

Error communis facit jus.

Origins. The Roman Law, the Mid Ages and the Old Romanian Law

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Abstract. The subject of this research is the principle of apparent validity in law. Generally speaking, the application field of the theory of appearance is limitless, jurisprudence and doctrine making its application possible in many areas of expertise. The *error communis facit jus* adagio is a sort of “equity axiom” which each generation of theoreticians and practitioners of law have passed on to the others to follow with fealty. We propose an analysis of the Roman law, then the Mid Ages situation and finally, the old Romanian law. The most important conclusion of this study is that any rule of law is capitalized through its applications. This research opened a larger way for considering those problems. The development of this subject is a must for the bibliography of the domain.

Key words: law, validity, principles, error, appearance

1. Preliminary aspects

The principle of apparent validity in law is defined in doctrine as being that “general principle according to which each person who was entrusted with good faith in an invincible judicial appearance, publicly seen as reality itself, it must be protected judicially” [1].

Generally speaking, the application field of the theory of appearance is limitless, jurisprudence and doctrine making its application possible in many areas of expertise.

Therefore, in the area of apparent property, the literature specific to the domain [2] notes that “Appearance in law, as a means of gaining the right to property and other real rights, is not established by the legislative entity as a principle, but it can be applied as an autonomous juridical figure, not only in regard to the real estate law, but also regarding those particular cases, such as the servitude right or the usufruct one, where the supposed acquisition can be based on a common and invincible error, along with the good faith of the beneficiary with an onerous title, who receives this right according to the law”.

The area of the theory of appearance also encompasses the apparent mandate, the apparent heir and creditor, simulation, possession, the civil servant, the fictive companies, the transfer of nominative deeds, the apparent capacity, the apparent marriage, the apparent quality as a merchant, the apparent residence and associate [3].

According to this theory, the law sanctions an ostensible situation and recognizes the emergence of some juridical effects in favor of those who created that situation.

It is thus acknowledged, in the literature specific to this field, that it has always been admitted the fact that “good faith backed up by common error must be the defender of third parties and that it offers them immunity against the sanction of nullity, which, according to the strictness of the law, threatens the juridical documents concluded without abiding the conditions imposed by the law” [4].

The *error communis facit jus* adagio is a sort of “equity axiom” [5] which each generation of theoreticians and practitioners of law have passed on to the others to follow with fealty.

The history of law has got to know it, to establish its place, and at the same time found a way to express a concise formula which we've been repeating to this very day: *error communis facit jus*.

Through our endeavor we wish to prove that this tradition has not been interrupted and the rule that we are discussing about has been accepted by our doctrine and jurisprudence and established by our modern laws [6].

2. The crystallising of the principle in the Roman law

The Roman jurist-consults did not enunciate anywhere the idiom *error communis facit jus*. However, it is indisputable that numerous texts draw their inspiration from this idea that the common error regarding a juridical situation is equivalent to the law itself, founded on the principle of equity.

The hypotheses in which the idiom *error communis facit jus* is established are divided in two categories: some refer to the public actions carried out by a person as a representative of the state, but who is not empowered to fulfill this function, whilst others place us in the presence of juridical reports of private law and they refer to the concept of putative capacity, the issue at hand being the juridical documents closed by an incapable person which is considered capable.

In what follows, we will refer to the first category of documents. We will fully cite the famous text of Ulpian, known as the Barbarius Philippus law:

„Barbarius Philippus, cum servus fugitivus esset, Romae proetoram petiit, et proetor designatus est: sed nihil ei servitatem obstetisse, ait Pomponius, quasi proetor non fuerit. Quin verum est, proetura eum functum, et tamen videamus si servus, quamdiu latuit in dignitate proetoria, functus sit: quid dicemus? Quae edixit, quae decrevit, nullius forem momenti? An fore, propter utilitatem eorum, qui apud eum egerunt vel lege, vel quo alio jure? Et verum puto, nihileorum reprobari. Hoc enim humanis est; cum etiam potuit populus romanus servo decernere hanc potestatem: sed et si scisset servum esse, liberum effecisset. Quod jus multo magis in imperatore observandum est” (L. III Digeste, De officio proetorum, c. I, t. XIV).

