicare adagiul *nemo auditor*.....

In realitate, participarea victimei la activitatea ilicita, poate fi privita ca o cauza de exonerare partiala sau totala de raspundere, dar nu ca o cauza de inadmisibilitate a actiunii reclamantului.

Daca, anterior savarsirii faptei, autorul acesteia , a obtinut consimtamantul victimei cu privire la un anumit mod de a actiona, care potential ar fi de natura sa produca un prejudiciu, caracterul illicit al faptei – chiar daca prejudicial s-ar produce ulterior – este inlaturat si, ca atare este inlaturata si raspunderea.

De remarcat este faptul ca potentiala victima este de acord nu cu producerea prejudiciului, ci cu savarsirea unei fapte ale carei posibile consecinte ar avea efect negativ asupra patrimoniului sau, sau chiar asupra persoanei sale.

In aceasta situatie, ne gasim de fapt, in prezenta unei clauze de neraspundere

6. The application field of the " *nemo auditur ....* **" rule.**

In the first place, it is necessary to answer the question whether the application field of this rule contains the criminal civil responsibility or not, more specifically if, when the compensation action is formulated by the victim who could invoke his own turpitude, the *nemo auditor ...* rule could be opposable. More than that, we have to answer the question if the author of the prejudicial fact can invoke at his turn the application of the rule in order to conserve the advantages accomplished by committing a crime.

When the victim himself participated to the illicit act or activity that naturally provoked the damage, we could think about applying the *nemo auditor*.... adage.

Actually, the victim's participation to the illicit activity may be regarded as a cause of partial or total exoneration of responsibility, but not as a cause of unacceptability of the plaintiff's action.

If, before accomplishing the fact, its author obtained the victim's consent regarding a certain way of acting that could produce damage – even if the damage could be subsequently produced – it is removed and, as such, the responsibility is also removed.

We have to notice the fact that the potential victim does not agree not with the producing of the damage, but with accomplishing a fact whose possible consequence would have a negative effect on his patrimony or even on his person.

In this situation, we are actually in the presence of an irresponsibility clause accomplished based on the idea of assuming the risk that, even if it was conversed for a long time, due to the imperative feature of the rule consecrated by art. 998 of Civil Code, it finally was accepted also in the matter of the criminal civil responsibility, if the fact that caused prejudices was accomplished with an easy guilt of the author. But if the author's guilt consists in intention or serious guilt, the irresponsibility clause will be null.

intemeiata pe ideea asumarii riscului, care desi a fost mult timp controversata, datorita caracterului imperativ al regulii consecrate de art. 998 C.civ., in cele din urma s-a admis si in materia raspunderii civile delictuale, daca fapta cauzatoare de prejudicii a fost savarsita cu o culpa usoara din partea faptuitorului. Daca insa vinovatia autorului faptei consta in intentie sau culpa grava , clauza de neraspundere va fi nula.

Potrivit unei opinii, obiect al clauzei de neraspundere nu-l pot constitui decat drepturile patrimoniale nu si cele personale, nepatrimoniale[32].

Conform altei opinii, pe care o impartasim, in mod exceptional, pot fi recunoscute ca valabile si clauzele ce au ca obiect inlaturarea raspunderii pentru producerea unor prejudicii, constand in vatamari corporale usoare cum este cazul accidentarii sportivilor cu conditia de a se fi respectat regulile jocului[33] sau, atunci cand asemenea clauze ar fi indreptatite prin scopul lor, cum ar fi , de exemplu, acceptarea unor operatii chirurgicale, in scopul prelevarii ori transplantului de organe[34].

Atunci cand suntem in prezenta unei infractiuni, autorul acesteia nu poate invoca regula *nemo auditur...* pentru a conserva produsul faptei sale imorale, deoarece, fie intervin dispozitiile art. 118 C.pen. , care reglementeaza confiscarea speciala, fie se procedeaza la restabilirea situatiei anterioare, prin restituirea bunurilor care au facut obiectul infractiunii victimei, atunci cand aceasta s-a constituit parte civila.

In solutionarea laturii civile a cauzei, instantele tin cont de comportamentul victimei, doar ca de o simpla cauza de exonerare.

Asadar, autorul unei inselaciuni in conventii , spre exemplu , nu ar putea sa se prevaleze pentru a scapa de responsabilitatea civila, de caracterul illicit al conventiei , in baza careia a comis infractiunea, invocand aplicarea regulii *nemo auditor...* De asemenea, un proxenet, nu va putea invoca imoralitatea activitatii pe care a desfasurat-o

According to a certain opinion, the object of the irresponsibility clause may be represented only be the patrimonial rights, not by the personal, non-patrimonial ones[72].

According to another opinion that we share, as an exception, we may recognize as being valid the clauses that have as an object the removal of the responsibility for the production of certain prejudices represented by easy corporal harm, such as the case of accidents of the sportsmen when the game rules are respected[73] or when such clauses would be right by their purpose, such as accepting certain surgeries, in order to draw or transplant organs. [74]

When we are in presence of a crime, its author cannot invoke the *nemo auditur...* rule in order to keep the fruit of his immoral action because either the stipulations of art. 118 of Criminal Code, that regulate the special confiscation, interfere, or it proceeds to the reestablishment of the previous situation, by returning the goods that represented the object of the victim's crime, when it consisted in a civil party.

In solving the civil side of the cause, the courts consider the victim's behaviour just as a simple exoneration cause.

Therefore, the author of a fraud in conventions, for example, could not avails in order to escape from the civil responsibility, from the illicit feature of the convention based on which he committed the crime, by invoking the application of the *nemo auditor...* rule. Also, a procurer cannot invoke the immorality of the action he had developed in order to paralyze the eventual action in compensations from the part of the harmed persons by committing the crime.

