**Jurnalul de Studii Juridice**

JOURNAL OF LEGAL STUDIES

ISSN: 1841 – 6195 (print), ISSN: 2067 – 8509 (electronic)

Coverd in: CEEOL, Index Copernicus, Ideas, RePeC, EconPapers, Socionet

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# INSTITUTION OF THE OATH: A PLURIDIMENSIONAL LEGAL-ANTHROPOLOGICAL APPROACH

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Jurnalul de Studii Juridice, Anul VI, Nr. 3-4,
Decembrie, 2011, pp: 41-51

The online version of this article can be found at:

http://jls.upa.ro/

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Published by:

Lumen Publishing House

On behalf of:

Legal Research Center of Petre Andrei University from Iasi

# INSTITUTION OF THE OATH: A PLURIDIMENSIONAL LEGAL-ANTHROPOLOGICAL APPROACH

**Nicolae SADOVEI**[*]

**Abstract:**

*Approached within legal sciences, the oath entity has a pluridimensional institutional character, where various approaches are possible, both theoretical (including normative), and practical.*

*The attempt to perceive the concept of oath in a traditional way, as an entity researchable through the mechanisms applied in the field of legal sciences, which is approaching it into an already dedicated style, is even from the start a challenging one.*

*The oath passed through the history of civilizations that have succeeded over the times without being subjected to radical changes, being present in all historical periods and in all cultures known to researchers intersected in anthropology, ethnology and social psychology, including to lawyers interested in legal anthropology.*

*The oath, from a historical and anthropological perspective, can be identified at two levels: the ordinary oath deprived of any normative and ceremonial-ritual aspects, and the social public oath, with effects over the public and private life, both of the individual who makes the oath, and over the third parties involved.*

**Keywords:**

*oath, legal, anthropology, labour law, legal sciences, history of civilizations, normative, ceremonial-ritual*

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**Importance of the anthropological approach of the oath.**

Being one of the least researched entities in the framework of legal sciences (while in the Moldovan scientific space an institutional theoretical approach is completely missing), the oath is – both in terms of epistemological and praxeological aspect – one of the most inflexible and also, strange and mysterious social entities, which is still in an embryonic state under the aspect of scientific quantificability. Like most legal entities, the oath is not of a closed and singular institutional character. Both the epistemology of law, as well as the praxeology of legal relations direct us to a single and indisputable conclusion possible: approached within legal sciences, the *oath* entity has a pluridimensional institutional character, where various approaches are possible, both theoretical (including normative), and practical. This leads inevitably to an increased interest for the researcher interested in tackling a subject very interesting and attractive, on the one hand, and certain reluctance, on the other hand, because of the lack of indigenous research of the entity addressed here. The attempt to perceive the concept of oath in a traditional way, as an entity researchable through the mechanisms applied in the field of legal sciences, which is approaching it into an already dedicated style, is even from the start a challenging one.

Under the primary conceptual aspect, the oath, approached strictly institutionally through the prism of the labour law, represents a set of elements coordinated between them, forming a functional internal system, through which appropriate legal support is offered to the devotion and obedience of the individual to a *noumen*, via some assumed obligations, materialised by the provision of a strictly legally determined activity (work). In the context of an oath differentiated approach, system elements remain the same and only the content is changing, from case to case. But *per total*, the right of a person to work is not affected, as this can be performed through different ways, within some legal relations that do not necessarily include taking the oath as a condition for such a relation to start. Given this situation, the researcher of the oath concept has to address its institutional elements in a more flexible way, in order to be able to analyze the contents of these elements as component parts of a whole.

As a multidimensional social entity, the oath has various aspects that can be assigned to different areas of social sciences. As a legal entity,



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it is not of a recent origin, being known since the first organized human communities and, in terms of modern language, governed by persons elected or appointed by the leaders or the community in a certain *"dregatorie"* (romanian historical rank), regardless of its concrete and historical name. With reference to the Carpathian-Danubian-Pontic historical area, which we belong to, it seems that the oath was already known and applied here before the Roman-Dacian era. According to a legend, at the beginning of the history, Thracian kings, also governing the Carpatho-Danubian world, were united among themselves by a secret oath. A so-called "law of silence" enveloping this oath, so that the enemy would not know that they were defending their lands and treasures together. Some historians believe that, in fact, the Thracian tribes were somehow united by royal brotherhood leaders, long before the great king Burebistas. The chosen ones, initiated to the *secret of the Thracian oath*, used to wear golden or silver helmets, engraved with certain signs, known and understood by them only (http://www.dacii.ro/modules.php?name=news&file=article&sid=892 - accessed on 15.08.2011).

