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LEGAL REGIME OF THE MONETARY OBLIGATIONS IN THE CIVIL LAW OF THE REPUBLIC OF MOLDOVA

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Summary of the PhD thesis

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Introduction

The actuality and importance of the topic lies in the fact that the institution of money is a constant in civil legal relations, which implication is mirrored in the evolution and development of society. Although the money are very present in everyday reality, the legal knowledge of civil law about the money is limited to its apparent economic aspect, without going into its nature and essence as a legal institution. In contemporary society, the financial system and information technologies are significantly intertwined with the phenomenon of money, which determines the need for a fundamental scientific approach in the civil law as well as scientific basis for the legal qualification of money in the system of civil relations.

In carrying out this research several techniques and methods were used, among which the analysis and historical research of the phenomenon of money and the specialized legal literature in the field of money, written in Romanian, Russian, English, French, Italian and German, thus ensuring a high level of comparative research of various institutions addressed in thesis. Access to foreign literature was made possible, in particular, thanks to research internships at the library of UNIDROIT and the library of Institute for East European Law of the "Christian-Albrechts" University of Kiel, Germany, as well as online sources. Since the institution of money and monetary obligations has legal, economic, finance and banking, historical, psychological and international implications, the thesis, as a research method, used inter and intra-disciplinary literature corresponding to the highlighted implications.

Chapter I is devoted to the Legal Theory of Money. The state theory of money, is mainly based on the description of the work of Georg Friedrich Knapp, translated into English, to whose name this theory is closely related. Further it is described the social theory of money, with special reference to the work of author Arthur Nussbaum. The analysis of these two theories is followed by the author's theory of the legal fiction of money in private law. After that the legal theory of money of Remy Libchaber is presented. Further there is a short decription of another concept identified in the literature - that of world money.

Chapter II "The general characteristic of the monetary obligations" begins with the notion of "monetary obligations". After that, the analysis is focused on relevant legal provisions, literature and practice as well as to the classification of monetary obligations where some criteria of classification are proposed based on the existing legal framework. The classification is followed by an analysis of the general regime on performance of the monetary obligations. In particular, institutions such as the right to claim performance of the monetary obligation, the applicable new

provisions of the Civil Code of the Republic of Moldova, the legal regime of the payment as a fact or a legal act and the qualification of the payment within the existing legal norms, the method of payment (cash and non-cash payments) and the context of the new regulations on the method of payment are analyzed.

Chapter III "Particularities of the performance of monetary obligations" deals with the means of payment and payment instruments. From the perspective of means of payment, fiat money, scriptural money and electronic money are examined. Considering the developments and implications of information technologies associated with the phenomenon of money, this chapter also examines the legal nature of virtual money, with reference to the explanations provided by banking authorities at European Union level. It also clarifies some aspects of the use of the terms "digital goods", "crypto goods" and "virtual currency" and the correlation between these concepts.

The thesis explores monetary nominalism and its associated concepts and institutions, such as „value debt", „currency clauses", „hardship" etc. The principle of nominalism is specific to monetary obligations and had a particular impact on the way various situations have been resolved throughout history.

The last chapter "Specific effects of the monetary obligations" presents an analysis of the effects of monetary obligations in the system of civil obligations. In particular, the institution of interest, both interest and interest for delay is analyzed. Compound interest and capitalization are institutions related to the applicability of interest, and these are analyzed in the context of the new amendments made to the Civil Code, including in comparison with Romanian law. Further, the chapter includes analysis of other specific effects of monetary obligations. These include the regulations on the costs for recovering the monetary debt by a professional introduced by the reform in Article 945 of the Civil Code of the Republic of Moldova No. 1107/2002, enforcement of the right of pledge over pledged money, particularities identified as part of the assignment of monetary claims, as well as the correlation between monetary obligations, the state of insolvency and the insolvency proceedings.

The analysis of the situation in the field of the legal regime of money and monetary obligations involves both the object of monetary obligations, meaning the money, and the mechanism of functioning of monetary obligations from their origin, their performance and extinguishment. Due to the specificity of money as being inter and intra-disciplinary institution, involving elements from historical, legal, economic, financial, psychological and international perspectives, the field of research is positioned under the auspices of a complex approach for private legal science.

The research highlights that the **institution of money is not a classical legal institution for the science of civil law**, as legal literature did not deal with the institution of money until the development of the first theories until the early 20th century.

As fundamental scientific sources in the field of the legal aspect of money, in particular concerning the approach to the legal theories of money, the research for the thesis was mainly based on the German, English, French and Italian literature. Our research shows that there is little scholarly work on money in private law in Russian as well as in Romanian literature. No approaches to the theory of money in private law have been identified in the national literature. With regard to monetary obligations, both domestic and foreign literature was examined in the thesis. In the national literature there are only general scientific approaches on different institutions, but fundamental scientific works, including PhD works, have not been identified at this stage. At the same time, foreign literature such as English, French, Italian, German, Romanian and Russian was examined.

Particular attention has been paid to the studies and works of the secretariat prepared within the International Institute for the Unification of Private Law ("**UNIDROIT**"), which is a primary source of debate on the model rules of the UNIDROIT Principles. Thus, in the author's view, the resources of the UNIDROIT works constitute an outstanding historical and comparative analysis, which is referred to in the text of the thesis to substantiate the scientific conclusions and recommendations of the work.

The state theory is presented in the work of Georg Friedrig Knapp "Staatliche Theorie des Geldes" (State Theory of Money), written in German, later updated and translated into English. The work translated into English is the work of reference in most of the works cited by other authors, which was also the approach in this PhD thesis. In his work Knapp examines the institution of money starting from the analysis of the means of payment, the classification of means of payment and from giving a definition of money, attached to the *Chartal* means of payment. Knapp creates a distinct terminology and develops various classifications of his own, especially with regard to means of payment, which gives his theory a systemic character and underlines an original manner of analysis. An important conclusion of Knapp is that the value of money can only be defined historically, by reference to the currency which was replaced by the current currency.

Social theory, founded by Arthur Nussbaum, highlights the idea that money comes from society, but not from the will of the state. Apparently, from the content of the reviewed literature, both theories are not associated with a specific branch of law.

Examples of analysis and reference to the state theory of money and the social theory of money can be found in the works of authors such as Remy Libchaber, David Fox, Wolfgang Ernst, Larry Randall Wray, Julius von Staudinger, Sebastian Omlor, Tullio Ascareli, Bruno Inzitari, Nicolas Mathey etc.

However, the theories mentioned above and other theoretical approaches described in the thesis did not allow the author to provide a satisfactory answer to the question **what is money in private law**. In this context, the PhD thesis takes a new approach by developing a distinct legal theory of money in private law. **This thesis introduces the theory of legal fiction of money in private law**, which is based on the inter and intra-disciplinary interpretation of knowledge from the literature cited in the thesis from the fields of history, economics, psychology, finance, banking law, international law, private law and human rights, adapted to the regulatory object of civil law, which denotes a complex and integrative scientific approach. The basic elements of this theory are based on the fact that, although they obviously form the basis for determining patrimonial relations in civil law, the money does not have its own value without being attached to the goods and services that exist in the society. Moreover, due to monetary and financial and banking regulations, money and monetary value could and are created by commercial banks through issuance of the credit and through creation of money by mere inscription into the bank account. In fact, money is a form of social trust, and in the legal sense it is a purely legislative creation, and therefore **a legal fiction**. In the context of social relations, especially civil relations, this fiction is **endowed with economic interest** through the state mechanism.

Some regulations on the method of payment, currency of payment, imputation of payment have been amended as part of the reform of the Civil Code entered into force on 1 March 2019, and the proposals of the author and previous scientific works contributed to the final drafts of those and other provisions of the reform related to the monetary obligations. In particular, the content of the relevant articles have been restructured and completed. The rules on method of payment are new provisions that did not exist in previous legislation. The main sources of inspiration for shaping those new provisions were the model rules form the UNIDROIT Principles of International Commercial Contracts and the DCFR.

The institution of imputation of payments was not deeply researched by the science at national level. At the same time, as part of the preparation of the thesis, the author published an article in the UNIDROIT Uniform Law Review containing a comparative study on the rules of imputation of payments in the Republic of Moldova, Romania and the Russian Federation and the alignment of those provisions with the model rules of the UNIDROIT Principles and the DCFR.

The comparative study highlights that the institution of imputation of payments is relatively new in the international model instruments. In particular, we found that, in view of the preparatory work on the UNIDROIT Principles, the introduction of provisions on imputation of payments was not prioritized and there was a dilemma as regards the introduction of the relevant provisions in the respective model rules.

Clearly, the whole thesis is intended to highlight the specific legal regime of monetary obligations and money in civil law. But the last chapter of the thesis encompasses specific legal effects, which are to be seen as a particularity of the regime of monetary obligations, and emphasizes their systemic character for the development of civil law regulations.

The evolution of the regulatory framework shows that the regime of monetary obligations is gradually extending to non-monetary obligations. This development can be seen as an effect of the regulation of monetary obligations, which highlights the institution of money and monetary obligations at the normative level. The main effect of monetary obligations is probably the applicability of interest, both interest and interest for delay (default interest). Interest can be considered the intuitive exponent of the phenomenon of money and the functioning of money, especially in developed economies. Understanding how interest works in monetary obligations predisposes the slide into the phenomenon of money itself, interest also being an essential element in determining the value of money.