But it is true that the author of one of the violence crime could invoke in his defence the counterattack unleashed by the victim. In this situation, the complaint of the aggressor who was aggressed in his turn cannot be declared as non-harmful.

Indeed, the courts will find out if the limits of self-defence were crossed, that means to consider the victim's action and, as

pentru a paraliza eventuala actiune in despagubiri din partea persoanelor prejudiciate prin comiterea infractiunii.

Este adevat insa, ca autorul uneia dintre infractiunile de violenta ar putea sa invoce in apararea sa, contraatacul declansat de victima. In aceasta situatie, plangerea acresorului care a fost la randul sau agresat, nu poate fi declarat ca indaminibila.

Intr-adevar, instantele urmeaza sa cerceteze daca s-au depasit limitele legitimei aparari, ceea ce inseamna sa tina cont de fapta victimei si, in consecinta, in solutionarea laturii civile sa imparta responsabilitatea, insa aceasta nu reprezinta o aplicare a regulii *nemo auditur*..

Atitudinea instantelor se explica prin grija de a evita ca, atat autorul infractiunii, cat si victima sa scape de responsabilitate. Practic, se analizeaza gravitatea culpelor.

Dupa cum s-a spus[35], gravitatea culpei poate influenta intinderea despagubirilor doar in cazul in care la producerea prejudiciului a contribuit si culpa victimei.

Primul criteriu pentru repartizarea prejudiciului, in aceasta ipoteza, nu este culpa, ci contributia cauzala la producerea pagubei, autorul faptei ilicite urmand sa raspunda numai in limita in care a cauzat prin fapta sa, prejudiciul suferit de victima.

Doar atunci cand acest criteriu obiectiv nu este suficient, neputandu-se stabili proportia intre contributia cauzala a victimei si a inculpatului la producerea prejudiciului, trebuie sa se recurga la criteriul subiectiv - gradul de vinovatie – pentru a se stabili masura in care paguba va fi suportata de autorul faptei ilicite si de persoana vatamata.

Tot astfel, in cazul infractiunilor savarsite ca urmare a provocarii din partea victimei, nu se poate vorbi de o aplicare a regulii *nemo auditur*…, la stabilirea despagubirilor civile tinandu-se seama de regulile referitoare la culpa comuna.

Potrivit regulilor privitoare la stabilirea culpei commune, ori de cate ori se va retine existenta culpei victimei, a consequence, in solving the civil side they have to share the responsibility, but this does not represent an application of the *nemo auditur*...rule.

The attitude of the courts is explained by their concern to avoid the fact that both the author and the victim of the crime could escape from responsibility. Practically, the gravity of the guilt is analysed.

As it was said[75], the gravity of the guilt may influence the extension of the compensation only if the victim's guilt contributed to producing the damage.

The first criterion for the classification of the prejudice, in this hypothesis is not the guilt, but the causal contribution to producing the damage and the author of the illicit fact is responsible only in the limit he caused by his action the damage suffered by the victim.

Only when this objective criterion is not enough and we cannot establish the proportion between the causal contribution of the victim and of the defendant to producing the prejudice, we must use the subjective criterion – the guilt degree – in order to establish how much the damage will be suffered by the author of the illicit fact and of the harmed person.

In the same way, in case of crimes accomplished as a consequence of the victim's challenge, we cannot speak about an application of the *nemo auditur*…rule, because, at the establishment of the civil compensation, we consider the rules referring to the common guilt.

According to the rules referring to the establishment of the common guilt, whenever the existence of the victim's guilt is kept, the compensations that have to be paid by the author of an illicit fact will be diminished, considering the gravity of both the author and the victim.

As a consequence, the author does not have to integrally repair the damage, but only the part corresponding to his guilt.

For the same reason, the rules above are to be applied also in case of crimes accomplished as a consequence of the

despagubirile la plata carora urmeaza a fi obligat autorul unui fapt illicit vor fi micsorate, tinandu-se seama de gravitatea culpei, atat a autorului, cat si a victimei.

Drept consecinta, autorul nu este tinut sa repare integral paguba, ci numai partea corespunzatoare culpei sale.

Pentru aceeasi ratiune, regulile de mai sus urmeaza a fi aplicate si in cazul infractiunilor savarsite ca urmare a provocarii din partea victimei. In asemenea cazuri, desi cauzarea prejudiciului este consecinta nemijlocita a activitatii autorului, victima contribuie totusi la acest prejudiciu, intrucat ea este aceea care provoaca prin fapte ilicite, savarsirea de catre autor, a faptului ca a pricinuit paguba.

Deci, daca provocarea nu ar fi avut loc, nu s-ar fi produs fapta culpabila a autorului, care a determinat prejudicial.

Drept, urmre, la stabilirea intinderii respunderii civile, fata de cuantumul integral al prejudiciului cauzat, trebuie sa se tina seama atat de gravitatea culpei autorului, cat si aceea a culpei victimei, deoarece ambele au contribuit la cauzarea prejudiciului.

Asa fiind, dupa constatarea – pe temeiul probelor efectuate- a faptei culpabile a victinei, care constituie provocarea la infractiunea savarsita de autor, instanta are obligatia sa determine motivat, in ce masura victima a contribuit prin fapta culpabila la producerea prejudiciului, stabilind in mod corespunzator despagunirile civile datorate de autor[36].

In concluzie, se poate opina ca, in materie delictuala exista reguli bine conturate, dupa care se stabileste intinderea despagubirii.

Autorul prejudiciului nu poate invoca, deci, adagiul *nemo auditur*… pentru a conserva folosul illicit obtinut prin comiterea infractiunii, sau a nu mai plati despagubiri atunci cand victima a participat in vreun fel la producerea pagubei.

