CODIFICATION OF CIVIL LAW: ASSESSMENT, REFORMS, OPTIONS

LEGAL HERITAGE

HU ISSN 2939-8223

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CODIFICATION *of* CIVIL LAW:

ASSESSMENT, REFORMS, OPTIONS

EMŐD VERESS (*ed.*)

CENTRAL EUROPEAN ACADEMIC PUBLISHING
Budapest – Miskolc 2024

Emőd Veress (ed.)
Codification of Civil Law: Assessment, Reforms, Options

PUBLISHED BY

Central European Academic Publishing
1122 Budapest, Városmajor str. 12-14. (Hungary)
Tímea Barzó, Director-General

ISBN 978-615-6474-72-8
ISBN (epub) 978-615-6474-73-5
ISBN (pdf) 978-615-6474-74-2

https://doi.org/10.54171/2024.ev.ccl

Technical Editor
János Székely

DESIGN BY
IDEA PLUS
Elemér Könczey
Kolozsvár / Cluj-Napoca (Romania)

PREPRESS
PÁTRIA PRINTING HOUSE CO.
Chief executive officer: Katalin Orgován

PRINTED BY
CC Printing Kft. in Hungary.
Responsible manager: Áron Könczey

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TABLE OF CONTENTS

Lajos Vékás: Foreword 11

Chapter 1
Emőd Veress: Introduction: General remarks on private law codification in East Central Europe 17

Chapter 2
Jürgen Basedow: Codification of private law. The European perspective 37

Chapter 3
J. Michael Rainer: Current topics and theory of private law codification. 65

Chapter 4
Hugh Beale: An alternative approach: Private law in the Common Law system. 81

Chapter 5
Attila Menyhárd: Codification of civil law in Hungary: The Civil Code as a part of the system of law. 115

Chapter 6
Gustavo Cerqueira: Objectives and crises of codification of private law in France. 139

Chapter 7
Attila Dudás: Reflections on the Preliminary Draft of the Serbian Civil Code from 2019 181

Chapter 8
Milan Hlušák: The current state of the Slovak private law recodification 209

Chapter 9
Milan Hulmák: Reform of Private Law in the Czech Republic 229

Chapter 10
Tatjana Josipović: Codification of Civil Law in Croatia: Challenges of multiple crises for the reform of Croatian civil law 259

Chapter 11
Meliha Povlakić: Codification of Civil Law in Bosnia and Herzegovina 291

Chapter 12
Miha Juhart: Civil Law Codification in Slovenia 339

Chapter 13
Lukas Rass Masson: The French Civil Code after its bicentenary (2004–2023): Catching up with modernity 367

Chapter 14
Radu Rizoiu: On unity in the age of diversity: The monistic approach of Romanian Civil Code 395

Chapter 15
Harry Runia: Codification in the Netherlands. Professor Meijers' successful campaign for a complete revision of the Dutch Civil Code (1838) 439

Chapter 16
Martin Schauer: Codification of Civil Law in Austria. 469

Chapter 17
Claudio Scognamiglio: Recent developments in Italian Civil Law on compensation for non-pecuniary damage 491

Chapter 18
Piotr Stec: Codification of the Civil Law in Poland 521

Chapter 19
Emőd Veress: Customary Law vs. Codified Law in 1930s Hungary: Insights from the Work of Károly Szladits 547

ARGUMENT

Ten years have passed since the Hungarian Civil Code entered into force. The Code builds strongly on tradition, but where necessary, the scope for renewal and innovation has been realised. Several events have taken place in Hungary since the establishment of the Civil Code to enable assessing its application.

To commemorate the anniversary of the introduction of the Hungarian Civil Code, the Hungarian Academy of Sciences, the Central European Academy of the University of Miskolc, and the Ferenc Mádl Institute of Comparative Law organised an international conference titled *'Codification of Civil Law: Assessment, Reforms, Options'* on 18–19 May 2023. The specific theme of the conference was aimed at reviewing the current state of private law codification, reforms of the previous decades, current challenges, and the future changes planned in some European countries.

This volume contains some of the papers presented at the conference, edited into full chapters, providing an in-depth evaluation of the chosen topics. The individual papers offer an insight into the workshops on private law codification, highlighting achievements and dilemmas and successes and failures. Overall, the volume serves as a rich repository of many key issues related to private law codification.