The oath passed through the history of civilizations that have succeeded over the times without being subjected to radical changes, being present in all historical periods and in all cultures known to researchers intersected in anthropology, ethnology and social psychology, including to lawyers interested in legal anthropology. Even if historical periods were different, this entity has been kept inside all political-legal formations of any kind and style. Furthermore, with an amazing perseverance, some of these formations insisted on the public oath making act, imposing it on various occasions, most of which being in direct connection with the fulfillment of administrative tasks by an individual as employee of the respective state formations, person empowered with a range of *"dregatoresc"* (romanian historical rank) competences in what we call today the state power, executive or judicial power. Since the early formation of the basic state entities, authorities of the respective bodies have asked their subordinates appointed to various *"dregatoresc"* positions to make an oath of allegiance. At the same time, it is known that the initial origin of the oath is outside the field that represents the direct object of researches of pure legal sciences. It's seed goes back to the sacral area, that is to the field reserved to religion and mystic; the oath was subsequently integrated into the law through the first regulations imposing, in certain cases, the sworn in by a certain person. Hence, the



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oath cannot be historically addressed without taking into account the anthropological elements characterising it.

Even the ancient Romans already knew, like all other nations with political and administrative statutes, the institution of oath (Черниловский З.М., (1991), :140). Thus, Roman law has introduced a number of words and adages in the field, such as *juramentum* - generic name for the ritual act of making an oath; *juramentum corporalis* - corporal oath, made on an object or a work regarded as holy; *juramentum fidelitas* - oath of fidelity; *juramentum necessarium* – necessary (compulsory) oath, made for confirming something, that one part has to make at the request of the other part and which binds this part; *juramentum voluntarium* – voluntary oath, which was not mandatory, but once one side made it, the other party had to make it too; *calumniae juramentum* – an oath made to invalidate another oath, made in order to confirm the good faith. The act of making an oath was called *jurare*, and the oath binding act was called *adjurare***.** One of the first known definitions of the oath also comes from those times: *juramentum est affirmatio vel negatio de aliquo, attestatione sacrae rei firmata* – An oath is an *affirmation* or a denial concerning any matter, confirmed by the *attestation* of a sacred thing (Б.С.Никифоров, (1979), :135), as well as some features of the oath, like *juramentum est indivisibile, et non est admittendum in parte verum et in parte falsam* – An oath is indivisible and it is not to be held partly true and partly false, as well as oath formulas, like *devenio vester homo* – I become your man (oath formula made to the feudal) (Ibidem, :61), as well as interdictions to make an oath, like *minor jurare non potest* – a minor can not make an oath (Ibidem, :161). During the ruling of Justinian Kind, the general oath became mandatory for all those who participated in the justice making process within the Empire.

Certain aspects of the social public act of making an oath are also addressed in the surveys carried out by historical researchers. Historian Petre P. Panaitescu mentions in one of his surveys dedicated to feudal relations that the so-called *feudal tribute* also existed in the history of Romanians; it has been deducted from the clerical acts referred to the faithful acolytes and their allegiance showed to the lord, which is nothing but, according to the historian, an *oath of homage* (Petre P. Panaitescu, (1994), :36,39). In the modern period of the Moldovan Principality, close to the establishment of Romania following the unification of the two historical Romanian principalities, the last prince who has made an oath was Alexandru Ioan Cuza, on January 17, 1859, in the following formula:



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*„I swear, in the name of the Most Holy Trinity and in front of my country, that I will guard the rights and interests of the Homeland, that I will be faithful to the Constitution in its text and spirit, that in all my ruling I will watch the observance of laws by all and in all, forgetting about all persecution and hate, loving alike those who have loved me and those who have hated me, having in front of my eyes the welfare and happiness of the Romanian nation. So Lord and my compatriots help me."* (http://istoriiregasite.wordpress.com/2011/02/22/juramantul-depus-de-alexandru-ioan-cuza-la-alegerea-cadomn -al-moldovei- 517-ianuarie-1859 (accessed on 21.09.2011)

In the Russian Empire, according to the encyclopedic dictionary by Brokgauz and Efron, three reasons for making an oath developed in the XIX century: the allegiance oath for the king who acceded to the throne (a tsar) and for his descendants; the allegiance oath made by the newly-appointed imperial servants; judicial oath, as a probation in line with the imperial procedural legislation (Брокгауз Ф.А., Ефрон И.А., (1882), :450).