Aplicarea regulii ar putea fi, insa, invocata – dupa parerea noastra- in cazul actiunii in restituire, a persoanei care a fost victim's challenge. In such cases, the victim contributes to this prejudice because he is the one who challenges by illicit facts the author to accomplish the damage.

So, if the challenge had not happened, there would not have been the guilty action of the author that determined the prejudice.

As a consequence, when establishing the extension of the civil responsibility for the integral quantum of the caused prejudice, we must consider both the gravity of the author's guilt and the one of the victim's guilt because both of them have contributed to causing the prejudice.

So, after finding – based on the effectuated proofs – the victim's guilty action that consists in challenging the author to accomplish the crime, the court has the obligation to reasonably determine how much the victim has contributed by his guilty fact to producing the prejudice, correspondingly establishing the civil compensations owed by the author[76].

In conclusion, we may say that, in criminal matter, there are some well shaped rules depending on which we may establish the extension of the compensation.

Thus, the author of the prejudice cannot invoke the *nemo auditur*… adage in order to keep the illicit advantage obtained by committing the crime or in order not to pay compensations when the victim has participated in some kind to producing the damage.

The application of the rule could be invoked – in our opinion – to the returning action of the person who was harmed by emitting a no cover cheque that he accepted, knowing what is it about.

Also, the *nemo auditur*… rule can be invoked in case of the returning action of the dishonest persons who paid the price of the goods about which they knew they were coming from crime committing.

The Supreme Court applied this rule when it rejected the action of the plaintiffs because they were dishonest.

prejudicita prin emiterea unui cec fara acoperire pe care l-a acceptat in cunostinta de cauza.

De asemenea, regula *nemo auditur*… poate fi invocata in cazul actiunii in restituire, a persoanelor care fiind de rea-credinta au platit pretul bunurilor despre care stiau ca poveneau prin comiterea de infractiuni.

Instanta Suprema a facut aplicarea acestei reguli atunci cand a respins actiunea reclamantilor cu motivarea ca au fost de rea-credinta.

In speta, reclamantii l-au chemat in judecata pe parat pentru a fi obligat sa restituie sumele de ban ice reprezentau pretul de cumparare platit de ei pentru unele bunuri, care au facut obiectul infractiunii de specula, pretinzand ca nu au cunoscut aceste imprejurari si ca, ulterior, obiectele fiind confiscate, paratul s-a obligat sa restituie pretul, dar apoi a refuzat sa-si execute angajamentul, pentru ca din probele administrate a rezultat ca reclamantii au fost in deplina cunostinta de cauza, de achizitionarea bunurilor ce au format obiectul infractiunii comise de parat. Facand aplicarea regulii *nemo auditur*… instanta suprema a respins actiunea reclamantilor pentru restul sumelor platite[37].

Dupa cum se observa, din motivarea acestei solutii, instanta suprema a facut o aplicare ferma a principiului potrivit caruia, un reclamant nu poate invoca in in sustinerea actiunii, propria sa turpitudine, precum si a principiului potrivit caruia, situatia anterioara nu poate fi restabilita in sensul de a dispune restituirea reciproca a prestatiilor effectuate, atunci cand cauza actului juridic este imorala pentru ambele parti, fara a se face distinctie in raport cu gradul de turpitudine al fiecaruia.

Majoritatea cazurilor in care isi gaseste aplicarea regula *nemo auditur*… se circumscrie obligatiilor care iau nastere dintr-un contract si priveste actiunea in repetituiune sau in restituire.

Daca obligatia are caracter imoral doar in privinta paratului, actiunea in repetituine este admisibila.

Here, the plaintiffs called in justice the defendant in order to force him to return the money amounts that represented the buying price paid by them for certain goods that made the object of the speculation crime, pretending that they did not know these circumstances and, subsequently, the objects being confiscated, the defendant was forced to return the price, but then he refused to accomplish his commitment because, from the administrated proofs, it resulted that the plaintiffs totally knew about the achievement of the goods that made the object of the crime committed by the defendant. By applying the *nemo auditur*… rule, the Supreme Court rejected the action of the plaintiffs for the rest of the paid amounts[77].

As we may notice, from the motivation of this solution, the supreme court firmly applied the principle according to which a plaintiff cannot invoke in supporting the action his own turpitude, and also the principle according to which the previous situation cannot be re-established referring to disposing the mutual return of the effectuated services when the cause of the juridical act is immoral for both of the parties, without making a distinction reported to the turpitude degree of each party.

Most of the cases where the *nemo auditur*… rule is applied are circumscribed to the obligations that are born from a contract and regard the repetition or returning action.

If the obligation has an immoral feature only regarding the defendant, the repetition action is acceptable.

When, both the plaintiff and the defendant are guilty of immorality, according to an opinion, the repetition action must be rejected based on the *in pari causa turpitudinis cesat repetitio* principle, if there is an equal immorality of the parties, and according to another opinion, the judicial courts, not being called to make the dosing of the parties' immorality, the repetition action must be rejected as unacceptable because the plaintiff cannot invoke his own turpitude, even if the defendant was accused of a more serious

In situatia in care, atat reclamantul cat si paratul se fac vinovati de imoralitate, potrivit unei opinii, actiunea in repetitiune trebuie respinsa in baza principiului *in pari causa turpitudinis cesat repetitio*, daca se contureaza o imoralitate egala a partilor, iar potrivit unei alte opinii, instantele judecatoresti, nefiind chemate sa faca dozajul imoralitatii partilor, actiunea in repetitiune trebuie respinsa ca inadmisibila, deoarece reclamantul nu poate invoca propria turpitudine, chiar si in cazul in care paratului i-ar fi imputata o imoralitate mai grava[38].