The Editor

FOREWORD

LAJOS VÉKÁS

1. After the deep and intense social changes witnessed in the 1990s, the codification of private law was on the agenda of every state in East Central Europe, as well as in the Baltic States. However, the possibility of codification of private law in the late 20th century was questioned in principle by many authors. Their view was that the age of codification was over. With life changing ever so fast and paths of social development becoming highly unpredictable, they felt that not enough stability was maintained to create a code.[1]

The great classical codes were written in the 19th century. The social conditions for these codes have undergone fundamental changes. Another important point owing to which the classical codes were created has also lost its significance now: the creation of a single private law for a single nation-state. This was an important aspect in the drafting of the French Code civil, the Austrian Civil Code (ABGB), and the German Civil Code BGB as well as the Swiss codification. Presently, this argument is also irrelevant.

1 Fikentscher, 1977, pp. 135 et seq.; Kübler, 1969, pp. 645 et seq.; Esser, 1977, pp. 13 et seq., 31, 37 et seq.; from the point of view of the development of EU law, questioning the possibility of national codification, *Vareilles-Sommières,* see De Vareilles-Sommières, 1998; for historical analysis, see Wieacker, 1954, pp. 34 et seq., 47 et seq.

Vékás, L. (2024) 'Foreword' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 11–15. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_1

However, the passage of time applies only to the ideological-political views underlying the creation of the classical codes. An important practical reason for codification surviving the 19th century is now evident: the need to systematise norms using a homogeneous method. Systematic standards are better suited to keeping pace with changing circumstances than *ad hoc* rules, which are quickly amended. Legal certainty can be served more effectively by a well-founded code than by the legislator's daily frenzy over an unmanageable mass of statutes and other norms. As Theo Mayer-Maly stated forty years ago, the assertion that it is impossible to make a code today is largely an attempt by the legislator to escape from pursuing the task. 'So macht man Schuld zum Schicksal', he wrote.[2] In 1985, Karsten Schmidt published a lengthy study on the future of codification. Carefully analysing the pros and cons, he concludes that the codex can prove to be a valuable form of legislation in the present circumstances.[3]

The post-socialist countries were also encouraged by successful codification in the Netherlands (Burgerlijk Wetboek). In Lithuania (2000), Romania (2009), the Czech Republic (2012), and Hungary (2013), a comprehensive code has been created. In Estonia, Slovenia, and Croatia, specific areas of private law have been recast in separate statutes. In Latvia, the 1937 Code was renewed and enacted in 1992 and 1993.

2. After four decades of non-democratic governments and misguided policies that led to an economic and social deadlock, the post-socialist countries began to pave the path for a social order based on private property and free enterprise. The legislations were a departure from the premise that the new civil code has to establish the conditions for a constitutionally protected market economy interwoven with social elements in private law. The code primarily lays down the legal frameworks for property transactions. However, it also aims to provide protection for the personality rights of individuals and legal persons and for personal relationships within the family.

The social model of codification chosen by post-socialist countries is that of a social market economy prevailing in the old Member States

2 Mayer-Maly, 1982, pp. 4, 213.

3 Schmidt, 1985, p. 79.

of the European Union (EU). This social model required comprehensive acceptance of the private autonomy of owners, particularly the full recognition and protection of private property. This principle (as the first pillar of private autonomy) pervades the entire code. The other fundamental condition of private autonomy (the second pillar) is the acceptance of the principle of freedom of contract. Any limitation to this is justified only to the extent that this is rendered indispensable by the demand for social justice, and it is still possible under the conditions of free market competition. This equilibrium is not easy to achieve. The law governing consumer contracts is crucial in maintaining this balance. The third pillar of private autonomy is freedom of association, the demands of which are to be served by the institutions of associations, companies, and cooperatives following the tested models of traditional private law legislations.[4]

3. The post-socialist countries realised that the legislation of the EU would have a direct influence on their reforms in several fields (e.g., in consumer contract law and company law) while developing codifications. Therefore, these countries intended to integrate the lasting core of EU private law directives into their codes, as far as possible. However, the legislatures did not try to build the entire corpus of EU private law into the Civil Code because the rules in the EU private law directives are mostly fragmented, casuistic, and often subject to change, and thus are not suitable in all their detail for codification planned with a long-term perspective. Therefore, the decision was to include only some more durable rules based on European directives as the basis for codifications and to leave the others in separate acts, in a way opting for the lesser evil. (Similarly, the old Member States also applied different codification solutions. For example, the German legislator has integrated the Consumer Directives into the BGB. In Italy, the rules of the same directives have been integrated into the Consumer Protection Act from 2005.)[5]

4. The doctrine of no gaps is not advocated by the proponents of codification, but by its opponents. Even the classical codices were not without gaps. Similarly, one cannot expect post-socialist codes to be free of gaps.

