Simulation: An Institution with a Past and a Future

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Abstract

Simulation was and still is a way to hide the real will of the parties. This mechanism can, in most cases, have an illicit purpose consisting of defrauding creditors or heirs or even tax evasion, but it can also have a noble purpose. This institution has been known since antiquity, embodying the Roman legal genius. Romanian private law evolved as the needs of society imposed changes, the Romanians being a very, thorough people in terms of analyzing the aspects brought up in practice, an analysis that led to the perfection of the legal system. In ancient Roman law, numerous cases of simulating a reality were distinguished, among which the claim action granted to peregrines, adoption, in iure cesio and fictitious actions will be mentioned. In the Roman province Dacia, there was also the fiction of ius italicum, and in the Romanian Countries the institution of simulation appears in the "Legal Manual" of Andronache Donici, a concept taken over and supplemented by the Callimachus Code. The present study includes two parts, the first in which simulation applications and the evolution of this institution over time are presented, and the second part in which simulation is analyzed from the point of view of contemporary legislation and the implications arising from the simulation of certain acts. Emphasis is also placed on doctrinal solutions, following the case study on the current situation and resulting conclusions. Among the qualitative legal scientific research methods used in this study are the logical method, the comparative method and the historical method.

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1. Introduction

The present study includes two parts, the first in which simulation applications and the evolution of this institution over time are presented, and the second part in which simulation is analyzed from the point of view of contemporary legislation and the implications arising from the simulation of certain acts. Emphasis is also placed on doctrinal solutions, following the case study on the current situation and resulting conclusions. Among the qualitative legal scientific research methods used in this study are the logical method, the comparative method and the historical method.

The institution of simulation has attracted interest since ancient times, as people sought new ways to fulfill their real will by circumventing the existing legislation at the time. Although this practice sometimes does have a licit, even ennobling character, it can also have a deep illicit character. That is why it is important to analyze the purpose for which it is made and depending on it, the legal or illegal nature of the cause can be determined.

Thus, the cause is missing when discernment is also missing, it is licit when it complies with the law and public order, and it is illicit when by means of it, imperative legal norms[2] are evaded. At the same time, a moral cause must not contravene the rules of social coexistence and good morals.

The sanction of the unlawful and immoral cause is the absolute nullity of the act if it is

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[2] Vâlceanu, I.D., (2024), *Simulația – diferite forme de manifestare*, available on https://www.juridice.ro/726571/simulatia-diferite-forme-de-manifestare.html, accessed on the 04.06.2024.

common or if the other party either knew it or should have known it.

The cases of concealment of reality are penciled in, further, with a historical evolutionary character both from the period of Romanian law and from the evolution of Romanian law. Thus, there are detailed cases in which the peregrines needed legal fictions to be able to acquire the quiritary property by resorting to the mechanism of tradition and later to acquire the peregrine property a fiction was again needed, this time disguising even their citizenship status. Also, as examples of the use of fiction by the Romanian people, the categories of fictional actions and the mechanism for acquiring property *in iure cessio* are also presented. Compared to our native space, a strong influence of Roman law can be noted in this regard, starting from the fiction of *ius Italicum* used in Dacia, the Roman province, to the Napoleonic-inspired Civil Code 1864.

The concealment of the real will of the parties in the present can take various forms, the most common of which is the simulated price in the case of a sale, the interposition of personae, the fictitious sale in order to avoid enforcement, or the masking of a donation through a contract of sale to the detriment of reserved heirs.

2. Historical evolution of the institution of simulation

2.1. The embryo of simulation in Roman law

2.1.1. The fictitious actions

The concept of action has been known since Roman law (*vindication, petition, iudicium*) and was generalized in the post-classical era.

Considering the origin of the actions, they were divided, in Roman law, into civil actions (*actiones civiles*) - originating in legislation and honoraria actions (*actiones honorariae*) - original creations of the magistrates. The latter category also includes fictitious actions, along with actions *in factum* and actions with the formula in transposition[3].