O aplicare a acestui principiu se intalneste in ceea ce priveste nulitatea actelor de procedura; aceasta este inlaturata prin aplicarea art. 108 alin. ultimo C.pr.civ., potrivit caruia *nimeni nu poate invoca neregularitatea pricinuita din propriul sau fapt*[39].

7. Regimul juridic al actiunii in resciziune

Pentru a ne lamuri cu privire la fizionomia regulii *nemo auditur*… este necesara analiza succinta a regimului juridic al actiunii in restituire.

Astfel, se poate pune intrebarea fireasca daca actiunea in baza careia se cere restituirea prestatiei este una si aceeasi cu *actio de in rem verso* ce tine de institutia imbogatirii fara justa cauza, sau isi are suportul in institutia platii lucrului nedatorat.

In primul rand, trebuie observat ca, daca reclamantul are la dispozitie actiunea bazata pe contract sau alt izvor de obligatii, nu se poate intenta actiunea bazata pe imbogatirea fara just temei.

Actiunea in restituire este consecinta fireasca a declararii nulitatii actului.

Imbogatirea fara just temei, ca izvor de obligatii, are un caracter subsidiar, in sensul ca *actio de in rem verso* nu poat fi exercitata decat in absenta oricarui alt mijloc juridic prin care s-ar putea recupera pierderea suferita.

De asemenea, nu trebuie facuta confuzie intre actiunea in restituire si actiunea la care face referire art. 993 alin. 1 C.civ., care

immorality[78].

An application of this principle is met regarding the nullity of the procedure documents; this is removed by applying art. 108, the last paragraph of Civil Procedure Code according to which *nobody can invoke the irregularity caused by their own action*[79].

7. Juridical system of the rescission action

In order to be clear about the physiognomy of the *nemo auditur*… rule, we need the succinct analysis of the juridical system of the returning action.

Thus, we may ask the natural question whether the action based on which we demand the return of the service is the same as the one of *actio de in rem verso* related to the institution of the enrichment with no fair cause or it has its support in the institution of the payment of the non-owed good.

In the first place, we must notice that, if the plaintiff has at his disposition the action based on contract or other source of obligation, we cannot intent the action based on the enrichment with no fair cause.

The returning action is the natural consequence of declaring the nullity of the act.

The enrichment with no fair cause, as a source of obligations, has a subsidiary feature, meaning that *actio de in rem verso* can be exerted only in the absence of any other juridical means by means of which we could recover the suffered loss.

Also, we must not make confusion between the returning action and the action to which refers art. 993, paragraph 1 of Civil Code that consecrates the right to act for the one who paid without owing. The discussed article shows that the person who thought he was a debtor, by an error, and he paid a debt, has the repetition right against the debtor".

By paying the non-owed object, we

consacra dreptul la actiune pentru cel care a platit fara sa datoreze. Articolul in discutie arata ca acela care din eroare, crezandu-se debitor, a platit o datorie, are drept de repetitiune in contra debitorului".

Prin plata lucrului nedatorat, se intelege remiterea unui lucru sau a unei sume de bani care in realitate nu exista.

Asadar, daca actiunea nascuta din contract este inchisa, ramane actiunea extracontractuala *de in rem verso* pentru a reclama ceea ce a trecut dintr-un patrimoniu in altul.

Pentru a fi posibila *actio in rem verso* este necesar ca plata sa fie fara cauza. Or, in cazul regulii *nemo auditur…* exista o cauza care, insa este imorala.

De asemenea, exista diferenta intre actiunea in restituire si actiunea la care face referire art. 993 alin.1 C.civ., deoarece obligatia de restituire a ceea ce s-a primit ca urmare a unei plati nedatorate si dreptul corelativ de a cere restituirea, inceteaza cand plata s-a facut pentru cauza imorala, iar debitorul este cel putin culpabil.

Evident, daca s-ar admite restituirea, s-ar admite ca temei al acestei restituiri insasi culpa celui ce o pretinde.

Practica judecatoreasca a decis ca, intr-o asemenea situatie restituirea prestatiei este inadmisibila pentru ca reclamantul a urmarit un scop vadit imoral pentru incheierea contractului, scop in care este potrivnic legii"[40].

O asemenea restituire s-ar baza , deci, pe propria culpa a celui ce cere restituirea. Este insa, in afara de orice indoiala ca o asemenea solutie nu este posibila, deoarece s-ar baza pe acelasi obstacol: reclamantul obligat sa indice de ce a platit, ar trebui sa se prevaleze de imoralitatea sa, iar judecatorul ar refuza sa-l asculte.

Bibliografie

M. Djiuvara, *Teoria generala a dreptului*, Bucuresti , 1930, vol II

D.C. Danisor , *Drept constitutional si institutii politice*, vol I, Ed. Universitaria, Craiova, 1999

understand remitting a thing or a money amount that does not really exist.

Therefore, if the action born from a contract is closed, there is still the extra-contractual *de in rem verso* action in order to reclaim everything that passed from a patrimony to another one.

For *actio in rem verso* to be possible, the payment must have no cause. But, in case of the *nemo auditur…* rule, there is a cause that is immoral.

Also, there is a difference between the returning action and the action to which refers art. 993, paragraph 1 of Civil Code because the returning obligation of what was received as a consequence of a non-owed payment and the correlative right to ask for the return stop when the payment was made for the immoral cause and the debtor is at least guilty.

Obviously, if the return was accepted, we would accept as a base of this return the guilt of the one who pretends it.

The judicial practice decided that in a certain situation the return of the service is unacceptable because the plaintiff has followed a clearly immoral purpose in order to make the contract, a purpose that is against the law"[80].

Such a return is based therefore on the own guilt of the one who asks for the return. But, indeed, such a solution is not possible because it is based on the same obstacle: the plaintiff, forced to indicate why he paid, should avail of his immorality and the judge would refuse to listen to him.