In Romanian literature, interest research is marked by the work of Maria Dumitru, dedicated to the legal regime of default interest. In Russian literature, the interest, in particular interest for delay, is widely discussed. Among the Russian authors can be highlighted M.I. Braghinski, V.V. Vitreanski, E. A. Suhanov, A.G. Karapetov, L.A. Novoselova, M. Rojkova, E. Gavrilov and others.

In the recent decades of the legal practice in the Republic of Moldova, the application of interest has been and continues to be a dominant subject in civil disputes, with a confrontation of arguments concerning public policy, mandatory rules, on the one hand, and contractual freedom, market economy requirements, on the other.

With the implementation of the reform of the Civil Code on 1 March 2019, the relevant legal framework has been amended, issues concerning the amount of contractual interest have been clarified, as well as was regulated limits related to the interest in loan agreement in view of the subjects of the contractual relation. It should be noted that after the implementation of the Civil Code reform the interest for delay becomes applicable not only to monetary but also to non-monetary obligations.

THESIS CONTENT

1. LEGAL THEORY OF MONEY

The legal aspect of money was not extensively debated in the literature until after the economic effect of its value was significantly affected by the outbreak of the First World War.[1] It was necessary that major monetary turbulences[2] happen to change the attitude of lawyers. The problems related to money became being interesting not only to economists, but also became fascinating for lawyers.[3] On the other hand, some authors, even at the end of the XX-th century, argued that there was no legal theory of money.[4] It has been observed that jurists associate themselves with economic concepts without concern for their compatibility with legal objectives. In doing so, the law imports extraneous problematics, which it does not need, but also a functional conception that escapes from nature of money, essential for the foundation of a legal theory.[5]

The legal approach of considering money only as an economic object produces barriers in legal analysis.[6] However, we shall note that money is not only limited to the category of economic and/or legal object, but also reflects social behavior towards the phenomenon of money, being characterised as a social convention, phenomenon or form of social trust.[7] The evolution of mechanisms and information technologies that mirror the economic functions of money conditions a broader scientific challenge, such as determining the legal status of virtual money, e.g. cryptocurrencies such as Bitcoin, Ethereum and so on.[8] These preconditions are of high scientific importance for private law, and the reflection on the **legal theory of money** is the irrefutable

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[1] In the preface to the first edition of his work (1938), F.A. Man mentions that, apparently, there exist no English (American) work devoted to the subject of legal aspect of money. One of the explanations would be that interior value of money did not suffer significant „turbulences" until 1914, when the First World War began..

[2] An overview on the monetary crisis and evolution of the monetary policies after the First World War are methodically described by Griziotti Benvenuto in Requeil des Cours. *L'evolution monetaire dans le monde depuis la guerre de 1914*. Librairie Recueil Sirey, Tome 49 de la Collection, 1934.

[3] Kessler, F. *Book Review: Money in the Law. Faculty Scholarship Series.* Paper 2713, 1940. Available: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3710&context=fss_papers.

[4] See Mayer, P. In: Libchaber, Remy. *Recherches sur la monnaie en droit prive*. Paris: Librairie Generale de droit et de jurisprudence (LGDJ), 1992, Preface. The author mentions that Doyen Carbonnier was highlighting the lack a legal theory on money.

[5] Libchaber, R, *op. cit.*, p. 6.

[6] Libchaber, R., *op. cit.*, p.7

[7] See Aleveque, Ch. și Glein, V. *On marche sur la dette*. Edition de La Martiniere, 2016, p 49. ISBN 978-2-7578-5751-9.

[8] For a description of the cryptocurrencies, including Bitcoin, Ethereum and others, see Schreder, T. *Das neueu Geld, Bitcoin, Kryptowärungen und Blockchain verständlich erklärt*. Piper Verlag, 2018, pp. 20, 60, 68 and the following. ISBN 978-3-492-30746-8; Regarding the regulatory aspects of the blockchain technologies in European Union and United States of America, see Yeoh, P. Regulatory issues in blockchain technology. In: *Journal of Financial Regulation and Compliance*, vol. 25, nr. 2, Emerald Publishing Limited, pp. 196–208. ISSN 1358-1988.

foundation for conceptualization and scrutiny the institutions that are characterized by the presence of money.

The state theory of money is methodically revealed in the work of G.F. Knapp "Stattlische Theorie des Geldes".[9] This theory includes an approach that is directly opposed to the metallist view, according to which the value of money derives from the metal standard adopted, e.g. gold or silver.[10] The state theory of money has a dual aspect. In the first place it means that circulating media of exchange in law constitute money only if they are created by or with the authority of the State or such other supreme authority as may temporally or *de facto* exercise the sovereign power of the State. The second consequence of the State theory of money is that in law money cannot lose its character except by virtue of formal demonetization.[11]

With special consideration, Knapp notes that paper money, a dubious form of "degenerate" money, is a clue to the nature of money, even if that sounds paradoxical. The soul of money is not in the material parts, but in the legal order governing their use.[12] Lawyers consistently recognized since medieval times that the ascription of monetary status to a certain kind of asset was an act of sovereign power and the study of legal history supports Knapp's state theory of money.[13]

In the state theory, a debt can be *real* (*lytric*)[14] or *nominal* (*nominal*).[15] The real debt is measured in a unit of value that is not changed or altered, for example when the debt is expressed in a metallic unit of payment (i.e. gold)[16] and is paid in the same unit. The debt is nominal if it can be paid in payment units at the time of payment. Nominal debt will include debt expressed in a unit of payment which, in principle, can be altered by the government.[17] [18]

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[9] Knapp, G. F. *The State Theory of Money*. The first edition of Knapp's work was published in 1905, the second edition – in 1918, the third edition – in 1921, the fourth edition – in 1923. The last edition was translated in English language, except the chapter IV, that approaches the history of evolution of money in some states and, based on our observations, namely the edition translated in English is largely referred in European literature when referring to the state theory of money. In the process of writing this work all the references to Knapp's work envisage the translated version in English: *State Theory of Money*. London: Macmillan & Company Limited, St. Martin's Street, 1924. [accessed 1.08.2020]. Available: http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/knapp/StateTheoryMoney.pdf

[10] Fox, D., Ernst, Wolfgang, L. Randall W., *op. cit.*, p. 4.

[11] Frederick, A. M. *The Legal Aspect of Money*. Fourth Edition. Oxford University Press, 1982, pp. 17–18. ISBN 0-19-825367-2.

[12] Knapp, G.F., *op. cit.*, p. 2.

[13] FOX David, ERNST, Wolfgang, VELDE, R. François. *Money in the Western Legal Tradition: Middle Ages to Bretton Woods, Chapter I, Monetary History between Law and Economics*. Oxford University Press, 2016, p. 18. ISBN 9780198704744.

[14] To note that in his work Knapp develops a language of his own, rarely encountered in literature.

[15] If we try to propose a criteria for classification, in our view, this would be „depending on alteration or not of the value of the debt".

[16] Knapp calls this system „*autometallism*", but it is not necessary that unity of value to have as its basis a metal, it could be any material.

[17] Knapp, G.F., *op. cit.*, p. 15.

[18] From this statement could be identified reflection of the expression of monetary nominalism, which is a fundamental legal principle of the monetary obligations.

Therefore, if a debt expressed in a particular means of payment (i.e. gold coins), at the time of the performance of the obligation, can be enforced by means of payment other than those at the time the obligation arose (i.e. in silver coins or paper money), then the debt will be nominal. In the state theory of money such a debt will be nominal even if the state will not change the means of payment, but only has the possibility to do so.

In the case of *real* debt (*lytric* debt), characteristic to the authelistic system, the debt is defined by means of the material from which it is prepared. So, in this case the unity of value coincides with the unity of payment. If such state of affairs were to remain unchanged, then the lytric system (that of real debt) would stop there. Thus, if autometallism had started in copper, then autometalism would still exist today in copper,[19] and therefore the debt would have to be paid in copper.

The question has been raised whether the banknotes fall within the concept of money in state theory or not. They could be so treated as long as the state accepts them in payments made to the state (*epicentric* payments), but states may require that banks make their notes convertible to state-issued money: 'one of the measures by means of which the state assures a superior position.[20] However, only the money issued by the state would be convertible into precious metal. The understanding and the depth of Knapp's theory became more exponential with the abandonment of the convertibility of money into precious metals mainly with the end of the Bretton Woods Agreement.[21]

The state theory of money is opposed to **the social theory of money**. The followers of this theory believe that it is the usage of commercial life or the confidence of the people that at any rate in situations of crisis or emergency, have the power to make things money, [22] that in the phenomenon of money the attitude of society, as distinguished from State, is paramount.[23] It is not the state but the society that ultimately decides whether a coin or paper will work and thus be considered money.[24]

In his work,[25] professor Arthur Nussbaum, to whose name the social theory of money is mainly connected,[26] postulates that experience shows that in emergency situations the medium of

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[19] See Knapp, G.F., *op.cit.*, p. 12.
[20] Fox, D., Wolfgang, E., Wray, L. R., *op. cit.*, p.8.
[21] See also Fox, D., Ernst, W., Wray, L. R., *op. cit.*, p.8.
[22] Mann, F. A., *op. cit.*, p. 20.
[23] Nussbaum, A. in Mann, F. A., *op. cit.*, p. 20.
[24] Kessler, F., *op. cit.*
[25] Nussbaum, A. *Money in the Law National and International*. The Foundation Press Inc, 1950.
[26] However, before Nussbaum, the social theory of money was endorsed by Savigny. See Kessler, F., *op cit*. [accessed 2.09.2020]. Available: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3710&context=fss_papers

exchange issued not by the state enters into circulation and is inevitably recognized by the court as money, even only for the purpose to protect payments made in good faith with such a medium during periods of emergency.[27] Because of its purely social, but not state, reasoning, this theory has been given the name sociological or social theory of money.