In the case of fictitious actions, the praetor used a specific formula created for a specific case, in order to solve a different case. As a result, the praetor inserted into the formula a fiction according to which an existing fact was considered as non-existent or, on the contrary, he considered that an event took place which, in reality, did not happen.

Following the model of civil law, fictitious actions have the formula drafted *in ius* when, in fact, it comprises a fiction. An example, in this sense, is the public action that sanctions the praetorian property. The fiction introduced by the praetor in the formula of this action consists in the enunciation of the expiration of the term necessary for usufruct, thus giving the possibility to the plaintiff to be able to pursue the property in anyone's hands.

2.1.2. Property in classical Roman law

Simulation is an institution that dates back to ancient times. Thus, several cases will be mentioned in which the Romans used various fictions to achieve the real goal pursued. In this sense, the forms of property existing at the level of classical law can be evoked.

A form of property in classical Roman law is the quiritary property.

The expansion of the Empire, as well as the stabilization of economic relations with the pilgrims, led the Romans to, in the classical era, also recognize the right of ownership to foreigners. Since they could not resort to the use of civil modes of transmission of property, they used tradition to disguise the reality.

Gradually, tradition began to be used in relations between citizens, being a more convenient way of acquiring property, compared to civil law. That is why it is considered that the Quiritary

[3] Molcuț, E., (2007), *Drept privat roman,* revised and added edition, Universul Juridic Publishing House, Bucharest, p. 76.

property starts to become more flexible in the classical era[4].

Another form of property from the period of classical Roman law that is used in fiction is the peregrine property.

Peregrine property arose as a result of the expansion of commodity exchange, from which some peregrines managed to accumulate considerable fortunes. Thus, the claim action was granted to the peregrines in two ways: either by removing the words *iure quiritium*, or by introducing a fiction. The peregrines were also granted, by means of the fiction of the quality of citizens[5], the actions *furti* and *damni iniuria dati*.

Peregrine property disappeared after 212, when citizenship was granted to almost most foreigners by Caracalla's edict.

2.1.3. *In iure cessio*

In iure cessio represented, in Roman law, a way of acquiring property by organizing a fictitious process[6]. The legal operation was carried out according to a prior agreement between the parties. Thus, the plaintiff claimed that he was the owner of the disputed asset, and the defendant did not contradict him. In the face of the silence of the defendant (the alienator of the object), the magistrate uttered *addico* and, in this way, ratified the claims of the plaintiff.

2.1.4. The adoption

Adoption was created following the interpretation of the provisions of the Law of the XII Tables regarding the sale of the family son[7].

Also, this institution represents an artificial way of creating parental power, consisting in the process of passing a family son under the power of one *pater familias* under the power of another *pater familias*.

The conclusion of the act of adoption involves the completion of two stages. Thus, in the first stage the following events take place: three sales, along with two successive demolitions. Through the new system created by jurisprudence, all the five legal operations mentioned above could take place on the same day, bypassing, in this way, the long time interval of 10 years required by the texts of the Law of the XII Tables, an interval necessary for the valid sale of the son of the family, with his removal from parental authority.

In the second stage, a fictitious process (*in iure cessio*) takes place according to the following procedure:

- the adopter appears before the magistrate;
- the buyer and the son of the family present themselves with him;
- the buyer, as a defendant, is silent (*cedit in iure*);
- the magistrate takes note and ratifies the plaintiff's statement, pronouncing *addico*.

Adoption involves the cumulative meeting of the following *substantive conditions: the adopter is pater familias;* the adopter and *pater* familias of the adopted must give their consent, between the adopter and the adopted there must be at least 18 years of age difference, as the Romans considered that the institution of adoption imitates nature.

Adoption produces the following effects: the adopted becomes fictitious cognates and agnates with the agnates of the adopter; the blood relationship is maintained, but the civil relationship ceases. Therefore, the adopted person no longer has the right to inherit in the original family, instead he acquires the right to inherit in the new family.

