Abstract of the doctoral thesis

The civil capacity of associations and foundations in Romanian law

The doctoral thesis "The civil capacity of associations and foundations in Romanian law" is structured in five chapters and points out the distinctive elements which provide to the analysed juridical institution its specific outline. It underlines the particularities of the associations and foundations' civil capacity, seen as belonging to the category of the private law's moral persons. This category is, then, integrated to the larger category of the moral person's juridical capacity.

When elaborating the present doctoral thesis, wee took into account the evolution of the legislative frame regarding this matter. Thus, its whole contents tackles as well with the legal stipulations generally applicable to the moral person as stated by the Decree nr. 31/1954 as with the stipulations of the Ordnance nr. 26/2000 regarding the associations and foundations. Are concerned the Law nr. 21/1924 for the moral persons (nowadays abrogated) and the Law nr. 287/2009, published in the Official Monitor nr. 511 of July, 42-th, 2009 (which has not been enforced).

The Chapter I entitled "General notions on the moral person" contains thru section. In the first one "Considerations on the history of the moral person", we are analysing the status of the moral person in the Roman law, then in the ancient Romanian law, as well as how the moral person was regulated upon by the Romanian Civil Code. We have shown that, *exempli gratia*, the Roman law through *Lex Iulia de collegiis*, the legal status for associations was instituted and a "system of previous authorization" was imposed. Therefore, whatever association was obliged to obtain a special authorization. Without it, it would have been

considered as "illicita collefia". The religious associations were, yet excepted from this rule. This authorization had started by being previous and legally expressed - authentical in the actual sense - but, gradually, it comes to acquire the asset of implicitness. Thus during the III-rd century A.D., the "tacit authorization" comes to be generalized..

In the ancient Romanian law an important juridical activity is attested by historical documents as being carried on by the ecclesial establishments, within the feudal Romanian states. Therefore, the churches are entitled to be seen as the main moral persons of that time. There are original documents concerning legacies, donations, sales-purchases, exchanges, various privileges granted and patrimonial rights confirmed authentically, various lawful actions with patrimony purposes where churches and monasteries do appear as distinct subjects of law.

The ancient Romanian legislations do indeed settle by their granted enforcement the asset, for the ecclesial establishments, of being, lawfully, moral persons. The Cartea românească de învățătură (The Romanian Wisdom Book), printed, on Vasile Lupu's order at the Trei Ierarhi Monastery from Jossy, in 1646, or the Îndreptarea legii (The Rightful Way of Law) printed, on the order of Matei Basarab, at Târgovişte, in 1652, do indeed contain norms regulating the founding requirements for some churches and monasteries, but also some matters regarding the protection of their respective ownership rights. By his Synodal Muniment, Alexandru Mavrocordat forbids the donations that would have been made" by the paupers and by the ones from the lowest estate to the ones that are richer and more powerful", yet such donations are lawfully acknowledged if they should be done to monasteries or churches. Later, this issue will be also adopted by the Codex elaborated by Andronache Donici (Chapter XXIV, art. 12). But it is the Callimach Codex which systematically organizes the regulations concerning the

civil law status established for monasteries churches. Their respective moral personality is lawfully enforced through a series of norms which regulate the existence conditions and the effective contents of the civil capacity that was attributed to ecclesial establishments.

The Callimach Codex enforced in Moldavia from 1817 to 1875 has stipulated, for the first time ever in the Romanian law, a general regulation of the moral person's status, inspired from the Austrian Civil Code, to which it was largely similar. Our Codex therefore starts from the social reality of the persons' association, which could be either "conforming to the law", thus permitted or "opposed to safety, to the public order or to the good morals and manners", thus forbidden. When it is permitted, the association may adopt the form of existing without a moral personality or either the - superior - form of bearing it. Finally, the Romanian Civil Code does not stipulate dispositions regarding the moral personality, because, by the adjustment done to suit the French Civil Code, the general regulation formerly established by the Callimach Codex was abandoned. In the new Civil Code the references made to the concept of moral person are mediated only: the arts. 4758 to 479 mention the state and the public domain; the art. 559, concerning the usufruct's duration states that: "the usufruct which is not granted to private persons cannot last beyond thirty years"; the art. 811 concerns the matter of: "the capacity of disposing of (something) or the one of receiving (something) through donation made between living persons or by testament made" (similar to the art. 910 of the French Civil Code); the art 817 is kindred to the art. 937 of the French Code.

In the Second Section, "Considerations concerning the juridical grounds of the moral person" we do analyse the various theories issued about it. The discussion is about: the dualist id theories which state that, apart from the personality of the individual, there is, within law, a distinct

kind of personality, specifically belonging to moral persons; The monistic theories, which utterly deny the existence of any juridical personae that would exist apart from and outside of the individual personality. We distinctly analyse the monistic theories, as well as the ones known as: "the fiction's theory", "the reality's theory", "the collective's theory". We do demonstrate that, in spite of the objections that have been brought to it in time, the practical importance of the concept of moral person did not diminish at all. This is because it excellently explains the nature of collective interests, with the features of generality and permanence that they involve. The two great theories which attempt to elucidate the concept that we too analyse do come, ultimately, to meet, by acknowledging the "necessity" of it but then they separate, diverging about the matter of the role given to the public powers in their influence upon it. The "fiction's theory" allows a massive intervention of the state, which is entitled to, sovereignty, constitute the juridical personality itself and to establish this latter's limits. The "reality's theory", more cautious, admits for the state a moderated intervention only, in regard of this matter.