4 Vékás, 2023, pp. 329 et seq.

5 Vékás, 2020, pp. 1273 et seq.

As a code is built to last many decades, it is important that it is based on sufficiently abstract terms. We agree, however, with Luhmann's view that norms should not represent sociological notions.[6] Social problems must be transformed into legal terms in the code.

5. In terms of the social influence of the private law codifications of the last two hundred years, one can differentiate between four generations of codices. My classification is as follows:

– classical codes (Code civil, Austrian ABGB, German BGB, and Swiss ZGB),
– second-generation codes (e.g., the first Belgian, Dutch, Italian, and Romanian codes in the 19th century, largely copies of the previous ones),
– socialist codes in a society without private property of productive assets, and
– post-socialist codes.

The codifications in Eastern Europe and the Baltic states from the last thirty years belong to the fourth generation. These civil codes originated during the course of the historically late reestablishment of a private property-based society. Although the privatisation of state property was affected by separate statutes, the new codes play an important social role, almost similar to that played by the classical codes in the early 19th century.[7]

Allow me to dedicate these opening remarks to the memory of Professor Attila Harmathy. Our careers ran parallel for many decades, and his death last year is a painful loss for European jurisprudence, for Hungarian private law, and for me personally.

6 Luhmann, 1974, pp. 50, 99.
7 Vékás, 2023, pp. 329 et seq., 338.

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INTRODUCTION: GENERAL REMARKS ON PRIVATE LAW CODIFICATION IN EAST CENTRAL EUROPE

EMŐD VERESS

1. THE CIVIL CODE: A CONSERVATIVE INSTRUMENT

In the grand evolution of legal systems, a code is not just a compilation of rules and regulations but also a tangible symbol of societal organisation, an embodiment of structured thought, and a proof to the evolution of jurisprudence. Known historically as a 'codex' or a 'book', a code captures the essence of a civilisation's legal framework, crafted with precision and imbued with cultural significance.

The genesis of codes, or codification, marks a pivotal moment in the records of legislative history, particularly within the sphere of civil law. Its journey can be traced to its origin in the late 18th and early 19th centuries, a period characterised by dramatic shifts in societal structures and the rise of bourgeois revolutions seeking to dismantle the shackles of feudalism. Within this turning point, the concept of a 'civil' or 'bourgeois' code emerged, symbolising the aspirations of these revolutions and the foundational principles upon which modern legal systems are built.

Veress, E. (2024) 'Introduction: General remarks on private law codification in East Central Europe' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 17–35. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_2

Central to the ethos of civil codes is the elevation of the individual citizen to the forefront of societal consciousness. Grounded in the sanctity of private property and contractual freedom, these codes represent a paradigm shift away from feudalistic hierarchies towards a more egalitarian and rights-based framework. With equality enshrined as a guiding principle, civil codes serve as bulwarks against arbitrary power, providing a stable foundation upon which the edifice of justice can be erected.

Yet, beneath the veneer of permanence, a measured exchange between tradition and progress is in play. While civil codes are intended to endure the test of time, their conservative nature belies the interaction of dynamic forces within the legal system. For instance, the Napoleonic Code originated amidst the fervour of the revolution, but it was designed to consolidate rather than disrupt the new status quo. Similarly, the German and Swiss codes, with their steadfast commitment to tradition, underscore the notion that while change may be inevitable, it must be tempered with prudence and respect for precedent.

The evolution of law is a complex relationship between tradition and innovation. While civil codes provide a framework for stability, they are not immune to change. Reforms, though often incremental, serve as the lifeblood of legal systems, adapting to the evolving needs of society while preserving the core tenets of justice and equality. In essence, civil codes represent more than just legal texts: they are living documents, reflective of the ever-shifting sands of societal norms and values. As guardians of stability, they stand as pillars in the enduring quest for order and equity in a changing world.