In order to circumvent the provisions of the Papia Poppaea Law, the Romans resorted to the

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[4] Idem, p. 121.
[5] Idem, p. 126.
[6] Idem, p. 130.
[7] Idem, p. 99.

simulation of adoption, thus being able to become fathers without *de facto* having a child and without investing time, resources and effort in order to educate a Roman citizen devoted to the citadel[8].

Immediately after the adoption, these new parents emancipated their so-called offspring. But this *mala fide instrumentum* was denounced in the senate which decided by decree that no benefits could be obtained from such adoptions[9].

2.2. The evolution of simulation in the Romanian space

2.2.1. In the province of Dacia Augusta

The Thracian kingdom of Burebista became a Roman province in the year 106. Thus, in Dacia Augusta there were colonies that benefited from the fiction of *ius Italicum*, because their land was assimilated to the Italic land, and the inhabitants of these lands, mostly Roman citizens, could exercise quiritarian ownership over the soil, they did not pay the tax on the land (*tributum soli* or *stipendium*)[10].

Provincial land ownership was also known in the Thracian provinces of the Roman state.

2.2.2. In the medieval era

In the Romanian Countries, the simulation can be found in Andronache Donici's "Legal Manual" where it is regulated that "economical sale for nothing shall not count"[11], which implies that the simulated sale is considered null. This conception of simulation is later taken up and completed in the Callimachus Code[12], in the drafting of which Andronache Donici also participated.

3. The institution of simulation in the present

3.1. General considerations

In the doctrine[13], simulation was defined as a legal operation carried out by dissimulating the real will of the parties, which consists in the simultaneous existence of two conventions/agreements (one public and one secret that annihilates/modifies the effects produced by the apparent act).

Simulation is an exception to the rule of contravention against third parties. Apparent (or public) contractual aims to create a legal situation that differs from the real one. The secret deed contains the true legal relations desired by the parties in reality. Thus, the general purpose of the simulation can be outlined, namely that of hiding the real will of the parties from third parties.

The simulation can either create the appearance of the existence of a non-existent act, or, on the contrary, hide the real nature of the act intended by the parties or trace the conditions of the real act intended by the parties[14].

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[8] Bercu, V., (2020), *Simulația – vehicul juridic roman cu motorul încă funcțional (scurt istoric),* available on http://juridicemoldova.md/0316/simulația-vehicul-juridic-roman-cu-motorul-încă-funcțional, accessed on the 06.04.2024.

[9] Owen, M., Gildenhard, I., (2013), *Tacitus Annals: Latin text, study aids with vocabulary and commentary,* Open Book Publishers, Cambridge, p. 78.

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[11] Donici, A., (1959), *Manualul juridic al lui Andronache Donici* (în *Adunarea izvoarelor vechiului drept romînesc,* vol. V), The Printing House of the Academy of the Popular Republic of Romania, Bucharest, p. 53.

[12] Callimachus' Code of 1817, repealed in 1865.

[13] Pop, L., Popa, I.-F., Vidu, S.I., (2020), *Drept civil. Obligațiile,* the second revised and added edition, Universul Juridic Publishing House, Bucharest, p. 180.

[14] Niță, V.I., Stanciu C., *Considerații teoretice și practice privind acțiunea în simulație,* available on https://drept.ucv.ro/RSJ/images/articole/2006/RSJ4/A04NitaValiIleana.pdf.

3.1.2. Simulation structure and validity conditions

In order to establish the existence of the simulation, it must meet three cumulative conditions[15] regarding the existence:

a. of two legal acts (public and secret);

b. of the intention of the parties to simulate;

c. The secret act can be concurrent/prior to the public one, never afterwards.

The simulation agreement (to simulate) is the understanding of the parties to start the simulation operation[16]. This agreement includes the will of the parties to produce all the legal effects specific to the simulation.