Frederick Alexander Mann[28] wrote that the social theory of money, propounded by mainly economists but also some jurists, would be tenable in law only ifit could explain the relevance of crises for the legal definition of money, if it were reconcilable with undeniable monopoly of the modern State over currency, and if could point to a single case where money in the legal sense was created or lost its character by the will of the community against or without the will of the supreme *de jure* or *de facto* authority.[29] In opposition, Remy Libchaber argues that the state theory cannot be accepted and that Nussbaum's[30] position in favor of a sociological[31] conception of money is more satisfactory.[32]

While the state theory and the social theory offer a general legal-scientific perspective on money, with a focus on the origin of money, we propose to focus the analysis on the regime of money in private law. Thus, **in our view, money is a legal fiction,**[33] **which the state endows with economic interest.**[34] From the point of view of patrimonial relations, especially by integrating the money in the category of goods, which, according to the classical rules of civil law, includes objects and patrimonial rights, no precise classification of money in any of these categories can be identified (and does not exist).[35] So, for example, paper banknotes, metal coins, which can be individually appropriated, are only attached to the physical medium, but do not

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[27] Nussbaum, A., *op. cit.*, pp. 5–6, 7–8.

[28] For a review of the work of Mann F. A. see Evan, Ch. The Legal Aspects of Money, by Frederick Alexander Mann. *Indiana Law Journal*, vol. 32, nr. 1, art. 10, 1956, pp.117-123. ISSN 0019-6665 [accessed 15.05.2020]. Available: http://www.repository.law.indiana.edu/ilj/vol32/iss1/10

[29] Mann, F. A., *op. cit.*, pp. 20–21.

[30] For a critical analysis of the theory expressed by Nussbaum see Ascarelli, T. et.al. *Comentario del Codice Civile*, Book Four *Delle Obligazzioni, Obbligazioni Pecuniarie*, art. 1277-1284. Nicola Zanichelli Editore Soc. Ed. del Foro Italiano, 1959, p. 71 and the following.

[31] Regarding the support of the social theory see also Farenga, L. *La Moneta Bancaria*. Torino: G. Giappichelli Editore, 1997, pp. 19–27 and the following. ISBN 88-348-6163-9.

[32] Lunt endorsed mainly the social theory of money, although he recognized also the important role of the state in money phenomenon. At the same time he mentioned that Knapp's theory has significantly influenced Russian science. See Лунц Л. А., *Деньги и денежные обязательства в гражданском праве* (1927). Москва: Статут, 1999. ISBN 5-8354-0012-8. pp. 34, 40, 46.

[33] Regarding the fictiv feature of money as objects in economy see Танимов, О. *Теория юридических фикций*. Москва: Проспект, 2017, p.14. ISBN 978-5-392-23710-4.

[34] **Palamarciuc, Vl**. *Teoria ficțiunii juridice a banilor în dreptul privat*. International Scientific and Practical Conference „Recent Developments in the Law of Obligations". Chisinau, 4-5 October 2018. Chisinau: CEP USM, 2020. ISBN 978-9975-149-89-1.

[35] On the other hand, in Russian federation, by the reform of the Civil Code (Article 128), as object of civil rights appear both cash money as well as money from the bank accounts. See Гришаев, С. Деньги как объект гражданских прав: изменения в законодательстве. In: *Хозяйство и право,* 2014, nr. 2 (445), February. ISSN 0134-2398.

integrate the full legal significance of money, especially because they do not constitute a patrimonial value by themselves.

A right in rem may be enforceable against means of payment, in which case we have an individual appropriation, but not against money, which cannot be the object of ownership. At the same time, if money is to qualify as a claim (receivable), then there must be a relative legal relationship between debtor and creditor, which cannot be inferred from the idea of money. In this context, we may pose the question how to qualify the guarantee of the Moldovan Leu (MDL), regulated in Article 5 of the Law on money:[36] "The Leu (cash in circulation and on current and term bank accounts) is put into circulation being fully insured by the assets of the National Bank of Moldova, by the amount of goods and services provided on the territory of the Republic of Moldova, by the assets of the economic agents of the Republic of Moldova located abroad." This provision reflects an element of social trust with which money is endowed. The expression "insurance of the Leu" is not a legal-civil guarantee, such as a real or personal guarantee, but rather a political-legal statement by which the state informs the holders of means of payment about the economic relationship of the Leu with existing goods and services. At a practical level, the extent to which there is a direct relationship between the Leu and the elements of ensuring the Leu could be conceived only variably, because the elements ensuring the Leu are not individualized and their value is not determined, a task that would probably be impossible. The character or function as receivables of money allows us to understand its role in patrimonial relations, money being rather a functional accessory of goods and services, but it does not contain a value of its own. Thus, in the context of patrimonial relation in civil law, money, which is also the basis for the qualification of monetary obligations, is a legal fiction.

Another reasoning that money is a legal fiction is that **money is and can be created by banks**, because it is banks that do most of the creating and circulating of money. In fact, when the bank offers a loan, in practice, the client, the beneficiary of the capital, always has the resources credited to his account. A new loan in assets, materialized by the simple game of inscription, becomes an available resource on the borrower's account and increases the money supply, the so-called quantity of money held by economic agents other than financial institutions; the increase in the money supply induces an increase in the purchasing power of economic agents and increases aggregate demand in the economy.[37] The creation of money through borrowing is a basic but still

[36] Legea nr. 1232/1992 cu privire la bani. In: *Monitorul Parlamentului Republicii Moldova*, 1993, nr. 3, art.51.
[37] See Siliadin, J. *Comprendre la banque et son environnement en zone euro*. RB Edition, 2016, p. 20. ISBN 9782863257814.

little understood feature of the money mechanism.[38] The explanation for this phenomenon, and for money in general, also has a constitutive psychological component, namely that money is a form of inter-subjective social trust.[39] This trust is the basis for the formation of credit in the economy, an imaginary good, which is also a special form of money. Trust is the sole medium for most money in the world.[40]

This reality and perspective of interpretation led us to identify **a legal criterion for validating money as an object of the civil circuit.** In determining such a criterion, we started from the legitimate interest that the individual or any other subject of private law has when holding money. Therefore, the interest of the individual is primarily an economic interest, because money itself has an economic purpose and it arises after debt (credit) arises.[41] Thus, the money, although a legal fiction, represents **an economic interest for the holder**. Due to this qualification, money (through various forms of means of payment) can be validated as an object of patrimonial relations in the civil circuit.

The abstract nature of money raises the question of ownership over them. **We are of the opinion that classical civil legal theory is not designed to answer the question of who owns the money.** However, in the classical approach, only the view of the material aspect, in particular the fiduciary means of payment, not the scriptural one, will be placed at the center of attention, which will compromise from the outset the conceptualization of money only through the view of that means of payment in the narrow perspective of trying to identify the link with property rights.[42]

In order to exclude dogmatic speculations of the intersection of property rights with the institution of money in civil law, *de lege ferenda*, we consider that it would be helpful if the civil legislation were amended, namely Article 479 of the Civil Code to be supplemented with para. (3),

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[38] See Orrell, D. *Quantum Economics. The New Science of Money*. Icon Books Ltd, Omnibus Business Center, 2019, p. 245. ISBN 978-178578-508-5.

[39] „La monnaie est une convention sociale reposant sur la confiance, elle n'a d'autre valeur que celle que nous lui accordons." Aleveque, Ch., Glein, V., *op.cit*., p. 49.

[40] Harari, Y. N., *Money*. Vintage Minis, 2018, pp. 26-27. ISBN 9781784874025. The author mentions that the crucial role of trust explains why our financial systems are so closely connected with political, social and ideological systems, why the financial crises are often initiated by the political evolutions and why stock markets may increase or fall depending on how traders feel in the morning (see *op. cit*., p. 13).

[41] An economical explanation according to which money appear after the debt (the credit) appears, which means that it precedes appearance of money is offered by Aleveque, Ch., Glein, V., *op. cit*., pp. 32–35. This hypothesis underlines that expression of "debt" is connected with presence of the monetary obligation.

[42] If we wish to identify a perfect association between the right of ownership and money, we will need, probably, to rethink the system of defining and attributing of the real rights, in which money were conceived only in its materialized form (not scriptural) by cash existent in circuit. English writer David Fox highlights the confusion of the legal explanation of money from perspective of corporal objects that express the money (*Corporeal view of money as a cause of confusion*). See Fox, D. *Property Rights in Money*. Oxford University Press, 2008, p. 38 and the following. ISBN 978-0-19-829945-5.

which would provide as follows: "The means of payment in cash shall be subject to the rules on goods and the means of payment from the accounts shall be subject to the rules on patrimonial rights." In this way, a legislative analogy will fill the regulatory and theoretical gap regarding the exercise of rights over means of payment and the protection mechanisms associated with them.

In the author's view, the other theories, mainly state theory and social theory, approach the subject of money from the perspective of its creation and origin. The theory of fiction, however, scientifically conceived from the perspective of private law, comes to explain why [and how] money must be accepted in the civil circuit, within patrimonial relations.

In **Remy Libchaber's theory the term "money" has two meanings**, which must be distinguished without hesitation, one *material* (unit of payment), the other *intellectual* (unit of value). The monetary process is based on the combined use of both components.