Here we consider necessary to mention the reticent attitude of the juridical science in the former USSR in the equidistant approach of the concept of oath, of the obvious anthropologic sub-layer of this entity, while anthropology as science is centered on the idea, according to which the essence of the human being is, first of all, of a spiritual nature (Столяренко В.Е., Столяренко Л.Д., (2004), :25). Even so, in the former Soviet area during the 70 years of Communism, although it has been stated clearly and firmly that any form of mysticism must be extirpated as being a remainder of the former bourgeois-capitalist arrangement, several categories of subjects have kept however the compulsoriness of making an oath - *«присяга»*. From the moment the Bolsheviks have taken over the power in Russia following the event known in the history as the *Bolshevik October Revolution*, the Bolsheviks not only didn't give up the practice of making an allegiance oath by certain categories of state servants (and not only), but they also severed the content of the oath formula, by including the drastic consequences to follow in case of inobservance.

## Previous anthropological approaches of the oath.

From a legal-anthropological approach, the oath is, in a sense, an anthropogenic vestige of theological order, from the times when a promise made by word was a much more important event than just the



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simple agreement of one part to conclude a contract. In terms of its essence, in the Anglo-Saxon researched area, several researchers have carried out surveys, of which we would like to mention Enoch Lewis and James Endell Tyler. On the very first pages of his survey – "A Dissertation on Oaths," Enoch Lewis highlights that fact, according to which, even without a deeper research of the topic, one could notice the existence of sufficient and serious objections concerning the ordinary use of the oath making acts (Enoch Lewis, (1838), :4). *"A just sense of the awfulness of the Divine majesty, and a conviction that his favours are all gratuitous, would lead us to regard every declaration which partakes of the nature of an oath, with fear and suspicion,"* (Ibidem, :5), and without an additional consideration of doctrines and precepts of the Christian religion, an oath is too awful to be introduced applied to Christians, to be adjusted to any of their profane (human) concerns. Lewis supports the idea, according to which, oaths appeared naturally as a consequence of a very depraved morality that have spread over the world and has generated the possibility of moral self-corruption of the person. The lie and hypocrisy as one of the personal self-corruption modalities have paved the ground for the understood wish for following the veracity. In such situation, it was natural for the society to search for a method which, in the most important events, would ensure the veracity and the truth.

According to the Ancient Greek historian Polibius, the oath was rarely met in the ancient world, but once the human perfidy has grown, the number of cases when people were imposed to or have voluntarily decided to make various oaths has also grown. Polibius must have been familiar with the depraved morals and hypocrisies of his countrymen, particularly of those in the administration, since himself was also a public dignitary by career. According to Polibius, various oaths were used to be made, one of them being the so-called *Jupiter's oath*, made at the conclusion of contracts and treaties. When Jupiter's oath was made, the one making the oath was holding a stone in his hands and, swearing in the name of the state, he was saying the following: *„May the gods be merciful to me, if I keep this oath, but if I think or commit something that is contrary to this oath, then all the people will remain safely in their own country, with their own laws, in their wealth, to their altars, to their graves, and I should be the only one worth to be thrown like this stone."* After saying the oath, the person making it was throwing the stone (Полибий, (2004), :157).



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Another researcher, James Endell Tyler, mentions in his study *„Oaths, Their Origin, Nature, and History,"* that in general, people do not trust the veracity of other people, when these pretend saying the truth, because they cannot rely on their good faith when they make an empty promise and are determined to look for something that would satisfy them, imposing the latter a more binding responsibility than just their simple word (James Endell Tyler, (1834), :6). Tyler refers to a famous case in the XIX century, *„Omychund and Barker,"* when William Murray, Solicitor General of England, said the following: *„No country can subsist twelvemonths where an oath is not thought binding, for the want of it must necessarily dissolve society."* (Ibidem, :7).

Russian professor Dmitriy Makarov (1828) mentions that fact that the essence of all oaths is nothing else but a self-denial act, like a guarantee for the truth, of something sacred and precious for the life of the one who makes the oath. The insincerity of the person who took the oath separates him/her from that guarantee, the committed offence is discovered, the person is sanctioned with a general abhorrence and because the person has served it, without being afraid of the commitment made to the truth, is passing it to the calvary of the eternal torment – the conscience. The author mentions in this context that the law is sacred, therefore it is priceless; the law is priceless, that is why it requires respect: hence, an oath can only be made on the priceless holiness of the law. Any oath is a true guarantee for the conscience, a driving force of honesty («пружина честности»), without which, no law would function (Д.Ч.Макаров Д.Ч., (1828), : 185-186).

## Modern anthropological approaches of the oath.

Giorgio Agamben (2011), professor of philosophy at the University of Venice, is the author of a valuable study about the multi-aspectual nature of the oath, *„The Sacrament of Language. An Archaeology of the Oath"* (Giorgio Agamben, (2011), : 1).