The secret act cannot be subsequent to the real act, because if it were, it would modify or revoke the public act, so there would no longer be a simulation[17]. Despite this fact, the doctrine[18] specifies that, although the manifestation of will in the secret deed must be prior or at most concurrent to that in the public deed, the parties may subsequently conclude the declaratory document *ad probationem (instrumentum*).

From the point of view of civil law, the simulation can be carried out by means of a fictitious legal act or by disguise or by impersonation[19].

Art. 1289 para. (2) The Civil Code[20] provides that the secret act cannot produce effects even between the parties if it does not meet the substantive legal conditions *ad validitatem* established in art. 1179 Civil Code[21] (capacity, consent, definite and lawful object as well as a moral and lawful cause).

Per a contrario, the doctrine[22] mentions that the donation, although it is a solemn contract, if it is disguised in the form of a sales contract, the donation thus disguised is not subject to the requirements of form, being valid if the substantive conditions as well as the validity conditions required for the apparent/public act. The condition of the solemn form would have become incompatible with the hidden character of the secret act.

The simulation may have an illicit purpose, for example defrauding the interests of creditors or reserved heirs or tax evasion. But the simulation can also have a noble cause, for example if it is desired to perform an act of charity without revealing the identity of the author[23].

3.1.3. Effects of simulation

They are regulated by art. 1289 para. (1) Civil Code according to which the effects of the secret contract are produced only between the parties and between the parties' universal or universal successors, in the latter case only if, from the nature of the contract or from the stipulation of the parties, it does not appear otherwise. In other words, the secret act is not objectionable to third parties.

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[15] Veress, E., (2020), *Drept civil, Teoria generală a obligațiilor,* the 5th edition, C.H. Beck Publishing House, Bucharest, p. 86.

[16] Pop, L., Popa, I.F., Vidu, S.I. (2020), *op. cit.*, p. 185.

[17] Stătescu, C., Bîrsan, C, (20087), *Drept civil. Teoria generală a obligațiilor,* the 9th revised and added edition, Hamangiu Publishing House, Bucharest, p. 78.

[18] Baias, Fl. A., in Baias Fl. A., Chelaru, E., Constantinovici R., Macovei, I. (coord), (2021), *Codul civil. Comentariu pe articole,* C.H. Beck Publishing House, Bucharest, p. 1537.

[19] Veress, E., (2020), *op. cit.*, p. 87.

[20] Art. 1289 Civil Code provides that: "(1) The secret contract produces effects only between the parties and, if the nature of the contract or the stipulation of the parties does not result to the contrary, between their universal successors or with universal title. (2) However, the secret contract does not produce effects even between the parties if it does not meet the substantive conditions required by law for its valid conclusion." (site: https://legeaz.net/noul-cod-civil/art-1289-effects-between-the-parties-the-effects-of-the-contract, consulted on 07.06.2024).

[21] Art. 1179 of the Civil Code provides that: "(1) The essential conditions for the validity of a contract are: 1. the capacity to contract; 2. consent of the parties; 3. a determined and lawful object; 4. a lawful and moral cause. (2) To the extent that the law provides for a certain form of the contract, it must be respected, under the penalty provided by the applicable legal provisions." (site: https://legeaz.net/noul-cod-civil/art-1289-efecte-intre-parti-efectele-contractului-contractul, consulted on 07.06.2024).

[22] Veress, E., *op. cit.* (2020), p. 91.

[23] Stătescu, C., Bîrsan, C., (2008), *op. cit.*, p. 80.

Also, this legal text restricts the scope of the proceeds-cause only to the universal successors or with universal title of the parties. They can become third parties to the secret act if, by means of the simulation, their author intended to defraud their interests.

Thus, it can be stated that, although the simulation is only opposable to the parties, it can have consequences on the third parties or on the due proceeds.

In order for the secret act to produce effects towards the parties[24], the doctrine specifies that it must not necessarily comply with the formal conditions, as is the case with the disguised donation through a sales contract.