The demarcation between two units also appears in their field of intervention: social - in one case, individual and psychological - in another case. The payment unit, by its nature, is embedded in a monetary instrument and allows payments to be made. So, its unification is social, it has the vocation to go from hand to hand or, more precisely, from heritage to heritage. It is by excellence a collective instrument, a means of circulating wealth in society, on which the whole social group agrees. The unit of value intervenes at a different level from everything else. The unit of value may also have a certain social role, but above all it is an object whose use results from an individual and psychological process, even if it has a social purpose.[43]

The difference between two units is that one serves the payment and the other estimates the value. The former is subject to consensual recognition by the social group, the latter describes an individual and fluctuating appreciation. So, for Libchaber, the concept of money resides in the articulation of these two units.[44]

[43] Libchaber, R., *op.cit.*, pp. 21–23.
[44] Libchaber, R., *op. cit.*, pp. 66, 69.

2. GENERAL CHARACTERISTIC OF MONETARY OBLIGATIONS

2.1. Concept and classification of monetary obligations

The monetary obligation denotes specific features deriving from its specific object – the money. The legal norms and legal practice of the Republic of Moldova attribute to a monetary obligation any obligation to pay a sum of money, regardless of its original expression.

The classification of civil obligations into monetary and non-monetary was proposed by a great French author, Jean Carbonnier, under the influence of the economic circumstances and monetary fluctuations of the last century.[45] This distinction and classification, on the one hand, becomes more and more accentuated, by highlighting the regime of monetary obligations in contrast to non-monetary obligations, on the other hand, the can be observed the contagious nature of some institutions from monetary to non-monetary obligations, such as the application of interest for delay. Articles 6.1.12 and 6.1.13 of the UNIDROIT Principles[46] contain one of the examples showing the assimilation of regime between monetary and non-monetary obligations, taking into account the application of adaptations resulting from the object of the obligation. At the same time, the literature also analyses the difference in the regime of monetary versus non-monetary obligations.

Our research led us to identify a criterion for classification of monetary obligations according to the criteria whether the obligation generates interest or not. According to this criterion we classify monetary obligations into obligations that bear interest and obligations that do not bear interest. By interpreting Article 874 of the Civil Code we establish the general rule that all monetary obligations are not bearing the interest, unless otherwise provided by law or contract.

2.2. Performance of monetary obligations

Like any civil obligation, the performance of a monetary obligation is linked to the concept of payment, which implies voluntary performance of the obligation. In the French literature there is a dilemma: is payment a legal act, the proof of which must be made by a written document, or is it a *legal fact*, the proof of which could be proved by any means? Thus, the author Laurent Siguoirt, following the analysis carried out in his work on proof of the obligation to pay a sum of

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[45] Pop, L. *Câteva considerații generale referitoare la categoria datoriilor de valoare*. In: *Dreptul.* 2002, No.9, Bucharest.

[46] *UNIDROIT Principles of International Commercial Contracts, 2016*, published by UNIDROIT, Rome, Antica Tipografia. 2017 ISBN 978-88-8644937-3.

money,[47] concludes that proof of payment cannot be reduced to the opposition between different concepts of its legal nature. He also points out that there is no automatic link between the legal qualification of the payment of a monetary obligation and the rules of proof.

The theoretical qualification of the act of payment is also important for the legal system in the Republic of Moldova. We believe that it is necessary and correct to distinguish payment as a legal fact from the concept of legal act. We are of the opinion that the payment of a sum of money is not a legal act, but merely a performance as part of the civil obligation.

The Civil Code of the Republic of Moldova previously did not contain any general rule on the method of payment: cash, transfer or other means. Our efforts to complete the draft amendment to the Civil Code[48] have prompted the introduction of provisions providing a general regulation on the method of payment and the time of performance of the monetary obligation.

The cash payment of a monetary obligation can be defined as the material (physical) transmission of monetary tokens by the debtor to the creditor. It is based on the remittance of ownership (Eigentum) and possession (Besitz) of monetary tokens.[49] Although payment in cash may be considered as the primary method of performance of monetary obligations, there could be observed the weight of acceptance of non-cash payment as a valid payment for the discharge of the monetary obligation in the legal literature, model rules of private law, state policy and commercial practice. Within non-cash payments, a distinction is to be made between payment made by means of a title of monetary receivable, such as cheque, bill of exchange, promissory note, etc., and payment made by transfer via payment service providers. As noted in the literature, any non-cash payment - with the exception of the promissory note (*Eigenwechsel, billet a ordre*) - involves a third party acting as an intermediary and making payment on behalf of the debtor. Thus, a bilateral relationship becomes a trilateral relationship and involves risks that do not occur in cash payment.[50] We proposed that provisions similar to those in Article 6.1.7 para. (l) and (2) of the PICC (Payment by cheque or other instrument) and para. (2) of Article III. - 2:108 of the DCFR to be introduced in the Civil Code of the Republic of Moldova, now being included in the Article 872 para. (2) and (3) of the Civil Code.

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[47] See Siguoirt, L. *La Preuve Du Paiement Des Obligations Monetaires*. Paris: LGDJ, Lextenso editions, 2010. ISBN 978-2-275-03520-8. ISSN 0520-0261.
[48] See **Palamarciuc, Vl.** Letter containing proposals on amendment of the draft Civil Code registered with Ministry of Justice dated 26 May 2017.
[49] Von Staudingers, J., Schmidt, K., *op cit.*, c. 37, p. 119.
[50] Yesim, A., *Commentary on UNIDROIT Principles of International Commercial Contracts*. Stefan Vogenauer, 2nd ed., Oxford University Press, 2015. 756. ISBN 9781509912971.

Further, we draw attention to the fact that the PICC contains a separate article on payment by transfer, namely Article 6.1.8 (Payment by funds transfer), which is not found in the DCFR. In Article 872 para. (4) of the Civil Code has been inserted the solution from the PICC.

3. SPECIFIC FEATURES OF THE PERFORMANCE OF MONETARY OBLIGATIONS

3.1. Means of payment and payment instruments

In the perspective of delimiting means of payment from payment instruments, it was pointed out that for a form of money to be operational, it would need to preserve (store) payment units and be able to transfer them from one asset to another. Studies of different monetary forms show that no object can have both characteristics at the same time. Some forms allow you to store payment units, others to transfer.[51] Means of payment are the physical objects that store payment units, and payment instruments are the objects that allow money to be transferred. It should be noted that means and instruments of payment are the first perception of money, and their misclassification creates various confusions about money. In our view, **means of payment can be defined as the monetary unit in its materialized form.** This can be in cash, in the form of monetary tokens, as well as non-cash, in the form of registration in the account. In other words, the means of payment, today, manifests itself in fiduciary and scriptural currency. The transfer of monetary units takes place either by physical remittance of fiat currency or by transferring monetary units in the form of scriptural (including electronic) money from one account to another using a payment instrument. The method of transmission serves to qualify the payment method.

3.2. Currency of performance of the monetary obligations

The regulation on currency and the currency of performance of the obligation is part of the regulatory system of economic protection and promotion of currency policy in the state. As a general rule, a monetary obligation performed in the territory of a state is expressed in the national currency of that state and is performed in the currency of that state.

The legal literature[52] reflects a multitude of issues that can arise in the context of determining the content of the obligation and the manner of its performance. Therefore, uncertainty may arise when the parties do not specify in detail the currency of account or the currency of payment, for example in a contract the parties determine the amount of the currency of account or the currency of payment expressed in "Leu". Such an expression can be interpreted as referring to the "Moldovan leu", but also to the "Romanian leu".

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[51] See Libchaber, R., *op. cit.*, p.73.

[52] Mann, F. A. *The Legal Aspect of Money*. Fourth Edition, Oxford University Press, 1982. See Part I, Book VIII „Determination of Money of Account: Initial Uncertainty", p. 220 and the following. ISBN 0-19-825367-2.

In the context of the amendments made to the Civil Code, we point out that Article 873 para. (2) has been completed with the following highlighted expression: "If the monetary obligation expressed in foreign currency is to be performed on the territory of the country, performance shall be made in national currency, unless **[the parties have provided for payment in foreign currency and]** the law allows the receipt / performance on the territory of the Republic of Moldova of payments and transfers in foreign currency". The purpose of the addition is to clarify the provision that the parties have to stipulate that the payment should be made in foreign currency, which may be valid if the law allows the receipt/making of payments and transfers in foreign currency. If the parties do not provide for payment in foreign currency, then the debtor will be able to perform in national currency, even if currency regulations allow payment in foreign currency.

The reform of the Civil Code merged the provisions of previous Articles 583 and 584 of the Civil Code, which are now contained in Article 873. Article 873 para. (4) contains the rule on the risk assumed by the change of exchange rate of the currency in the event of delay by one of the parties. The first sentence of para. (4) of Article 873 constituted para. (2) of Article 584 of the Civil Code as it stood before the reform. The other provisions of para. (4) of Art. 873 have been introduced at the initiative of the author,[53] and partly inspired by Article 6.1.9 para. (4) of the PICC and Article III.2:109 para. (3) of the DCFR.

3.3. Place of performance of the monetary obligation

In the legislation of the Republic of Moldova, Article 859 letter a) of the Civil Code establishes that if the place of performance is not determined or does not result from the nature of the obligation, performance shall be carried out at the domicile or seat of the creditor at the time the obligation arose - in the case of a monetary obligation. On a comparative level, a different rule is laid down in Article 1494 letter a) of the Civil Code of Romania, which states: "In the absence of a stipulation to the contrary or if the place of payment cannot be determined according to the nature of the performance or by virtue of the contract, established practice between the parties or custom, monetary obligations must be performed at the domicile or, as the case may be, the place of business of the creditor on the date of payment."