The hypothesis is the following: Barbarius Philippus, a slave who had run away, asked for the praetor's office in Rome and was elected praetor. [7] He then carried out a number of actions that were assigned to the jurisdiction of the praetor. Later on his origin was discovered. Under these circumstances, the following question had to be asked: „quid dicemus? Quae edixit, quae decrevit, nullius forem momenti?”. The juridical law demanded that those documents be nullified. However, Ulpian deemed them to be valid, basing his claims on arguments of general utility and equity. It was obvious that the annulment of those documents would have prejudiced countless private interests (*propter utilitatem eorum qui apud eum egerunt vel lege, vel quo alio jure*), but, at the same time, would have stained the praetor's image who was the representative of the state.

We can encounter a similar hypothesis in Law II of the Code, *Du sententiis et interlocutionibus*, c. VII, t. XLV: „Si arbiter datus a magistratibus cum sententiam dixit, in libertate morabatur, quamvis postea in servitatem depulsus sit, sententia tamen ab eo dicta habet rei judicatae auctoritatem”.

A slave, considered as being free, had been appointed as an arbiter by the magistrate. Although he had been reinstated into servitude, his decision was considered as having the authority of a judged thing. It is necessary to mention that the magistrate did not have, like the Roman praetor, the power to deputize, to correct the flaw of an appointment.

We can notice that the application of the equity law is not limited only to the case when the authority who had invested an incapable person with a public attribution could cover up the flaw of its appointment.

Referring to the actions carried out by an incapable person under the circumstances where it does not imply any mission conferred by the public authority, the common error will produce the following consequences: it will deem those certain actions as being valid.

The Roman jurist-consults expressed a categorical point of view in this sense, regarding testaments. The witnesses' incapacity could be transformed, in the case of a common error regarding their condition, in a putative capacity and allowed maintaining the validity of the testament.

It is known that, in the Roman law, the capacity must exist in the moment of closing the testament. However, the testament in which the witness is a slave who passes as a free one, in the eyes of all, is maintained as valid.

Two texts provide the same solution regarding this situation. A constitution of Emperor Adrian (L. I of Code, *De testamentis*, c. VI, t. XXIII) shows the hypothesis in which a slave, enjoying the state's possession of a free man, had been utilized as a witness in a testament. Later on, his servitude condition being uncovered, the legitimate heir asked for the annulment of the testament whose dispositions were not favorable to him. Being consulted regarding this matter, Emperor Adrian stated that the document was valid provided the slave was considered a free man by everyone.

Emperors Sever and Antonius have the same opinions on the matter. Iustinian's institutions have recollected their decisions.

The case is the same as the previous one, in the sense of drawing up a testament in the presence of a witness that is a slave, but considered a free man. The answer was the following: „*Divi Severus et Antonius rescripserunt subvenire se ex sua liberalitate testamento, ut sic habeatur, ac si, ut oportet, factum esset; cum eo tempore quo testamentum signaretur, omnium consensu hic testis liberorum loco fuerit neque quisquam esset qui ei status quaestionem moverit*”.

The final part of the text hints at the common error and its effect namely that of considering free the testamentary witness whose servitude was proven after the closing of the testament. As far as the latter is concerned, it must be taken into consideration as if it had been properly indicted. Consequently, the role of the common error is emphasized in explicit terms in the cited text.

Leaving behind the area of public actions, in regard to the juridical documents closed between private parties, we can notice that the equity rule is applied in the juridical relations in which one of the parties involved is an incapable.

In the main, the one who contracts must inform himself about the conditions of the contractor: „*Qui cum alio contrahit vel est vel esse debet non ignorus conditionis ejus*” (L. XIX Digeste, *De reguris juris*, c. IV, t. XVII). Nevertheless, a distinction has been established between the unpardonable and gross ignorance which haled from an extreme negligence and the authentic ignorance which a contractor preoccupied by his own interests could find himself in. The first is not sufficient to validate the contracts closed with an incapable person. The second, on the contrary, is capable to “repair” the flaw.