The moral person is averagely associated to a groupment, a collective of people. This is way , before 1990 but also for some time after this gear our doctrine has sustained the collective's theory, in order to explain concept of moral person. But, as a matter of fact, the collective's theory, should this former have been either double or unique was meant to provide the grounds for, at that time, the juridical regime of the currently functioning "socialist state's units". It had to sustain and promote the positively existing juridical regime granted to "the socialist ownership right" and to "the real rights of the new type". It was, therefore not destined to explain the real, scientific, grounds of the concept of moral person. The reality of the life's flow shows us that, in the option

actually taken by the juridical system, the constitution of the moral person has come to be separated from the exigency requiring the effective existence of (more than one) a plurality of associates. For example, such is the case of the trading society with a limited liability constituted by an unique associate. The III-rd sections "The concept of moral person" does focus on the constitutive elements of the moral person: its independent organization, the patrimony of its own and its distinct purpose.

The Second Chapter of our doctoral thesis is entitled: "The civil capacity of the moral person" and is made of six sections, in the frame of which are studied the moral person's use and exercise capacities. This is done in order to describe the general panorama into which is sited the theme approached by our doctoral thesis namely: the civil capacity of associations and foundations. In the I-st Section "Considerations upon the founding of the moral person", we analyse the ways through which a juridical person could be founded in Romanian law, as they continue to be ruled by the Decree nr. 31/1954, but also the changes proposed by the Law nr. 287/2009, published in the Official Monitor nr. 511, of July 24-th, 2009, or by the New Civil Code. In the II-nd Section, "The use capacity of the moral person", we do study matters concerning the concept of use capacity for the moral person, its juridical asset, its beginning, its contents and its ceasing. We demonstrate, arguing by founded reasons, that the sanction for the disrespect of the rules regarding the use capacity of the moral person is the absolute nullity of the juridical civil act there by concluded. The Law nr. 287/2009 does rule oven the civil liability of the persons involved into the founding process of a moral person: its founders, its associates, its representatives and whoever else has been working on behalf of a moral person being in the process of its constitutions. All these are liable in front of third sides, unlimitedly, joint and several, in regard to the juridical acts concluded on

the moral person's behalf through the infringement of legal stipulations. The newly created moral person, after acquiring its respective personality, is therefore, able to "assume them". The art. 205 states that the juridical acts there by assumed should be considered as the moral person's own ever since the moment of their conclusion. On the other hand: "whatever moral person may receive liberalities under the requirements of common law, ever since the date of its foundation act, or, in the case of foundations established by testament, ever since the moment when the succession of the testament's author is opened, even in the case when the respective liberalities should not be imperatively necessary to the legal foundation of the respective moral person" (so states art. 208).

In the III-rd section, "The exercise capacity of the moral person", we do study systematically matters concerning the concept of the exercise capacity for the moral person its beginning, its contents and its ceasing. We also discuss of the sanction which should be applied if the rules of this matter would not be respected. We do continue by distinct sections, each of them analysing the effects occurring upon the moral person's civil capacity due to its re-structuring, as well as due to its possible ceasing.

The III-rd chapter is entitled: "General notions concerning the associations and foundations" and begins by précising the place where associations and foundations are sited, in the frame of the moral persons' general taxonomy. The most important panorama able to classify them is given by the criterion of the applicable juridical regime. According to it, moral persons are divided in two great categories: public law moral persons and private law moral persons. From this latter subcategory are considered to be parts the associations and the foundations. The second section: "Historical considerations concerning the associations and foundations as they are ruled in the Romanian law" contains a rigorous

analysis of the evolution of these categories of juridical persons. It starts with the period from 1864 to 1924, presenting the period when the aw nr. 21 of 1924 was enforced, and comparing this law with the French law issued July, 1-st, 1901, going towards our actual regulations of this matter. The III-rd section: "The concepts of association and foundation" does distinctly analyse the concepts of association and foundation, the specific features of the constitutive elements required by this kind of private law moral persons, as well as the various types of associations and foundations.