[53] For explanations that based the introduction of amendments and additions to Articles 583 and 584 of the civil Code, integrated now in the Article 873 Civil Code, see **Palamarciuc, Vl.** *Reguli de executare a obligațiilor pecuniare – Propuneri de completare a Codului civil al Republicii Moldova*. Summaries of the communications from the National Scientific Conference with international participation, 9-10 November 2017. Chisinau: CEP USM 2017, pp. 172-176. ISBN 978-9975-71-812-7.

According to the DCFR, the focus is on the creditor's place of business at the time of performance of the monetary obligation, irrespective of the location of the creditor's place of business, as well as the creditor's place of business at the time the obligation arose.

We believe that the system adopted in the Republic of Moldova is the most appropriate, as it ensures predictability in the relationship between the parties from the moment the obligation arises. At the same time, the national system does not prohibit the creditor from changing the place of establishment, but provides sufficient guarantees to the debtor to be informed and not to incur additional costs caused by the change of the creditor's place of establishment.

3.4. Period for performance of the monetary obligation

The provisions of Article 862 of the Civil Code lay down the legal regime of the term of payment of the monetary obligation between professionals, as well as when payment is to be made by a public authority for goods, services or performance of work by professionals. The last hypothesis mainly concerns public procurement contracts. In the case of the relationship between professionals, the law determines that the period of payment may not exceed 60 days. A clause exceeding this time limit shall be deemed unfair and affected by absolute nullity under Article 1080 para. (1). However, a derogation from this payment deadline may occur if the parties have expressly provided for this in the contract and the debtor has an objective reasons for derogation from the time limit, as it is set out in Article 1080 para. (3) lit. (c) of the Civil Code.

A similar but more restrictive rule is established for payments made by public authorities to professionals. Thus, the deadline for payment by public authorities is a maximum of 30 days according to Article 862 para. (2). By way of exception, the parties may expressly stipulate in the contract a period for performance which may not exceed 60 days if it is objectively justified, taking into account the nature or specific characteristics of the contract. The failure to comply with these conditions, even if the clause was individually negotiated, will lead to the nullity of the contractual clause as unfair under Article 1080 para. (1). The difference in the legal regime of the payment period between the professional-professional relationship, on the one hand, and the professional-public authority relationship, on the other hand, is justified by the fact that public authorities generally benefit from more secure, predictable and continuous revenues than businesses. In addition, many public authorities can obtain funding on more favorable terms than businesses. At the same time, compared to businesses, public authorities are less dependent on building stable commercial relationships to achieve their objectives. Long payment periods and late payments by public authorities for goods and services generate unjustified costs for businesses. These were

some of the reasons described behind the adoption of Directive 2011/7/EU,[54] transposed into the rules cited from the Civil Code.

3.5. Imputation of the performance of the monetary obligation

Review of the works on drafting the UNIDROIT Principles of International Commercial Contracts shows that, initially, the rules on imputation of payments were not prioritized and it was uncertain whether or not they would be part of the instrument. One of the difficulties has been the lack of comparative references to the imputation of payments in the relevant international instruments and there has been considerable debate to formulate the current version of the provisions. Although the provisions on imputation of payments in the UNIDROIT Principles are similar to the corresponding provisions in the DCFR, there are some conceptual and technical differences.

In the national civil codes, the policy of regulating the imputation of payments differs, this results also from a comparative examination of the framework in the jurisdictions - Moldova, Romania and Russia. The civil codes of these jurisdictions are representative for the Eastern European region in the context of their economic and social experience. In the last few years, civil code reforms have been implemented in Romania and the Russian Federation. In the Republic of Moldova, the Civil Code reform was implemented as of 1 March 2019, and the institution of "imputation of payments" has undergone some changes, in the new wording it is called "imputation of performance", and mainly transposes the corresponding provisions of the DCFR. To a greater or lesser extent, all jurisdictions have drawn inspiration from the PICC and DCFR rules in the process of writing the provisions of the reforms.

Our comparative research shows that the criteria for imputation of payments and the order in which they are applied are different in each jurisdiction. The rules in Romania are largely similar to those in the PICC and DCFR. In the Republic of Moldova, until the reform of the Civil Code, the applicable criteria partially corresponded to the PICC and DCFR, but they were improved with the entry into force of the reform, and below we will highlight the evolutionary regulation of this institution in our legislation. In Russia the legal framework and the relevant judicial practice developed by the supreme courts imply more particularities.

[54] See the Preamble, paragraph (23) of Directive 2011/7/EU

3.6. Monetary Nominalism

Savigny designated the nominal value as being the value attached to each coin according to the will of its author (*Savigny bezeichnet als Nennwert den "Wert, welcher jedem Geldstück, nach der Absicht seines Urhebers, beizulegen ist"*). He recognized that through technical nominalism money signs are a fiction of real money,[55] considering precious metals as real money, thus revealing a metallistic conception. However, at that stage, the principle of nominalism for monetary obligations had not yet been (finally) formulated, and was only formulated in later writings.[56]

The effects of monetary nominalism can significantly affect contractual balance, in particular through factors unpredictable to the parties of a legal relation. One such phenomenon is when the state intervenes with policies to devalue money, such as altering the intrinsic value or introducing a new ratio between new and old currency. But here we return to the legal basis of the money fiction and the very wide margin of discretion that the state has in determining monetary policy.[57] An expressive exponent of the principle of monetary nominalism can be seen in the postulate "the mark equals the mark", or "the euro equals the euro"[58] or "the leu equals the leu".

There are several cases examined by the European Court of Human Rights, where holders of bank deposit accounts claimed back from the State sums deposited that did not have the same purchasing power, which would allegedly violate the right to the protection of property stipulated in Article 1 of Protocol 1 to the European Convention on Human Rights. In response to this issue, the European Court explained that "a general obligation on States to maintain the purchasing power of sums deposited with banks or financial institutions through systematic indexation cannot be inferred from Article 1 of the First Protocol",[59] and states have a very wide margin of discretion in determining economic (and social) policies, which includes monetary reforms, especially in large-scale situations such as state succession.[60] Therefore, from the point of view of Article 1 of

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[55] Von Staudingers, J., Schmidt, K. *op. cit.*, D 25 bb), p. 161.
[56] Von Staudingers, J. Schmidt K. op. cit., D 25 bb), p.161.
[57] See the chapter on theory of legal fiction of money and the below comments in light of the ECHR case-law.
[58] See Staudingers, S.O., *op. cit.* Vorbem zu §§ 244-248, C 22, p. 191.
[59] See cases *X. vs the Federal Republic of Germany*. Application No. 8724/79, Decision of the Commission dated 6 March 1980, Decisions and Reports 20, p. 226; *Boyajyan vs Armenia*. Application No. 38003/04; 22.06.2011, ECHR 2011, par. 55; *Dolneanu vs. Moldova*, Application nr. 17211/03, Judgment dated 13.11.2007, par. 31; *Appolonov vs Russia* (dec.), no. 67578/01, 29 August 2002, ECHR 2002, *Gayduk and Others vs Ukraine* (dec.), No. 45526/99, 2 July 2002, ECHR 2002; *Rudzinska vs Poland* (dec.), no. 45223/99, 7 September 1999, ECHR 1999-VI.
[60] See the case *Alisic et autre c. Bosnie-Herzegovine, Croatie, Serbie, Slovenie et Ex-Republique Yougoslave de Macedoine*, Requête No. 60642/08, par. 106-107.

Protocol 1 to the ECHR, the operation of monetary nominalism, as a form of the state's monetary policies, is valid from the perspective of the margin of appreciation attributed to the state.[61]

3.7. Measures to exclude the effects of monetary nominalism

As we have noted, the content of the principle of nominalism derives from regulations which establish that in the case of monetary obligations the nominal value is decisive. In opposition to this approach comes the **theory of valorism**, which is based on the value of exchange rate, the market value, in particular the purchasing power of money.[62] At the same time, the depreciation of money is a reality of our days. J. Carbonnier, referring to the complex and general phenomenon of inflation and monetary devaluation, also considered that since codification no other event had such a disruptive effect over patrimonial right.[63]

Referring to the principle of monetary nominalism, Remy Libchaber approaches it from the perspective of the components that make up the concept of money - the unit of value and the unit of payment. He explains that the main difference lies in their incidence with monetary depreciation. According to Remy Libchaber, debts expressed in units of value are naturally indexed to the goods and services procured; in considering them the process of valuing the debt is legitimate and deserves to be generalized. Only practical considerations, especially of simplicity, could lead to its rejection.[64] The author Felicia Rosioru took the view that, in fact, the debt of value delays the assessment of the receivables, "postpones the date of the assessment of the receivables in order to make it 'topical' and 'complete' in terms of the actual coverage of the debt or damage. It is not a legal fiction, but a technical, admissible and necessary means of removing monetary nominalism."[65]

The validity of the principle of nominalism has been constantly challenged, but it is an objectively applicable principle and follows from practice.[66] In this context, it has been assumed that valorism is incompatible with the public interest. The principle of the obligation of amount of

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[61] A particular situation related to the default in payment of compensations affected by inflation see the cases *Akkus vs Turkey*, par. 29; *Aka v. Turkey*, 49, where the Court explained: „Abnormally lengthy delays in the payment of compensation for expropriation in the context of hyperinflation led to increased financial loss for the person whose land has been expropriated, placing him in a position of uncertainty."