Third parties can invoke the existence of the secret act by means of an action in simulation, if it damages them, but since third parties in bad faith can only invoke the secret act in order to exploit their rights and interests, third parties in good faith have the opportunity to choose either to invoke the public contract or the secret contract.

Related to the effects that the simulation produces regarding the creditors of the parties, the latter, to the extent that they are in good faith, according to art. 1291 Civil Code[25], are protected by law. According to this article, bona fide creditors are not contractually opposable[26].

3.1.4. The action in the simulation declaration

The simulation presupposes the existence of the secret act that can either modify or remove the apparent or public act, as previously mentioned, since the secret act usually takes the written form, it has been called countersigned[27].

Thus, the operation can be proved between the contracting parties only by counter-indorsement. According to the jurisprudence[28], the secret act must be valid both from the point of view of substantive and formal conditions. Related to this point of view, we share the doctrinal opinion[29] according to which the secret act should not respect the conditions of form, since they are incompatible with the hidden character of the secret act.

In order to determine the simulated character of an act, one can resort to the action in simulation. By means of this ascertainment action, the existence of the secret act as well as the non-existence of the public act can be established.

The action in simulation is imprescriptible [30]and available to any person, either principally or by way of exception, because the appearance of law can be removed at any time, and the simulated legal act cannot be consolidated by the passage of time. This can be exercised under the condition of asserting a right, the existence of interest, the capacity and procedural quality, as well as a prejudice invoked by the plaintiff[31].

Although the secret deed represents a *negotium*[32] and not an *instrumentum,* the proof of the secret deed is particularly difficult, given the fact that there are situations in which the secret deed is not concluded by counter-notification and thus raises numerous evidential impediments.

jurisprudence[33] established the admissibility of testimonial evidence and presumptions if there is a beginning of written evidence, in the case of the impossibility of the parties to reconstitute

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[24] Veress, E., *op. cit.*, (2020), p. 91.

[25] Art. 1291 Civil Code provides that: "(1) The existence of the secret contract cannot be opposed by parties to the creditors of the apparent acquirer who, in good faith, noted the start of the forced pursuit in the land register or obtained seizure of the assets that were the object of the simulation. (2) If there is a conflict between the creditors of the apparent alienator and the creditors of the apparent acquirer, the former are preferred, if their claim is prior to the secret contract. (site: https://legeaz.net/noul-cod-civil/art-1289-efecte-intre-parti-efectele-contractului-contractul, consulted on 07.06.2024).

[26] Almășan, A., (2018), *Drept civil. Dinamica obligațiilor,* Hamangiu Publishing House, Bucharest, p. 208-209.

[27] Niță, V.I., Stanciu C., *op. cit*., p. 27.

[28] High Court of Cassation and Justice, civil and intellectual property section, decision no. 446 of January 25, 2005.

[29] Veress, E. (2020), p. 91.

[30] Supreme Court, civil section, decision no. 3009/1973, in Mihuță, I.Gh., (1976), Repertory of judicial practice in civil matters of the Supreme Court and other courts for the years 1969-1975, Scientific and Encyclopedic Publishing House, Bucharest, p. 121.

[31] Niță, V.I., Stanciu, C.., *op. cit*., p. 28.

[32] Dogaru, I., Drăghici, P., (2002), *Drept civil. Teoria generală a obligațiilor,* C.H. Beck Publishing House, Bucharest, p. 146.

[33] Supreme Court, civil section, decision no. 854/1989 in law, no. 3/1990, p. 64.

a document (impossibility due to the existence of kinship, service, friendship, etc.), as well as in the case that the secret document was drawn up by fraud, deception or violence[34].

Although third parties can prove the simulation by any means of evidence, when there are the legal conditions of form *ad validitatem* for the countersigned, the latter cannot be proved with witnesses. However, as long as the secret act does not take the form of a counter-indorsement, but only of a legal operation in the sense of *negotium*, proof of simulation becomes almost impossible.