The authentic ignorance was considered, sometimes, a case of common flaw. A family son, for example, could pass in everyone's eyes as being emancipated and capable of motivating himself, the opinion being easy to deceive by the actions and contracts of the incapable person. „*Si quis paterfamilias esse credit, non vana simplicitate deceptus, nec juris ignorantia, sed quia publice paterfamilias plerisque videbatur, sic agebat, sic contrahebat, sic muneribus fungebatur, cessabit senatusconsultum*” (L. III, Digeste, *Senatusc. moded.*, l. XIV, t. VI and L. I code *Ad Senatusc. moded.*). There is a common error regarding the juridical capacity of the family son “if it was believed that he had been a family father without being deceived by a simplicity of life, nor by the lack of knowledge of the law, but because he publicly appeared as a family father, if he behaved in this manner, if he contracted this way, if he fulfilled his duties in this fashion” [8].

This solution is logically bound to the rule that we are about to analyze.

3. The Mid Ages

The Roman law set its toll on the general evolution of juridical ideas and institutions, being adopted and adapted to the realities of the feudal society, so that later on it would constitute the main source of inspiration in the process of elaborating the modern codes [9].

In the troubled era from the beginning of the Mid Ages the study of Roman law did not cease. In Rome, Italy, and after that Ravenna, after which in France, Roman law was being taught and it inspired some scientific papers. *Exceptionis legum romanarum ale lui Petrus și Brachylogus juris civilis* dates back from the 11th century.

In Bologna, around the year 1100, a professor by the name of Imerius appeared and he disseminated the science of law. What made his activity special was the fact that he offered as a study *Justinian's Writings*. Imerius' lectures attracted around him a large number of disciples. Imerius exegetically studied Justinian's legislation and made use of the gloss system, detailed explanations positioned by or under the text which was analyzed: this is where the name of the school he founded comes from: the school of glossators.

The work of the glossators was edited in 1250 by Accurius, *Glossa Ordinaria*. The fact that the glossators had written down alongside Ulpian's text, referring to the slave Barbarius Philippus the following text, *Notatur hic quod circa factum error communis facit jus*, is remarkable.

In relation to the idea of equity, we feel it is important to mention the anonymous paper *Petri exceptiones legum Romanorum* from the 12th century in which the author sets out to annihilate everything that offends equity in the laws. He claims later on that the laws must be abided by if there is no rational reason to justify changing them. The glossators had a similar position as well.

At the half of the 12th century, Bulgarus mentions that the judge must show preference to equity over law.

We can encounter a pure theory of equity at St. Thomas d'Aquino. Adopting Aristoteles' theory, he states that in the cases in which applying it would damage somehow the natural law, the judgment can be made in accordance with equity, this being in fact the true intention of the legislative entity. [10]

In 16th century France, professor Alciat founded the historical school of Roman law. This school represented an important milestone in the study of Roman law, because its teachers capitalized to the fullest, besides the Roman juridical texts also information from other domains, such as history, philosophy, philology. The most famous representative of the historical school was professor Jack Cujacs, who, for the first time in history, attempted to reconstitute the works of the classical jurist-consults by aiding himself of Justinian's texts.

4. The old Romanian law

The validity of the documents signed by the apparent heir with the third parties of good faith is also acknowledged in the old Romanian law, as we can notice from a bibliographical source [11].

We've cited in this respect a motivation of a ruling made by the Court of Cassation:

"Taking into consideration the fact that the principle of opposability towards the true heir, of the papers written by an apparently succeeding heir was recognized and established by the Roman jurisprudence he too categorically results from the Digeste, law 44 from the answers of Scoevoia.