[62] Von Staudingers, J., Schmidt, K. *op. cit.*, D 30, p. 164.

[63] Roșioru, F. Accepțiunea clasică asupra naturii juridice a datoriilor de valoare. In: *Revista Română de Drept al Afacerilor*. Nr. 5, 2005, p. 37. ISSN 1583-493X. See also there the footnotes; Carbonnier, J. *Droit civil. Les Biens*. Paris, Presses Universitaires de France, 1956, p. 33.

[64] Mayer, P., *op. cit*.

[65] Roșioru, F., *op. cit.*, p. 15.

[66] Von Staudingers, J., Schmidt, K. *op. cit.*, D 31, p. 165.

money (*das Prinzip der Geldsummenschuld*) emerged as an unwritten right, a creature of legal custom (*Gewohnheitsrecht*). However, in the view of some authors, it is not based on the agreement of the parties, so nominalism is not to be applied only to monetary obligations arising from contract. This rejection of valorism shows that it cannot be applied to all monetary obligations, in particular to those that based on the principle of the obligation of amount of money.[67]

From our observations, only the terms "debt of value" ("*dette de valeur*") and "monetary obligation" ("*dette de somme d'argent*") are used in French and Romanian literature. Apparently, Wertschuld would be a category of genus and Geldwertschuld a variety of it. But our research leads us to conclude that Wertschuld is a feature of Geldwertschuld rather than a concept in its own right.[68] This can also be seen in the definitions of "debt of value" proposed above, which predominantly refer to the monetary obligation as the equivalent of the value of a non-monetary benefit. As we can see, "debt of value" is a concept that operates in counterbalance to the principle of nominalism. At the same time, the expression Geldsummenschuld operates in the context in which the principle of nominalism (*Nennwertprinzip*) is applicable.

The maintenance of the value of an obligation can be done through contractual provisions. The history of these clauses has evolved along with the history of inflation and currency. From the beginning of the 1920s until about the mid-1930s, there were wide used the clauses protecting the value of the consideration through **currency clauses, golden clauses**.[69]

The German author Arthur Nussbaum defined the gold clause (*clause d'or*) as an agreement between the parties whereby the debtor undertakes to pay gold pieces or to transmit a sum of money corresponding to the value of a given quantity of gold. At that time such clauses were very common because gold was the most precious metal commonly traded and the most valuable material from which currency was made.[70] From the above definition and from the legal literature, two types of gold clauses can be identified, the clause to pay in gold coins (*Goldmunzklausel, clausolo corso oro*) and the clause to pay an amount equivalent to the value of gold (*Goldwertklauzel, clausolo valore oro*).[71]

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[67] Von Staudingers, J., Schmidt, K. *op. cit.*, D 31, D 32, p. 167. The context of the principle „das Prinzip der Geldsummenschuld" was explained above, in section devoted to the principle of nominalism.
[68] Moreover, in an explanatory German legal dictionary we identified that explanation of the word „Geldschuld" is synonim with „Geldwertschuld". See http://www.jura-basic.de/aufruf.php?file=&pp=&art=6&find=t_1097yxyGeldschuld (accessed 18.08.2020).
[69] Von Staudingers, J., Schmidt, K., *op. cit.*, D 165, p. 244.
[70] See Nussbaum, A., *Clause-or dans les contrats internationaux*, Recueil des cours, 1933 – I, Bordeaux, Imprimieres Delmas, Chapon, Gounouilhou, 18.080, 1934, p. 559.
[71] *Ibidem*, p. 562.

In contract law, currency clauses are mainly used in international commercial relations, but they are also frequently found in national contracts.[72]

In practice, including in the Republic of Moldova, the parties may establish different account and payment currencies, as well as the introduction of currency basket provisions, designed to eliminate, at least partially, the unexpected effects of monetary nominalism. It has been pointed out in legal literature that such clauses are also known as the "clause – foreign currency value".[73]

The context of the principle of nominalism raises the question of whether the depreciation in the value of money can be adjusted by applying **the rules of contract adjustment theory**, known in the English literature as the "theory of frustration".[74] In the legislation of the Republic of Moldova, the correspondent of this theory is regulated in Article 1083 of the Civil Code and regulates the possibility of adjusting the contract in case of exceptional change of circumstances. The provisions of Article 1083 of the Civil Code are inspired from the provisions of Article III.-1:110 of the DCFR and Articles 6.2.1 and 6.2.3 of the UNIDROIT Principles. In a commentary to the PICC it was pointed out that the 1984 draft of the PICC in the current Article 6.1.9, which governs currency of payment, excluded the phrase enshrining the nominal principle,[75] thus leaving the text of the PICC without an answer to the question of the applicability of **hardship theory** in relation to extreme currency fluctuations. The argument in favor of monetary nominalism could be based on the fact that it pursues a purpose which is not purely legal but also one of economic and exchange rate policy, which, from the point of view of the public interest, would take precedence over the aims of contractual balance. On the other hand, the public interest premises of monetary nominalism should not have unbalanced implications in relation to a civil legal relationship, which develops between private persons, and contractual balance, being one of the purposes of the rules of hardship, should produce effects between the contracting parties.

Conceptually, we believe that nominalism does not exclude the applicability of the theory of hardship, but due to the specific nature of monetary obligations, the test of revaluation becomes

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[72] In French case-law the problem was posed related to the validation of the currency clauses regarding the foreign currency concluded in an internal contract with a banker. The problem was raised from perspective of the abusive clauses. See Danos, F. La validité de la clause valeur-monnaie étrangère dans un contrat de prêt interne conclu par un banquier. In: *Revue de Droit bancaire et financier,* No. 3, May 2017, etude 15. ISSN 1620-9435.

[73] Bârsan, C. Principiul nominalismului monetar și impreviziunea în contractul de împrumut de consumație având ca obiect o sumă de bani: o asociere ireconciliabilă? In: *Revista Română de Drept Privat*, No. 5, 2014. ISBN 1843-264601405.

[74] See Mann, F. A., *op. cit*., p. 111.

[75] The text of the provision from the draft was the following: „...fulfilment of an obligation to pay a sum of money takes place by the payment of the nominal amount due in the agreed currency".

very complex, circumstantial and exceptional. Parties to a contractual relationship could develop pragmatic arguments in both directions. However, by its nature, nominalism creates a strong, almost absolute, presumption against contractual adjustment.

At the same time, we point out that in some situations the prevalence of nominalism is directly established by the legislator and in such situations the applicability of the hardship theory can be considered excluded by the legislator's intention. Such an example would be the provision in Article 1247 para. (3) of the Civil Code, which expressly enshrines the nominal nature of the monetary obligation to be repaid by the borrower, without taking into account variations in the value of money, so that contractual hardship is not applicable even in case of fluctuations that create a significant imbalance between the performance of the parties to the contract

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4. THE SPECIFIC EFFECTS OF MONETARY OBLIGATIONS

4.1. Introduction on the effects of monetary obligations

All legal obligations, by their very essence, generate legal effects. In this respect, monetary obligations are not an exception, but they have certain specific features and sometimes even influence the normative creation of the regime of non-monetary obligations. Thus, from our observations we can identify several ways in which monetary obligations manifest their specific effects. These can be configured when determining the qualification of certain legal institutions (state of insolvency), the establishment of specific procedures depending on the object of the monetary obligation (exercise of the right of pledge on money or funds in accounts), effects linked to the nature of the monetary obligation bearing interest or those resulting from non-performance of monetary obligations, such as the calculation of interest for delay.

Revealing various examples that determine the specific effects of pecuniary obligations aims to highlight the aspect of the creation of the law based on the nature of money. Thus, the phenomenon of money is also a factor in the creation of legal rules, and some specific aspects of this impact can be identified in the legal effects generated by monetary obligations.

4.2. Interest as effect of the monetary obligation

Interest is an institution closely linked to the phenomenon of money, both economically and legally. Interest, perhaps, can be considered the intuitive exponent of the phenomenon and functioning of money, especially in developed economies. Understanding how interest works in monetary obligations leads one to slide into the phenomenon of money itself, interest being an essential element in determining the value of money.[76]

In the legal practice of the Republic of Moldova, especially in recent decades, the application of interest has been and continues to be a very present area in civil disputes, with a confrontation of arguments of public policy, mandatory rules, on the one hand, and contractual freedom, the requirements of the market economy, on the other hand. A certain influence on Moldovan legal practice and thinking seems to be impacted by the trends and explanations in Russian law and practice. During the last decade, the Supreme Court of Justice has issued several

[76] The process of understanding some general institutions and phenomena often begins with understanding of their derivatives. This was also the experience of the author. The preceding research to this work, initiated yet in student years, were devoted to legal interest, which, gradually, escalated in legal analysis of money, as a general concept and that generates the institution of interest.

opinions and explanatory rulings on the application of the provisions on interest on monetary obligations.[77]

In our view, in the light of the new regulatory framework and the interpretations in this thesis, **it is advisable for the Supreme Court of Justice to draw up a new explanatory judgment**, which would be devoted not only to interest and penalties, but would cover the legal regime of civil monetary obligations in general.

