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**THE CAUSES OF LACK OF DISCERNMENT. OPINIONS**

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**1. Preliminary observations**

Some categories of persons, such as minors, psychiatric patients, old persons, are protected by the institutions of civil law by way of: legal representation, judicial prohibition, guardianship, trusteeship.

The psychiatric patient with lack of discernment is protected by art. 142-151 of the Family Code and by art. 30-35 of the Decree no. 31/1954 on natural and legal persons, by the institution of judicial interdiction.

The essential condition for the application of the principle of judicial interdiction, in the case of a natural person, is lack of discernment. The cause of the lack of discernment is provided by art. 142 of the Family Code: the natural person suffering of a mental insanity or of a mental debility.

The Civil Code contains no definition regarding discernment.

In the legal doctrine, discernment is defined as "the power to appreciate the legal effects that are produced on the basis of will".<sup>2</sup>

The protection of the natural person that lacks discernment by the way of judicial interdiction enacted by the court of law means, on the one hand, the removal of the person from the civil circuit, the law considering that the person lacks capacity to exercise his rights, and by the way of guardianship on the other hand.

In the legal doctrine, the majority opinion is that among the conditions for applying judicial interdiction on the lack of discernment due

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<sup>2</sup> Beleiu, Gh., 1998, "Drept civil roman. Introducere în dreptul civil. subiectele dreptului civil", (Sansa, București), 330-331; Dogaru, I., 1993, "Elementele dreptului civil, vol. 1, introducere în dreptul civil, subiectele dreptului civil", (Șansa, București), 327-329; Urs, I., Angheni, S., 1998, "Drept civil. Partea generală. Persoanele, vol. 1", (Oscar Print, București), 241-243; Mureșan, M., 2002, "Drept civil. Persoanele", (Cordial Lex, Cluj-Napoca), 38

to psychical diseases named insanity or mental debility is very important. This enumeration is of a limited nature.<sup>1</sup>

Emphasizing this opinion, judicial practice stated that: "Neither the Family Code, nor any other law provides any other conditions for applying judicial interdiction."<sup>2</sup>

Regarding the causes of the lack of discernment, in the legal doctrine a unanimous opinion was expressed in the sense that: "the text (art. 142 Family Code) is of a strict interpretation and it cannot be extended by way of analogy to other similar situations; being so, only those suffering of insanity and debility can be the subjects of judicial interdiction, and not the persons who's discernment is lacking due to other reasons".<sup>3</sup> The Lawmaker had in mind in what regards the person that lacks discernment a factual situation that is stable and prolonged in time. In one opinion that is characterized as being "a permanent state, not one with a fugacious character".<sup>4</sup>

## **2. The concept of insanity and mental debility**

The concepts of insanity and mental debility are not in accordance with the actual medical knowledge. Thus, insanity can be attributed to all psychically ill persons in a general manner, as an incapacity to have a normal social life, without direct reference to discernment.

The term means estrangement. It was used, for the first time, in the medical language by P. Pinel in 1797, who used it to replace the medical term of craziness.<sup>5</sup> Mental insanity means the deterioration of one's understanding capacity.

For the continuators of Pinel, named "insanist", the person with mental insanity totally lacks moral liberty due to the serious perturbations of his capacity of understanding. In France, where the concept of mental

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<sup>1</sup> Beleiu, 1998, 330-331; Dogaru, 1993, 327-329; Urs, I, Angheni, S., 1998, 241-243

<sup>2</sup> Tribunalul Suprem, Secția civilă, Decizia civilă nr. 691/1978, Culegere de decizii pe 1978, 189

<sup>3</sup> Mureșan, M., Ciacli, P., 2001, "Drept civil. Partea generală", (Cordial Lex, Cluj-Napoca), 47

<sup>4</sup> Lupan, E., 1988, "Drept civil. Persoanele, (Universitatea Cluj-Napoca, Cluj-Napoca), 183-184

<sup>5</sup> Pelicier, Y., 1991, "Histoire de la psychiatrie", (Presses Universitaire de France, Paris), 134

insanity appeared for the first time, a forensic device was created to organize medical assistance specialized shelters for mentally insane persons. The system of shelters led to the creation of an authoritarian climate, the shelter becoming a hierarchical society, allowing the observance of psychical diseases.<sup>1</sup>

The word shelter became by time pejorative, the same as the expression mental insanity, due to the segregation of patients and of hospitals where these persons were treated. Thus, in France, on 4 February 1958 by a ministerial circular, the expression mental insanity was removed, being replaced by the expression mental malady. In Romania, where the modern legal language was borrowed from the French, the expression of mental insanity was maintained in the Family Code, possibly, due to the influence of politics in the regulation of the legal institution.

Insanity is a word with more than one meanings, that in addition to its psychiatric sense also bears philosophical and sociological significances.

For the philosopher J.J. Rousseau, in the Social Contract, the free citizen should dispose a part of his natural freedom in favor of society, the only one capable to defend the conventional freedom of everyone.

Thus, the expression of insanity (estrangement) by its multiple meanings and messages, of which some are obsolete, becomes by its continuous use obsolete.

The other expression in the Family Code, namely, mental debility, does not correspond in the present medical knowledge, to such a grave mental illness as to have as an effect the lack of discernment. At present, mental debility is similar to a slight mental retardation that is a mental state that does not preclude discernment. In these situations, when the lack of discernment does exist, it is only of a temporary character.

## **2. Law no. 487/2002 on mental health and the protection of persons with psychical turbulences regarding discernment and the causes of lack of discernment**

The predictions of Law no. 487/2002 art. 5 on mental health and the protection of persons with psychical turbulences defines the following two notions that present interest for the our paper:

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<sup>1</sup> Larouse Dictionnaire de psychiatrie et de psychopathologie clinique, 1993, 384

a) a *person with grave psychical turbulences* as being the person that "is not capable to understand the meaning and consequences of his behavior, in such a manner that needs immediate psychiatric assistance";

b) *discernment* as being "the possibility of the person to appreciate the content and consequences of his actions".

The cited legal definitions allow the following observations.

1. Discernment is a concept whose content exceeds the domain of law. The acts of the individual can be found in the whole social reality. In the domain of law, the acts of the individual bear the form of legal acts and facts. This way, the legal definition of discernment is overlapped by the doctrinal definition cited above.

2. Here, we encounter a new notion: the person bearing serious psychical disturbances that lacks discernment. The actual state of psychiatric sciences, obviously different from that of 1954, the year of the entry into force of the Family Code, obliged the lawmaker to reconsider the notions of mental insanity and of mental debility and by the notion of grave psychical turbulences to extend the lack of discernment to persons bearing serious psychical turbulences. Thus, the lack of discernment is caused by a grave psychical disease and not by mental insanity or mental debility.

3. The person that lacks discernment needs immediate medical care. This legal prediction underlines a new aspect: the person lacking discernment is a permanent care for a psychiatrist, the only one capable to provide immediate medical care under special treatment.

### 3. Conclusions

The causes of lack of discernment, as a permanent state, are serious psychical turbulences, others than mental insanity or mental debility, considered by the legal doctrine and practice, until the entry into force of Law no. 487/2002 as being the only grounds for the lack of discernment. The notion of insanity is synonymous with that of mental illness and can cause confusions. Not every mentally ill person anyhow lacks discernment. Consequently, it can be considered as lacking discernment also the persons that suffer from other grave mental sicknesses that require immediate psychiatric care.