Bibliography

M. Djiuvara, *General Law Theory*, Bucharest , 1930, vol II

D.C. Danisor, *Constitutional Law and Political Institutions*, vol I, Universitaria Press, Craiova, 1999

N. Popa , *General Law Theory* , Bucharest, 1992

T. R. Popescu, *General Theory of Obligations*, Scientific Press, Bucharest,

N. Popa , *Teoria generala a dreptului* , Bucuresti, 1992
T. R. Popescu, *Teoria generala a obligatiilo*r, Ed. Stiintifica, Bucuresti, 197.
Traian Ionascu, **Eugen A. Barasch** in *Tratat de Drept Civil*, vol I,
Doru Cosma – *Teoria generala a actului juridic civil* – Ed. Stiintifica , Buc. 1969
I. Catineanu , *Elemente de Etica* , Ed. Dacia, Cluj-Napoca, 1984
M. Elinescu, , *Raspunderea civila delictuala* , Ed. Academiei RSR , 1972, p. 147
Ioan Deleanu , *Drepturile subiective si abuzul de drept, Ed Dacia , Cluj Napoca, 1988*
D. Radu, *Examen teoretic al practicii judiciare, privind unele probleme de drept civil si al materiei*, in RRD 9/1984
C. Turianu in *Contracte Speciale* , *practica juridica adnotata*, Ed Continent XXI , Buc. 1995
J. Boncase , *La notion juridique de bonnes moeurs , in etudes de droit civil* – a la memoire de H. Capitant, Dalloz , Paris 1987
R. Savatier, *Des effets et de la sanction du devoir morale en droit positif francais et devant la jurisprudence,* Poitiers , 1916
GH. Boroi *Drept civil. Teoria Generala*, Ed. ALL Buc. 1997,
C Hamangiu , T. R. Balanescu , Al. Baicoianu, *Tratat de drept civil* , vol I Ed All Buc. 1998.
I Dogaru , *Drept civil roman* , Tratat , vol. I Ed. Europa, Craiova 1996
I.M.Anghel , Fr. Deak , M. F. Popa, *Raspunderea civila delictuala* , Ed Stiintifica, Buc. 1970
M. Elinescu , *Raspunderea civila delictuala*, Ed. Academiei RSR, Buc,. 1972
Doru Cosma, *Teoria generala a actului civil*, Ed Stiintifica , Buc. 1969
197.
Traian Ionascu, **Eugen A. Barasch** in *Civil Law Treaty*, vol I,
Doru Cosma – *General Theory of Civil Juridical Act* – Scientific Press, Bucharest, 1969
II. Catineanu , *Ethical Elements*, Dacia Press, Cluj-Napoca, 1984
M. Elinescu, , *Criminal Civil Responsibility*, RSR Academy Press, 1972, p. 147
Ioan Deleanu , *Subjective Rights and Law Abuse, Dacia Press, Cluj Napoca, 1988*
D. Radu, *Theoretical Examination of Judicial Practice regarding certain Problems of Civil Law and of Matter*, in RRD 9/1984
C. Turianu in *Special Contracts*, *Annotated Juridical Practice*, Continent XXI Press, Bucharest, 1995
J. Boncase , *La notion juridique de bonnes moeurs , in etudes de droit civil* – a la memoire de H. Capitant, Dalloz , Paris 1987
R. Savatier, *Des effets et de la sanction du devoir morale en droit positif francais et devant la jurisprudence,* Poitiers , 1916
GH. Boroi *Civil Law. General Theory*, ALL Press, Bucharest, 1997,
C Hamangiu , T. R. Balanescu , Al. Baicoianu, *Civil Law Treaty*, vol I All Press, Bucharest, 1998.
I Dogaru , *Romanian Civil Law*, Treaty, vol. I, Europe Press, Craiova 1996
I.M.Anghel , Fr. Deak , M. F. Popa, *Criminal Civil Responsibility*, Scientific Press, Bucharest, 1970
M. Elinescu , *Criminal Civil Responsibility*, RSR Academy Press, Bucharest, 1972
Doru Cosma, *General Theory of Civil Act*, Scientific Press, Bucharest, 1969

[1] Trib. Suprem, sectinea civilă Dec. nr. 144/1983 în rep. III, p. 79.
[2] **M. Djiuvara** , *Teoria generala a dreptului*, Bucuresti , 1930, vol II , p.27
[3] **D.C. Danisor** , *Drept constitutional si institutii politice*, vol I, Ed. Universitaria, Craiova, 1999, p.125 . – " Libertatea individului este doar formala, pentru ca el este vidat de propria moraliate. Doar un individ moral ar

putea fi liber in sine. Ori, morala disparand, devenind acest drept ca etica intersubiectiva impiedica progresul moral al individualitatii. Individul este liber pentru societate nu pentru sine; el este liber in relatie, nu in sine."

[4] **N. Popa** , *Teoria generala a dreptului* , Bucuresti, 1992, p.42.

[5] Digeste , Cartea XII , Titlul V , parag. VI .

[6] **Domat** , *Lois Civiles* , Liv.I, Tit. XVIII, sect. IV , n ind 0 , 8et. Liv II, tit VII, sect II , n ind 4 *Voir la coitique*, de **M. Dubois**, au Sirey, 1874, I, 281

[7] **Aubry et Rau** , 4 ed. XIV , parag. 442 bic., nota 8.