Taking into consideration the fact that the old Romanian laws have their origins in the byzantine laws, from where they drew their law principles which they later on applied according to the local institutions and customs;

That, in the cliff notes collection of the kingly laws, edited by Andronache Donici [12] and which, although had legislative power only in Moldova, still served for the elaboration and interpretation of the Caragea Code [13], it is stipulated that the person who will have owned in good faith the inheritance of another, will return it in the condition in which it was found when the petition was made;

From this disposition we notice that, in our old legislation as well, it passed on from the Roman law and the validity of the papers written by an apparent heir was admitted, and this principle must be admitted by the Caragea law as well, which is to be interpreted though the sources which helped elaborate it, as long as this law does not contain any stipulation to subvert the principle;

That, being as it is, it is without a doubt that the Caragea law also admitted the principle established in the previous laws which served as its basis, recognizing the validity of the documents drawn up by an apparent heir and his opposability towards the true heir, etc." [14]

5. Conclusions

We will not insist here more on the matters related to this particular area, as it will be tackled in another section of another research report, concerning the modern law in Europe and in Romania as a study case.

In this context, we would also like to emphasize the fact that the act of composing this research involved the phenomenon of translation. One of the main directions where the translation's theory evolved is that of its consideration as a branch of the linguistics, with a view to the fact that this is, doubtless, a bilingual case. At the same time, the translation contains non- or extra-linguistic aspects, which depend on the socio-cultural context of the source and target languages. And after all, we might say that the translation is an art. An art involved in all of the scientific domains, including the juridical one. [15].

In the end, we wish to add that we thought this incursion regarding the evolution of the theory of appearance useful and, at the same time, relevant, in considering the fact that any rule of law is capitalized through its applications; later on in our endeavour we will designate its place within the general principles of the law.

6. References:

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- [3] I. Deleanu, *Juridical Fictions*, All Beck Publishing House, Bucharest, 2005, p. 323-324
- [4] A.C. Algiu, *Error communis facit jus*, Imprimerie et Libraire générale de Jurisprudence, Paris, 1912, p. 11.
- [5] A.C. Algiu, *Error communis facit jus*, Imprimerie et Libraire générale de Jurisprudence, Paris, 1912, p. 11.
- [6] The new Civil Code establishes the principle of apparent validity in law in article 17 "The common and invincible error". The New Civil Code (Law nb. 287/2009) has been published in the "Official Romanian Monitor", no. 511 from the 24th of July, part I, but has yet to come into effect.
- [7] Praetor or Praetorius (lat. *Praetor*, "the one who walks forward") was a title given in Ancient Rome to the army commanders, their only superior being the consul. Aside from the military position, the praetor could also issue edict, also having the attribution of a judge (ro.wikipedia.org/wiki/pretor)
- [8] A.C. Algiu, *Error communis facit jus*, Imprimerie et Libraire générale de Jurisprudence, Paris, 1912, p. 18.
- [9] The jurists from the modern age have borrowed from the Roman law numerous juridical constructions and categories as well as general principles which they set at the very foundation of the whole regulation. A lot of the present juridical concepts and categories have their origin in the Roman law, which managed to confer them such an elaboration, so as they may be utilized on a universal scale. We can mention in this sense the contractual obligation concept, the felonious obligation, the annulment of obligations, the contract, the term, the condition etc.
- [10] A.C. Algiu, *Error communis facit jus*, Imprimerie et Libraire générale de Jurisprudence, Paris, 1912, p. 20.
- [11] D. Alexandresco, *The Theoretical and Practical Explanation of the Romanian Civil Law, eight tome, part I, The Sale (civil and commercial)*, Graphical Workshops Socec & Co, Soc. Anon., Bucharest, 1925, p. 100.
- [12] Andronache Donici's code was the cliffnotes version of the kingly laws and it was applied in Moldova between the years 1814-1817, when the Calimah Code came into effect.
- [13] The Caragea code was applied in Muntenia (part of Romania) starting with the 1st of September 1818 till the 1st of December 1865 when the current Civil Code came into effect.
- [14] The Court of Cassation, ruling number 169 from March the 6th 1915, cited by D. Alexandresco, *The Theoretical and Practical Explanation of the Romanian Civil Law, eight tome, part I, The Sale (civil and commercial)*, Graphical Workshops Socec & Co, Soc. Anon., Bucharest, 1925, p. 100-101.
- [15] S. Milancovici, "Studii de stiintă si cultură", V, 2009, no. 1 (16), p. 164-169