Until the reform of the Civil Code, legal interest in Moldovan law was mainly linked to the concept of monetary obligation. In fact, the connection of interest with the essence of the monetary obligation remains the point of connection for determining the meaning of interest. This is a matter not only of legal but also of economic and financial qualification. The amount of interest set out in Article 874 of the Civil Code is determined by the base rate of the National Bank of Moldova applicable for a six-month period, i.e. by applying the rate in force on 1 January and 1 July of the year. Until the entry into force of the reform of the Civil Code, the base rate of the National Bank of Moldova in force for each day of delay was applied. The practice of using the semi-annual base rate was taken over on the basis of the practice already established in the legal framework of the European Union and various existing European and international model rules.

Default interest is a variety of interest, applicable in the event that the monetary obligation is not performed on time. In the literature, default interest is also referred to as *dobinda moratorie*.[78] In the legislation of the Republic of Moldova, the main seat of the rules of default interest is enshrined in Article 942 of the Civil Code. The regime and legal nature of default interest is disputed in the literature. In the literature devoted to Russian legislation, several opinions can be identified on the legal nature of the interest paid in case of delay in the performance of the monetary obligation. Amendments made to Article 395 of the Russian Civil Code as part of the recent reform have generated further discussion on the subject of default interest.[79] The example of Russian law and practice is relevant, as it has apparently influenced some practices and arguments in the application of the relevant provisions in the Republic of Moldova.

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[77] See Hotărârea Plenului Curții Supreme de Justiție nr. 9 din 24.12.2010 privind aplicarea de către instanțele judecătorești a legislației ce reglementează modalitățile de reparare a prejudiciului cauzat prin întârziere sau executare necorespunzătoare a obligațiilor pecuniare, cu excepția celor izvorâte din contractul de credit bancar sau împrumut [online] [accessed 12.12.2017]. Available: www.csj.md. Recomandarea Curții Supreme de Justiție nr.95 din 6 decembrie 2016 cu privire la aplicarea dispozițiilor legale ce vizează contractul de credit/împrumut, încheiat cu organizațiile de microfinanțare [online] [accessed 12.12.2017]. Available: www.csj.md.

[78] See Dumitru, M., *Regimul juridic al dobânzii moratorii*. Bucharest: Publisher „Universul Juridic", 2010, ISBN 978-973-127-367-9, in the name of the work.

[79] See Гаврилов, Э., p. 3.

Until 1st March 2019, legal practice and literature tended to differentiate between "default interest" and "penalty" as legal institutions and, if the parties, by contract, established the penalty for late performance of the monetary obligation, default interest could also be charged. Conceptual changes were made to the application of these institutions by the Act modernizing the Civil Code. In particular, interest for late payment, regulated in Article 942 of the Civil Code, in conjunction with Article 947 para. (3) of the Civil Code, is considered now a form of penalty. Art. 947 para. (3) provides that "the penalty may be stipulated (...), including in the form of interest of default " and Article 942 para. (4) provides that "where a penalty clause has been stipulated, the creditor may, at his option, demand either default interest calculated in accordance with the provisions of this Article or the penalty for late payment"[80]

With regard to the cumulation of interest for delay and penalty for delay, as we have observed until 1 March 2019, the creditor, according to the existing legal regime and practice, could have claimed both default interest and penalty. On the basis of the current provisions, from 1 March 2019, the creditor is entitled to collect either the penalty or the interest for late payment.

We shall now clarify that the amendments to the Civil Code do not exclude the possibility of applying the provisions of Article 949 para. (2) of the Civil Code on the punitive penalty, compensation for damage in excess of the penalty. Thus, by law or by contract, the debtor may be required to pay both default interest to cover the loss and a punitive penalty clause to be applied on top of the compensation for the loss. The punitive nature of the penalty clause must be expressly provided for in the contract or in law. At the same time, on the basis of the provisions of Article 942 para. (6) of the Civil Code, in case of cumulation of default interest with the (punitive) penalty for delay, if the clause of cumulation is to the detriment of the consumer, such a clause will be affected by absolute nullity, as it would be contrary to Article 942 para. (4) of the Civil Code, which provides that the creditor may, at his option, demand either a penalty for late payment or default interest.

The legal nature of the interest is linked to the main obligation. Although this is not expressly stated in the legal provisions, we consider interest to be an accessory right. *Per a contrario*, without an obligation to pay the principal or the basic amount, the existence of interest cannot be conceived. Therefore, one of the essential conditions for calculating interest and the default interest or the penalty is the existence of a main monetary obligation.

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[80] Relevant remarks to the current provisions were proposed also by author during the process of work on this PhD thesis, through the letter addressed to Ministry of Justice of the Republic of Moldova „*Propuneri de completare a proiectului de modificare al Codului civil*", registered on 26 May 2017.

By way of comparative reference, we point out that Romanian case law has also determined that the right to interest is an accessory right to the main right, and the extinction of the right of action on the main right consequently determines the extinction of the right of action on interest, according to the adage *accesorium sequitur principale*.[81]

4.3. Other specific effects of the monetary obligations

The reform of the Civil Code introduced a new rule, inspired from Directive 2011/7/EU, on costs related to the recovery of monetary claims. The new rules are contained in Article 945 of the Civil Code and set a minimum compensation, the equivalent in Moldovan lei (MDL) of €20, that a professional creditor may claim from a professional debtor or public authority. The conditions for the application of this provision envisages that the obligation is monetary and that the conditions for the payment of default interest under Article 942 of the Civil Code are met. The rule does not apply in consumer relations or in relations in which professionals are not involved. The introduction of the new rules aims to transpose the provisions of Directive 2011/7/EU, whose objective, inter alia, is to discourage debtors from the late payment practices.

The traditional operation of the pledge[82] means that the pledged asset may not be transferred directly to the creditor in the event of non-performance of the secured obligation. At the same time, in the case of money, the legislator has established an exception to this rule. However, we consider that there is also a normative collision, which consists, in particular, in the provision of Article 676 para. (8) (a) and Article 684 para. (8) first hypothesis. We consider that the hypothesis in Article 684 para. (8) is more correct in relation to the object of the pledge, and *de lege ferenda* the content of Article 676 para. (8) should be supplemented by the provision that cash means of payment may also constitute the object of the pledge. To this end, we propose the following new point c): "c) cash means of payment (pledge with and without possession)". Another collision, already in the provisions of Article 684 para. (8) and Article 750 of the Civil Code, we draw attention to the fact that Article 750, regulating the enforcement of the pledge, refers only to money in bank accounts, but, as we have noted, the hypothesis of the rule of the Article 684 para. (8) covers, as the object of the pledge, national currency or foreign currency, without distinguishing between funds in cash or on bank accounts. In this context, the question arises as to

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[81] *Dobânzi. Prescripția dreptului la acțiune. Prescripția dreptului de a cere executarea silită*. (Î.C.C.J.), secția comercială, decizia nr.1792 din 23 mai 2006. In: *Revista Română de Drept al Afacerilor*, nr. 3, 2007, p. 93. ISSN 1583-493X.

[82] Regarding the concept of pledge see Tabuncic, T. *Gajul ca mijloc de garantare a executării obligațiilor*. Publisher Concordia, 2006, p. 11 and the following. ISBN 973-7955-81-1.

the applicability of Article 750 to cash. However, *de lege ferenda*, we consider that the provisions of Article 750 of the Civil Code should be supplemented by points c) and d), with rules on the enforcement of a pledge on cash money.

According to Article 2 of the Law on insolvency,[83] the insolvency is defined as "a debtor's financial situation characterized by his inability to meet his financial obligations, including tax obligations, when due". Insolvency is also the general basis for the initiation of insolvency proceedings, according to Article 10 (2) of the law. Therefore, if the debtor is unable to pay the monetary obligation, this may serve as grounds for declaring the debtor insolvent. And according to recent amendments to the Law on insolvency,[84] a presumption has been established, namely that inability to pay is presumed if the debtor is in delay more than 60 days. Since this amendment relates only to inability to pay, it can be concluded that failure to pay only monetary obligations on time for a period of more than 60 days is the subject of this regulation and the rule does not apply to non-monetary obligations. National judicial practice already applies these presumptions of non-payment in time of monetary obligations in the reasoning of decisions to institute insolvency proceedings.[85]

The conclusion that can be drawn from the legal provisions is as follows: non-payment of the monetary obligation is the basis for the qualification of inability to pay, the latter constituting the general basis for the insolvency of a debtor.

The context of insolvency intersects with the regime of monetary obligations not only by determining the state of insolvency, but also by the existence of special regulations established by law, which determine the regime of monetary obligations, such as the concept of "moratorium", assignment of monetary receivables.

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[83] Legea insolvabilității nr. 149/2012. In: *Monitorul Oficial al Republicii Moldova*, 2012, No. 193-197, art. 663. Date of enforcement 14.03.2013. Traditionally, the insolvency was defined as stay in playments, meaning the situation when the debtor may not anymore face with his assets the passive part. In English the insolvency is designated by the word „insolvency", in Spanish it is said „insolvencia", in French is used „insolvabilite", in Italian „insolvenza", in German „insolvenz". See Atanasiu, A. G. *Bankruptcy (en.), Insolvency (en.), Deconfiture (fr.)*. Concepte Juridice de Business. In: *Revista Română de Drept al Afacerilor*, No. 6 (August). Bucharest: Wolters Kluwer, 2009, p. 61. ISSN 1583-493X.

[84] Legea nr. 141/2020 pentru modificarea Legii insolvabilității No.149/2012. In: *Monitorul Oficial al Republicii Moldova*, 2020, No.205-211, art. 456.

[85] See, for example, the Judgment of the Chisinau Court dated 28 October 2020 in the case-file No.2i-294/20, Judgment of the Chisinau Court dated 8 October 2020 in case-file No. 2i-241/20.