The author is exploring the roots of the oath phenomenon within the human experience. He rejects the common idea supported by most researchers, according to which, the oath originates from religion, backing another idea saying that the oath originates from the inside of the human linguistic experience, that gave birth both to the religion and the law, as we know them today. Agamben considers that genesis of the ritual goes



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back beyond the religious rituals of human beings, going further back in the common human part, in a very far off realm, the one of the essence of human language. According to Agamben, the irreversible decline of the oath from our times corresponds only to the crisis the man as a *"political animal"* is within. The author takes over the thesis backed by another Italian scientist, Paolo Prodi, in his study *„Il sacramento del potere"* (1992), according to which, the modern man is today among the first generations which, in spite of the presence of some forms and liturgies from the past, live their own collective life without having made an oath as a solemn and total act, that is, in front of a new form of political association. (Ibidem).

Agamben's hypothesis consists in the fact that the enigmatic institution, both of political and religious order, denoted as oath, can be explored only if it is intelligibly situated in a perspective where the human nature as such, as a talking being and *„political animal"* is put under question. The author sustained that *„My hypothesis is that the enigmatic institution, both juridical and religious, that we designate with the term oath can only be made intelligible if it is situated within a persepctive in which it calls into question the very nature of man as a speaking being and a political animal. Hence the contemporary interest of an archaeology of the oath. Ultrahistory, like anthropogenesis, is not in fact an event that can be considered completed once and for all; it is always under way, because Homo sapiens never stops becoming man, has perhaps not yet finished entering language and swearing to his nature as a speaking being"* (Ibidem, :11).

One of Agamben's arguments is centered on the origin and meaning of the Greek word *horkos*, (argument taken over from Émile Benveniste), a derivation from the Greek philosophy terms for oath, and according to whom, at its origins, this word did not represent an act, but a thing.

Another researcher – the Russian professor Serghey Orekhov (1989) considers that the oath, as a regulatory entity, represents one of the characteristics of the life style of human beings, being present over the entire existence of the man as *homo socialis*. *„Various sources - biographies, chronicles, narrations, treaties, decrees, judicial books, philosophical-theological treaties – abound in references to the oath making procedure by ordinary people, rulers and church leaders. Oath and curse follow the individual during the whole life – from birth to death, serving as an essential element of the human behaviour."* (Орехов С.И., (1989), : 198).



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Orekhov considers that the origin of oath is associated with the dissolution of the primitive society and appearance of the class society, centered on the human personality development. The roots of oath are hidden, according to him, in the *tabu* institution, which supposes an absolute interdiction with a sacred character, referring to the behaviour, language, activities and relations of individuals, through which the behaviour of the community members can be controlled. The subsequent dissolution of this institution (tabu) has generated the need for a new institution to control the inter-human behaviour, an institution of both non-personal and personal characters. Serghey Orekhov considers that state entities in formation could not entirely face these functions, and the partial control and administration of these has been „pushed" to the cultic area (of the religious conscience). *„This is the reason why initially the oath has mythological attributes; subsequently, when the church became one of the dominating institutions, this has been transformed into a legal-religious institution, and later – into a purely legal act."* (Ibidem).

The oath, from a historical and anthropological perspective, can be identified at two levels: the ordinary oath deprived of any normative and ceremonial-ritual aspects, and the social public oath, with effects over the public and private life, both of the individual who makes the oath, and over the third parties involved. In the case of the social public oath, this had a pronounced objective, which had to be achieved. Social public oaths were of a mandatory character and were protected by the law. They used to be made at the conclusion of various treaties, contracts, when performing the judicial act etc., being followed by a pre-established ritual. From the anthropological aspect, the oath is, to all appearances, one of the first connection bridges between the religious aspects of the primary society and laic aspects. According to British anthropologist Bronislav Malinowski, two clearly distinguishable domains have been found within every primitive community explored by observers: the Sacred and the Profane, or, in other words, the domains of religion and science (Малиновский Бронислав, (1998), : 20-21).

Although they have been separated, these interfere with various occasions, one of these being the social public act of making an oath by a certain person on the occasion of his/her appointment to a usually public position. At the same time, it is necessary to bear in mind the fact that making the oath a mandatory act anywhere and anytime, will inevitably lead to the devalorisation of the act as such. As John Stuart Mill stated in



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his noted study about freedom, in the most evolved faiths and practices, there is a very strong tendency to degenerate and to transform into something mechanical (John Stuart Mill, (2001) :87).

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