[8] **Demolombe** , XXX I, nr. 436

[9] **Laurent** , XVI , n. 164; **Huc** , XVII , n. 392

[10] In favoarea aplicarii regulii in conditiile legislatiei actuale, vezi pro. Univ. dr. doc. **T. R. Popescu**, *Teoria generala a obligatiilo*r, Ed. Stiintifica, Bucuresti, 1970, p. 103, 104-106. – In sens contrar **Traian Ionascu**, **Eugen A. Barasch** in *Tratat de Drept Civil* , vol I, p.381 - 383

[11] **Doru Cosma** – *Teoria generala a actului juridic civil* – Ed. Stiintifica , Buc. 1969, p. 351

[12] Trib. Suprem, sectiunea civila , dec. 798/1985 in RRD nr. 3/1986 , p. 71 – Elasticitatea functionala a nulitatii se poate datora, in genere, unor inprejunari de fapt sau de drept, aparute inainte de constatarea sau de declararea nulitatii si care inlatura contrarietatea dintre consecintele actului si scopul lui admisibil. Urmeaza deci, sa se verifice daca prin imprejurari anterioare, dar mai ales concomitente si ulterioare incheierii actului nu s-a ajuns la asanarea nulitatii. Pentru dezvoltari precum si pentru distinctia intre aceasta forma a actului juridic nul si confirmare, a se vedea **Traian Ionascu, E.A.Barasch** , op. cit., p. 367 – 371.

[13] **I. Catineanu** , *Elemente de Etica* , Ed. Dacia, Cluj-Napoca, 1984, p.170

[14] **M. Elinescu**, , *Raspunderea civila delictuala* , Ed. Academiei RSR , 1972, p. 147

[15] **Ioan Deleanu** , *Drepturile subiective si abuzul de drept, Ed Dacia , Cluj Napoca, 1988,p. 57*

[16] Trib Suprem , sect. civ. , dec. 144/1983 in rep. III, p. 79

[17] Trib. Hunedoara , dec. 193/1988 in RRD nr. 10/1988, p. 68

[18] Trib. Suprem , sect civila, dec 27/1970, rep I , p. 130

[19] Trib. Timis. Dec. 822/1972 in RRD nr. 4/ 1973,p. 174

[20] Trib Suprem sect. civ. Dec 1416/1981 in CD, p. 74

[21] **M. Elinescu** , op cit. p. 143

[22] Trib. Constanta , dec. 195/1987 in RRD 2/1988, p. 69. Trebuie retinut ca motivul eliminarii leziunii din dreptul modern este de ordin economic in practica fiind greu de spus daca exista sau nu o leziune intr-un anumit caz concret deoarece valoarea atribuita de o parte contractanta unui lucru este adesea de ordin subiectiv si variaza la infinit dupa gradul de dorinta si de necesitate a fiecaruia. Prin decizia luata in discutie Instanta Suprema se pronunta intr-un fel, impotriva leziunii sau a restrangerii ei in dreptul actual din nevoia de a apara partile pe considerentul lipsei lor de experienta sau a exploatarii situatiei in care s-ar afla la un moment dat.

[23] Donatia este nula absolut pentru cauza imorala daca se dovedeste ca are drept scop stabilirea , continuarea, ori remunerarea unor relatii de concubinaj, reprezentand *pretum stupri*. Pentru dezvoltari in materie de donatie intre concubini, vezi **D. Radu**, *Examen teoretic al practicii judiciare, privind unele probleme de drept civil si al materiei*, in RRD 9/1984,p. 48 - 49

[24] Trib. Supr. Sect. civ. Dec. 27/1990. cit. **C. Turianu** in *Contracte Speciale* , *practica juridica adnotata*, Ed Continent XXI , Buc. !995, p.28.

[25] **L. Josserand** , In de l' abus de droit, Paris 1905,p.51

[26] **J. Boncase** , *La notion juridique de bonnes moeurs , in etudes de droit civil* – a la memoire de H. Capitant, Dalloz , Paris 1987 , p. 91-100

[27] **R. Savatier**, *Des effets et de la sanction du devoir morale en droit positif francais et devant la jurisprudence,* Poitiers , 1916 , p.345

[28] **Idem** p.412

[29] Doctrina dreptului civil roman, in marea sa majoritate nu impartaseste teoria actelor inexistente, argumentandu-se ca aceasta teorie nu are suport legal, este inutila din punct de vedere pragmatic si este falsa din punct de vedere teoretic. Pentru detalii, vezi **GH. Boroi** *Drept civil. Teoria Generala*, Ed. ALL Buc. 1997,p.178, **C Hamangiu , T. R. Balanescu , Al. Baicoianu** , *Tratat de drept civil* , vol I Ed All Buc. 1998 ,p.113.

[30] Pentru dezvoltari privind exceptiile de la aplicarea principiilor care guverneaza nulitatile absolute , vezi **I Dogaru** , *Drept civil roman* , Tratat , vol. I Ed. Europa, Craiova 1996, p.308 si urm.

[31] Trib. Maramures. Dec. 461/1982 in RRD 12/1982, p.59, in care se arata ca daca o actiune in declararea nulitatii absolute a unui act civil (de instrainare a unor terenuri) este admisa , partile trebuie sa-si restituie reciproc si integral prestatiile facute. In consecinta chiar daca in present, valoarea animalelor care se pretinde ca au fost vandute pentru achizitionarea terenului este mai mare , aceasta imprejurare nu prezinta interes, deoarece

concludenta sub acest aspect prezinta doar pretul achitat si a carui restituire se impune pentru restabilirea situatiei anterioare.

[32] **I.M.Anghel , Fr. Deak , M. F. Popa**, *Raspunderea civila delictuala* , Ed Stiintifica, Buc. 1970, p.80.