The IV-th chapter is entitled: "The use capacity of associations and foundations". It contains five section. In them we develop some of the conclusions to which we reached when we have studied the general use capacity of moral persons, but we also underline the specific features of the use capacity of associations and foundations. The I-st section: "Foundation of associations and foundations", we distinctly analyse the requirements for the constitution of associations and foundations. The II-rd section is entitled: "Concept and juridical assets of the use capacity for the associations and foundations". The III-rd section: "The beginning of the use capacity for associations and foundations" does study aspects concerning the beginning of the use capacity for associations and foundations, the status of the associations' branch offices and subsidiaries, as well as for the case of foundations' branch offices the limited use capacity for the cases of associations and foundations is also analysed. The IV-th section: "Contents of the use capacity for associations and foundations", starts from this capacity's asset of generality, this feature expressing the aptitude of these civil law subjects of owning all the rights, either patrimonial or not, that they could own under the existing legal conditions, as well as of assuming all patrimonial or non-patrimonial occurring obligations, no matter what their source would be. On the other

hand, the contents of the associations' and foundations' use capacity is also determined by its principle of specialization as it was legislatively enforced by the Law nr. 21/1924, art. 9, after having been sustained by our system prior to this normative act, especially by the jurisprudence of the administrative law. In its art. 206, the Law nr. 287/2009 stipulates, about the contents of the use capacity, firstly that the moral person might assume: "whatever civil rights and obligations, except for those which, by their nature itself or due to the legal stipulations, could only belong to individual persons". The moral persons with no patrimonial purposes, such as the associations and foundations, could own only: "the civil rights and obligations which are necessary for the realization of their purpose, lawfully established, for their constitutive acts or for their statute's establishment". The V-th section - "The ceasing of the use capacity for associations and foundations", does analyse aspects related to the ceasing date of the use capacity for associations and foundations, to their reorganizing, to their dissolving and liquidation. About the status of the goods formerly owned by an association or a foundation after this latter's dissolving there is the functioning rule according could not be transmitted to individual persons. These goods could only be transmitted towards moral persons, of public or private law, of which the statute establishes a purpose that would be identical or similar to the one chosen by the formerly dissolved association or foundation.

Finally, the V-th chapter of the thesis is entitled: "The associations' and foundations' exercise capacity and functioning" and is made of four sections. The I-st section "Organization and functioning of associations and foundations" approaches separately the association and the foundation, in respect to the questions raised by their specific organizing and functioning. We do underline and point out the existing resemblances and differences between these two cases. The association's organs are:

- the general Assembly;
- the Guiding Council;
- the censor, or, following the case, the Censors' Commission.

The association's general assembly does adopt its decisions within the limits outlined by the law, by its constitutive act and by its established statute. But these decisions are compulsory, even for the associated members who did not take part in the respective general assembly or who participated in it, but voted against the respective decisions, therefore requesting the recording of their separate opinions within the reunion's proceedings. These latter's are entitled to sue these respective decisions, in a delay of 15 days from the date when they have become aware of the respective decision or, following the case, from the reunion's date.

The II-nd section: "The exercise capacity of associations and foundations - its concept, beginning, contents ceasing". presents the opinions formulated by our doctrine in regard to the beginning of the exercise capacity for the moral person and to the solution which would be imperative for this matter. The moments when the exercise capacity becomes effectively functional are designated as being: "the moment when the leading organs are designated" and "the moment when the use capacity is acquired". We argue, founded upon solid reasons, that, for associations and foundations, the moment when the exercise capacity becomes effectively functional is coinciding with the moment when the use capacity is acquired. This solution is grounded upon the grammatical and logical interpretation of the actually enforced legal stipulations in this matter.

The III-rd section studies, for associations and foundations, the impact of the recognition for them of a statute of public utility on their juridical capacity. The recognition of the statute of public utility essentially determines the extension, for the respective association or

foundation, of the contents of its juridical capacity. This is done by assuming the rights and obligations expressedly mentioned by the law, as well as by the aptitude of acquiring whatever other rights and of assuming whatever other obligations might be raised by the concerns of the operations to which they have newly gained access.

The IV-th section: "Considerations upon the penal liability of associations and foundation", we do study matters which determine how the associations or foundations might interfere with the structure of the infraction and, therefore, what penalties might be applied to them. At the beginning of the XX-th century, Professor Dimitrie Alexandresco, studying the types of liability applicable to moral persons, was pointing out the difficulties which might appear into this matter, "because of the personality of the guilt, which is the ground of any liability". Therefore the penal liability remains "to be assumed by the real author of the deed, that is to say by the individual person". In regard to the types of penalties applicable to moral persons in general, thus to associations and foundations, in virtue of their penal liability, these are duly established by the Law nr. 278/2006, there by inserted within the actually enforced Penal Code. There is only one principal penalty, the only kind of principal that would suit the peculiarities of the moral person and, simultaneously, could properly fulfil, by its amount, the specific functions in regard to the subject of penal liability to which it is applied. This penalty is the amercement , going from 2.500 RON to 2.000.000 RON. To moral persons might, then, be applied the following complementary penalties:

- the moral person's dissolution;
- the suspension of the moral person's activity for a duration going from 3 months to one year;

- the suspension of the one activity of the moral person, in relation to which the respective infraction was perpetrated, for a duration going from 3 months to 3 years;
- the closure of some work sites belonging to the moral person, for a duration going from 3 months to 3 years;
- the forbidding, for the moral person, of its participating in whatever procedure of public auction for a duration going from 1 year to 3 years;
- the publication (pestering) or diffusion of the juridical decision condemning the moral person.

The Law nr. 286/2009 also known as the New Penal Code, does, indeed regulate the penal liability of the moral person, and it does so by preserving, as a principle, the actually functioning legal solutions concerning the penal liability requirements for the moral persons, as well as the applicable penalties for them.