As a consequence*, by law ferenda* it is proposed to introduce *negotium* the possibility of proving the legal transaction in the sense of by any means of proof, even if the countersigned must, according to the law, take on a certain form *ad validitatem*. This proposal is intended to considerably lighten the burden of proof in the simulation.

The penalty for illicit simulation is the unenforceability of the secret act against bona fide third parties. *Per a contrario*, the secret act is opposable to third parties in bad faith. The finality of the action in the simulation may aim at the resolution, termination or annulment of the secret act as an effect of the finding of the simulation.

The request for annulment of the public deed for fraud cannot be correlated with the resolution of the secret deed as a result of the non-payment of the price, since the defect of consent relates to the real will that does not exist in the public deed. There is, however, the possibility of sanctioning the simulation with nullity if it is proven that it was aimed at defrauding the law[35].

Although the action in simulation is autonomous and independent, if it is joined to an action in realization, a state of interdependence is created with respect to it. Thus, if the action in realization is not analyzed, the action in simulation is considered to be of no interest

The action in simulation is imprescriptible, unless the opposing party invokes the prescriptibility of the purpose action.

The simulation can be invoked both in the main case and by way of exception without the need to formulate a counterclaim.

4. Conclusions

A constant preoccupation with the concealment of the real will can be seen in the present. The simulation falls mainly in the field of legal property transfer operations.

If the parties intend to conceal by means of the simulation the commission of a crime/s, the sanction must undoubtedly be the absolute nullity of the secret act, since the cause would be unlawful.

It is appreciated, in the present research, that in the case of an action in the declaration of simulation, the party that invokes it must be granted the testimonial evidence even if it was not morally impossible to reconstruct a document or does not present the beginning of written evidence, since the very purpose of simulation is to hide reality.

Thus, it becomes almost impossible for a third party or a claimant to be in possession of the secret document. This criticism is also justified from the perspective of kinship/friendship relationships between the parties of the simulation that may not resort to a countersign, precisely based on mutual trust.

Per a contrario, if the secret act must take on the authentic form *ad validitatem*, it no longer has a secret character and testimonial evidence and presumptions can be admitted under restrictive conditions, although art. 1292 of the Civil Code[36] provides that interested persons can test the simulation by any means of evidence.

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[34] Supreme Court, civil section, decision no. 1108/1983, published in the Repertory of judicial practice in civil matters of the Supreme Court and other courts for the years 1981-1983, p. 81; Supreme Court, civil section, decision no. 1063/1970, published in the Repertory of judicial practice in civil matters of the Supreme Court and other courts for the years 1969-1975, p. 121.

[35] Pop, L., (1998), *Drept civil. Teoria generală a obligațiilor,* Lumina Lex Publishing House, Bucharest, p. 128.

[36] Art. 1292 Civil Code provides that: "Proof of the simulation can be made by third parties or creditors with any means of proof. The parties can also prove the simulation with any means of evidence, when they claim that it is illegal." (site: https://legeaz.net/noul-cod-civil/art-1289-efecte-intre-parti-efectele-contractului-contractul, consulted on 07.06.2024).

The difficulty of proving the simulation resides mainly at a practical level, since the jurisprudence[37] has held that a verbal secret agreement of the parties of the simulation cannot be retained if the existence of the agreement of the parties is not proven, without claiming the existence of the secret act in the sense of *instrumentum.*

In conclusion, it is found that despite the regulation offering evidence, the jurisprudence still tends to disregard presumptions and testimonial evidence.

Although art. 1289 of the Civil Code does not establish the mandatory form conditions for the validity of the secret act, the proof of simulation remains very difficult, because the illicit cause and the actual existence of the agreement of the parties must be proven.

By law ferenda it is proposed to add a new paragraph. (3) in art. 1289 Civil Code which expressly provides that "the secret act can be written or verbal. Regardless of the form required by law for its validity".

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