[33] Intrecerile sportive au loc intr-un cadru organizat, cu respectarea unor regulamente intocmite de organele competente, si sub supravegherea unor specialisti. Acceptarea unei lupte cu o persoana in stare de ebrietate si care nu are nici pregatirea fizica necesara in acest scop atrage raspunderea celui in cauza. In cazul in care o asemenea lupta a produs moartea unuia dintre participanti, culpa celorlalti care au provocat-o, consta in aceea ca nu au prevazut, desi cu un minim de diligenta puteau sa prevada, consecintele posibile ale luptei. Trib. Covasna, dec. civ. 179/1980 in RRD 2/1981, p. 66. In speta, victima apropus paratului, ambii fiind in stare de ebrietate, sa-si masoare fortele la tranta. Paratul a acceptat, dar fiind mai puternic si intr-o stare de ebrietate mai redusa a invins. Trantind insa pe victima la pamant, acesta a suferit un traumatism grav, constand in fracturarea coloanei cervicale, care i-a atras moartea dupa cateva zile. Procuratura , stabilind ca paratul nu a actionat cu intentia de a vatama, a dispus scoaterea sa de sub urmarire penal pentru infractiunea de lovituri cauzatoare de moarte. Concubina victimei, a formulat insa actiune bazata pe art. 998 c..civ. , pentru plata cheltuielilor de inmormantare si a pensiei de intretinere a doi copii minori, rezultati din convietuirea lor, cererea sa a fost admisa, dar, retinandu-se si culpa concurenta si egala a victimei, cele doua capete de cerere ale reclamantei au fost admise pe jumatate.

[34] **M. Elinescu** , *Raspunderea civila delictuala*, Ed. Academiei RSR, Buc,. 1972, p. 159-162.

O situatie speciala este aceea a culpelor comune in cazul in care avariile provocate prin coliziunea autovehiculelor se datoreaza vinei ambelor parti. Facandu-se aplicarea art. 998 – 999 C.civ. in acest caz conducatorii auto, urmeaza sa raspunda fiecare in raport cu intinderea culpei sale; Trib. Suprem, sect. civ. Dec. 1230/1976 in CD 1976, p. 145.

[35] CSJ – sec. civ. Dec. 747/1992, in *" Probleme de drept in deciziile CSJ "* , Ed. Orizonturi 1992, p. 92-93.

[36] T.S. dec. 17/1964 in CD /1964

[37] TS sec. civ. Dec. 544/1973; Judecatoria Fagaras dec. civ. 225/ 1972, ambele in RRD 10/1973, p. 148

[38] **Doru Cosma**, *Teoria generala a actului civil*, Ed Stiintifica , Buc. 1969, p. 352, unde se arata ca este de ajuns sa se constate ca reclamantul se prevaleaza de propria sa turpitudine spre a obtine restituirea obligatiei executate pentru ca actiunea sa fie respinsa ca inadmisibila, deoarece nedemnitatea solvensului, justifica prin ea insasi independent de aceea a accipiensului, inadmisibilitatea actiunii in repetitiune fara a fi necesara conditia paritatii partilor in imoralitate.

[39] Pentru aplicatii in Dreptul International Public, vezi expresia echivalenta: *nemo commodum capere potest ex infuria sua propria* .

[40] Vezi dec. civ. Nr. 807/1980 col civ. Trib Suprem.

[41] Supreme Court, civil section Dec. no. 144/1983 in rep. III, p. 79.

[42] **M. Djiuvara** , *General Theory of Law*, Bucharest, 1930, vol II , p.27

[43] **D.C. Danisor**, *Constitutional Law and Political Institutions*, vol I, Universitaria Press, Craiova, 1999, p. 125. – "The individual's freedom is only formal because he is voided by his own morality. Only a moral individual could be actually free. But, because of the fact the morality has disappeared, the fact that this right becomes an inter-subjective ethics hinders the moral progress of individuality. The individual is free for the society, not for himself; he is free in relationship, not in himself."

[44] **N. Popa**, *General Theory of Law*, Bucharest, 1992, p.42.

[45] Digests, 12th Book, 5th Title, parag. VI .

[46] **Domat** , *Lois Civiles* , Liv.I, Tit. XVIII, sect. IV , n ind 0 , 8et. Liv II, tit VII, sect II , n ind 4 *Voir la coitique*, de **M. Dubois**, au Sirey, 1874, I, 281

[47] **Aubry et Rau** , 4 ed. XIV , parag. 442 bic., note 8.

[48] **Demolombe** , XXX I, no. 436

[49] **Laurent** , XVI , no. 164; **Huc** , XVII , no. 392

[50] In favour of the application of the rule in conditions of the current legislation, see Professor **T. R. Popescu, PhD**, *General Theory of Obligations*, Scientific Press, Bucharest, 1970, p. 103, 104-106. – Contrarily, **Traian Ionascu**, **Eugen A. Barasch** in *Civil Law Treaty*, vol I, p.381 - 383

[51] **Doru Cosma** – *General Theory of Civil Juridical Act* – Scientific Press, Bucharest, 1969, p. 351

[52] Supreme Court, civil section, dec. 798/1985 in RRD no. 3/1986 , p. 71 – The functional elasticity of nullity can exist, generally, due to certain circumstances of fact or of law, appeared before finding or declaring the nullity, and that remove the contrariety between the consequences of the act and its acceptable purpose. Therefore, we have to check if, by previous circumstances, but especially by circumstances that are concomitant and ulterior to the act contract, it did not get to the nullity edification. For developments and also for the

distinction between this form of the null juridical act and confirmation, see **Traian Ionascu, E.A.Barasch** , op. cit., p. 367 – 371.