MAIN CONCLUSIONS AND RECOMMENDATIONS

1. An examination of general legal theories of money reveals the existence of two main legal theories, namely the state theory of money and the social theory of money. The conceptual framework of the state theory of money determines the prevalence in the literature and requires the configuration of the legal theory based on the arguments set out in this theory.

2. The conceptualization of money from the perspective of private law, in relation to the inter- and intra-disciplinary nature of the institution of money, has contributed to the development by the author of a new legal theory - **The theory of legal fiction of money in private law.** This theory qualifies money, being an object of civil legal relations, as a legal fiction, endowed with economic interest. The theory of the legal fiction of money in private law can serve as an argument for introducing changes in civil law and leads to new directions of research and analysis.

3. The scientific basis of payment as a legal fact distinguishes it from the qualification as legal act. Distinguishing this legal regime of payment will allow the well-deserved application of apparently "forgotten" provisions of the Civil Code, whose object of regulation is the extinction of obligations, in particular Article 967 of the Civil Code, as well as the reconsideration of the legal arguments underlying the practical solutions related to the proof of payment, a problem constantly arising before national courts and legal practitioners.

4. By interpreting the national legislative framework, the author proposes to classify monetary obligations according to whether or not they generate interest. As a result of this criterion, monetary obligations are classified as monetary obligations bearing interest and monetary obligations not bearing interest. Applying this criterion, in the light of the provisions of Article 874 of the Civil Code, it is determined that monetary obligations as a rule are not bearing interest unless the law or contract provides otherwise.

5. Introduction of the provision in the last sentence of Article 873 para. (4) of the Civil Code of the Republic of Moldova may be an example for amending the model rules of Article 6.1.9 para. (4) of the PICC and Art. III.2:109 para. (3) of the DCFR, as well as for the civil law of other states, namely by introducing a reasonable time limit, that would limit the right of creditor to claim the difference in rate after receipt of payment.

6. The introduction in the Civil Code of the Republic of Moldova of the possibility of applying default interest to non-monetary obligations requires the addition to the existing regulation of the possibility of applying the provisions of Article 875 para. (6) of the Civil Code also to the non-monetary obligations. In this context, there could be introduced para. (7), stating

that "the provision of paragraph 6 shall apply mutatis mutandis to non-monetary obligations", similar to the technique used in Article 6.1.13 of the UNIDROIT Principles.

7. The highlighting of the legal regime of pledge on money and means of payment led to the proposal *de lege ferenda* as follows:

7.1. Article 676 para. (8) of the Civil Code to be supplemented by lit. c) with the following content: "cash means of payment (pledge with and without pledge possession)";

7.2. Article 750 para. (1) to be completed with points c) and d) with the following content:

"c) to take the ownership of the pledgor's cash means of payments held by the pledgee on account of the secured obligation;

d) require the pledgor or the third party holder of the pledged cash means of payment to transfer them to the pledgee on account of the performance of the secured obligation".

7.3. the provisions of Article 750 para. (2) be supplemented by the words "or cash means of payment" after the words "funds in the bank account".

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Annotation

Identification data: Vladimir Palamarciuc, the author of the work „The legal regime of the monetary obligations in civil law of the Republic of Moldova", requests granting of the degree of doctorate (PhD) in legal science. Chisinau, 2021

Structure of the thesis: is formed from introduction, four chapters, conclusions and recommendations, bibliography from 252 titles and 198 pages of the main text. The obtained results are published in 3 scientific works.

Key-words: money, monetary obligation, legal fiction, currency, .

General scope and main objectives of the thesis: to determine scientifically the systemic feature and particularities of the legal civil regime of the money and monetary obligations in the system of regulating the civil obligations, as well as. identification of a civil law theory of the money.

Scientific novelty and originality of the thesis: consists, first of all, in the field of the research selected, the money and monetary obligations in civil law, the subject that was not reviewed systemically at national level. The scientific novelty is supported by the foreign literature reviewed and integrated in the system of scientific knowledges of the Republic of Moldova.
The scientific originality of the research resides in scientific configuration of the legal regime of the money and of the civil monetary obligations.

Results of the work: are formed from theoretical and practical dimensions. At the theoretical level the thesis proposes a legal theory of money, the theory of legal fiction of money in private law, which is susceptible to offer new directions of research in civil law, as well as of the institutions associated with the phenomenon of money. At the practical level the research on the thesis contributed for drafting of several articles from the Civil Code of the Republic of Moldova entered into force on 1 March 2019, as well as interpretation of those rules

Value of applying and implementation of results in practice: is manifested through offering a critical view on interpretation and applying in practice of various institutions researched herein. The scientific results included in scientific publications and proposals on amendment of the law, served the amendments of the national civil legislation materialized in the Law No. 133/2018 on modernization of the Civil Code and amending certain legal acts, thus, being directly implemented in the national normative system.

Adnotare

Date de identificare: Vladimir Palamarciuc, autorul tezei cu denumirea „Regimul juridic al obligațiilor pecuniare în dreptul civil al Republicii Moldova”, solicită acordarea titlului de doctor în științe juridice. Chișinău, 2021.

Structura tezei: este formată din introducere, patru capitole, concluzii și recomandări, bibliografie din 252 de titluri și 198 de pagini de text de bază. Rezultatele obținute sunt publicate în 3 lucrări științifice.

Cuvinte-cheie: banii, obligație pecuniară, ficțiune juridică, monedă, dobândă.

Scopul general și obiectivele tezei: să determine științific caracterul sistemic și particularitățile regimului juridic civil al banilor și obligațiilor pecuniare în sistemul reglementării obligațiilor juridice civile, precum șiidentificarea unei teorii juridice civile a banilor.

Noutatea științifică și originalitatea tezei: constă, în primul rând, în domeniul de cercetare ales, cel al banilor și obligațiilor pecuniare în dreptul civil, subiect care nu a fost suspus cercetării sistemice la nivel național. Noutatea științifică este susținută de literatura de specialitate străină analizată și integrată în sistemul cunoștințelor științifice al Republicii Moldova. Originalitatea științifică constă în abordarea și prezentarea integrată a cunoștințelor cu privire la regimul juridic al banilor și obligațiilor pecuniare.

Rezultatele lucrării: se constituie din dimensiuni atât teoretice, cât și practice. La nivel teoretic, teza propune o teorie juridică a banilor – teoria ficțiunii juridice a banilor în dreptul privat, care este susceptibilă de a oferi direcții noi de cercetare a banilor în dreptul civil, precum și a instituțiilor juridice civile asociate cu fenomenul banilor. La nivel practic, cercetarea asupra tezei de doctorat a contribuit la redactarea mai multor articole din Codul civil al Republicii Moldova intrate în vigoare la 1 martie 2019, precum și la interpretarea acelor reglementări.

Valoarea aplicativă și implementarea rezultatelor tezei: se manifestă prin oferirea unei viziuni critice asupra interpretării și aplicării în practică a diverselor instituții cercetate. Rezultatele cercetării, incluse în publicații științifice și propuneri de *lege ferenda,* au servit la modificarea legislației civile naționale, materializate în Legea nr. 133/2018 privind modernizarea Codului civil și modificarea unor acte legislative, astfel fiind direct implementate în sistemul normativ național.

Аннотация

Идентификационные данные: Владимир Паламарчук, автор диссертации на тему «Правовой режим денежных обязательств в гражданском праве Республики Молдова», просит присуждения степени доктора юридических наук. Кишинёв, 2021.

Структура диссертации: состоит из введения, четырех глав, выводов и рекомендациях, библиографии из 252 наименований и 198 страниц основного текста. Результаты опубликованы в 3 научных статьях.

Ключевые слова: деньги, денежное обязательство, юридическая фикция, проценты.

Общая цель и обьективы диссертации: научное определение системного характера и особенностей гражданско-правового режима денег и денежных обязательств в системе регулирования гражданско-правовых обязательств, а также выявить гражданско-правовую теорию денег.

Научная новизна и оригинальность диссертации: состоит целенаправленном исследование денег и денежных обязательств в гражданском праве, предмет, который не подвергался системным исследованиям на национальном уровне. Научная новизна подтверждена, также, исследуемой зарубежной литературой, проанализированной и интегрированной в систему научных знаний Республики Молдова. Оригинальность исследования заключается в научной конфигурации режима денег и денежных гражданских обязательств.

Результаты работы: состоят из измерений как теоретических, так и практических. На теоретическом уровне диссертация предлагает правовую теорию юридической фикции денег в частном праве, которая может способствовать определению нового направления для исследования денег в гражданском праве, а также гражданско-правовых институтов связаных с феноменом денег. На практическом уровне исследование докторской диссертации по способствовало разработке нескольких статей Гражданского кодекса Республики Молдова, вступившие в силу 1-го марта 2019 года.

Прикладная ценность диссертации и внедрение научных результатов: проявляется через критический взгляд касательно интерпретации и применения на практике различных исследованных институтов. Результаты исследования послужили внесению поправок в гражданское законодательство, воплощенные в Законе №. 133 от 15.11.2018 г. о модернизации Гражданского кодекса и внесении изменений в некоторые законодательные акты, таким образом, непосредственно внедряны в национальную нормативную систему.

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LEGAL REGIME OF MONETARY OBLIGATIONS IN THE CIVIL LAW OF THE REPUBLIC OF MOLDOVA

Specialization 553.01 - Civil law

Summary of the PhD thesis

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