[53] **I. Catineanu** , *Ethical Elements*, Dacia Press, Cluj-Napoca, 1984, p.170

[54] **M. Elinescu**, *Civil Criminal Responsibility*, RSR Academy Press, 1972, p. 147

[55] **Ioan Deleanu**, *Subjective Rights and Right Abuse, Dacia Press, Cluj Napoca, 1988, p. 57*

[56] Supreme Court, civil section, dec. 144/1983 in rep. III, p. 79

[57] Hunedoara Court, dec. 193/1988 in RRD no. 10/1988, p. 68

[58] Supreme Court, civil section, dec 27/1970, rep I , p. 130

[59] Timis Court. Dec. 822/1972 in RRD no. 4/ 1973, p. 174

[60] Supreme Court, civil section. Dec 1416/1981 in CD, p. 74

[61] **M. Elinescu** , op cit. p. 143

[62] Constanta Court, dec. 195/1987 in RRD 2/1988, p. 69. We have to keep in mind the fact that the reason of removing the lesion from the modern law is economical, being difficult to say in practice whether there is or not a lesion in a certain concrete case because the value attributed by a contracting party to a thing is often subjective and can vary to infinite depending on the desire and necessity degree of each person. By the discussed decision, the Supreme Court pronounces in some way against the lesion or its restraint in the current law because it wants to defend the parties basing on their lack of experience or on the exploitation of their situation at a certain point.

[63] The donation is absolutely null for the immoral cause if it is proved that is purpose is the establishment, the continuation or the remuneration of certain concubinage relationships, representing *pretum stupri*. For developments in matter of donation between the concubines, see **D. Radu**, *Theoretical Examination of the Judicial Practice regarding certain Problems of Civil Law and of Matter*, in RRD 9/1984, p. 48 - 49

[64] Supreme Court, civil section, Dec. 27/1990. cit. **C. Turianu** in *Special Contracts, Annotated Juridical Practice*, Continent XXI Press, Bucharest, 1995, p.28.

[65] **L. Josserand** , In de l' abus de droit, Paris 1905, p.51

[66] **J. Boncase** , *La notion juridique de bonnes moeurs , in etudes de droit civil* – a la memoire de H. Capitant, Dalloz , Paris 1987 , p. 91-100

[67] **R. Savatier**, *Des effets et de la sanction du devoir morale en droit positif francais et devant la jurisprudence,* Poitiers , 1916 , p.345

[68] **Idem** p.412

[69] The doctrine of the Romanian Civil Law, in its most part, does not share the theory of the inexistent acts, motivating that this theory has no legal support, is useless from the pragmatic point of view and is fake from the theoretical point of view. For details, see **GH. Boroi** *Civil Law. General Theory*, ALL Press, Bucharest, 1997, p. 178, **C Hamangiu , T. R. Balanescu , Al. Baicoianu**, *Civil Law Treaty*, vol I, All Press, Bucharest, 1998, p. 113.

[70] For developments regarding the exception from applying the principles that govern the absolute nullities, see **I Dogaru**, Romanian Civil Law, Treaty, vol. I, Europe Press, Craiova 1996, p.308 and the following.

[71] Maramures Court. Dec. 461/1982 in RRD 12/1982, p. 59, where it is shown that if an action in declaring the absolute nullity of a civil act (of estranging some lands) is accepted, the parties must mutually and integrally return the services they made. As a consequence, even if in present the value of the animals pretended to be sold in order to achieve the lands is bigger, this circumstance presents no interest and the conclusive feature under this aspect presents only the paid price whose return is imposed in order to re-establish the previous situation.

[72] **I.M.Anghel , Fr. Deak , M. F. Popa**, *Civil Criminal Responsibility*, Scientific Press, Bucharest, 1970, p.80.

[73] Sports competitions occur in an organized framework, by respecting certain regulations accomplished by competent organs and under the surveillance of some specialists. Accepting a fight with a drunken person that had no physical preparation needed in this purpose attracts the responsibility of the other person. If such a fight has produced the death of one of its participants, the guilt of the ones who provoked it consisted in the fact that they did not foresee, even if they could, by using a minimum of diligence, the possible consequences of the fight. Covasna Court, civil decision 179/1980 in RRD 2/1981, p. 66. Here, the victim suggested to the defendant, when they were both drunk, to measure their forces by wrestling. The defendant accepted, but because he was stronger and less drunk, he won. Because he put the victim on the ground, the last one suffered a serious traumatism consisting in the fracture of the cervical column, fact that brought his death after a few days. The prosecutor's office, establishing that the defendant did not action by having the intention to produce damage, decided for him not to be criminally followed for the crime of strokes causing the death. But the victim's concubine formulated an action based on art. 998 of Civil Code for the payment of the funeral and for the maintenance allocation of two minor children resulted from their cohabitation, her demand was accepted but, keeping the concurrent and equal guilt of the victim, the two demands of the plaintiff were half accepted.

[74] **M. Elinescu**, *Criminal Civil Responsibility*, RSR Academy Press, Bucharest, 1972, p. 159-162.
A special situation is the one of the common guilt if the damage caused by the collision of the motor vehicles is due to the guilt of both of the parties. By making the application of art. 998 – 999 of Civil Code, in this case, the drivers are to be responsible depending on their guilt extension; Supreme Court, civil section, Dec. 1230/1976 in CD 1976, p. 145.
[75] CSJ – civil section, Dec. 747/1992, in *"Law Problems in CSJ Decisions*", Orizonturi Press 1992, p. 92-93.
[76] T.S. dec. 17/1964 in CD /1964
[77] TS civil section, Dec. 544/1973; Fagaras Court, civil decision 225/ 1972, both of them in RRD 10/1973, p. 148
[78] **Doru Cosma**, *General Theory of Civil Act*, Scientific Press, Bucharest, 1969, p. 352, where it is shown that it is enough to find that the plaintiff avails of his own turpitude in order to obtain the return of the executed obligation for his action to be rejected as unacceptable because the indignity of the solvens is justified by itself independently of the one of the accipiens , the unacceptability of the repetition action without being necessary the parity conditions of the parties placed in immorality.
[79] For applications in Public International Law, see the equivalent expression: *nemo commodum capere potest ex infuria sua propria* .
[80] See civil decision. No. 807/1980 col civ. Supreme Court.