Viewed through the lens of private law, codification marks not just the culmination of a period of transition, but also the dawn of a new era characterised by stability and order. This process entails the establishment of a novel set of norms, meticulously crafted to serve as the soil on which legal certainty can flourish. In essence, codification demands not only the consolidation of prior transformations but also the systematic organisation of legal principles into a coherent framework.

2. THE ROLE OF CODIFICATION

The imperative of legal certainty finds a formidable ally in a well-structured code. Instead of dealing with the unpredictable flux of daily legislative activity, individuals and institutions can rely on a comprehensive code that provides a stable foundation. By delineating rights and obligations in clear and unambiguous terms, codification offers a shield against the capriciousness of legal interpretation, fostering confidence and predictability within the legal landscape.

Nevertheless, the inherent limitations of codification must be acknowledged. While a well-crafted code can address a myriad of legal issues, the quest for absolute comprehensiveness remains a utopian ideal. Even iconic codes like the French, Swiss, or German civil codes, while monumental in scope, fall short of encompassing every facet of law and society. However, this acknowledgement does not diminish the transformative potential of codification, particularly in contexts where legal reform is intertwined with broader social and economic upheavals.

A case in point is the revolutionary impact of codification in East Central Europe, where codes served as catalysts for the bourgeoisie transformation of ostensibly 'feudal' societies. Romania's adoption of a civil code in 1864 exemplifies this paradigmatic shift. Unlike instances where legal reform follows the establishment of a new economic order, the Romanian civil code was not merely a reflection of societal change but a potent instrument in driving it forward. By enshrining principles of private property and contractual freedom, the code laid the groundwork for a modern legal framework conducive to economic growth and social progress.

Codification in private law heralds the end of an era characterised by flux and uncertainty, ushering in a period of stability and legal order. While not devoid of limitations, the transformative potential of codification cannot be understated, particularly in contexts where it serves as a linchpin to broader societal transformations. As exemplified by cases such as Romania, the adoption of a civil code represents not just a legal

milestone but also a fundamental moment in the ongoing evolution of law and society.

Codification is driven by a multitude of compelling reasons, each contributing to its significance and impact. These reasons, ranging from ensuring widespread understanding of legislation to serving as instruments of reform and modernisation, underscore the multifaceted nature of codification and its far-reaching implications.

First, codification serves as a vehicle for ensuring general knowledge about legislation. By consolidating disparate legal provisions into a unified and accessible form, codification facilitates greater understanding and accessibility of laws among citizens, legal professionals, and other stakeholders. This transparency fosters a sense of accountability and empowerment within society, allowing individuals to navigate the legal landscape with more confidence and clarity.

Codification also enables the standardisation and systematisation of legislation, particularly where diverse legal norms are applied across different jurisdictions or areas of law. By harmonising disparate laws and regulations into a coherent framework, codification promotes consistency and coherence within the legal system, enhancing its efficiency and effectiveness. This standardisation streamlines legal processes, reduces ambiguity, and fosters greater predictability in legal outcomes, thereby bolstering legal certainty – a fundamental prerequisite for stability and economic development.

Beyond its instrumental role in fostering legal certainty, codification is also crucial in strengthening citizens' political identity. By codifying laws that reflect societal values and norms, legal systems affirm and reinforce the collective identity of citizens, providing a tangible expression of shared values and aspirations. In this way, codification serves as a cornerstone of civic engagement and political participation, empowering citizens to play an active role in shaping the legal landscape in accordance with their beliefs and principles.

Furthermore, codification serves as a medium for expressing the inherent value choices of a society. By codifying laws that embody particular moral, ethical, or cultural values, legal systems articulate and prioritise certain principles over others, shaping societal norms and behaviours. This expressive function of codification illustrates its role

in reflecting societal values and priorities, shaping the contours of legal discourse and governance.

Finally, in certain contexts, codification serves as a potent instrument of reform and modernisation. By revising and updating outdated or inadequate laws, codification works as a catalyst in bringing about transformative change within legal systems, adapting them to evolving social, economic, and technological realities. This reformative aspect of codification underscores its dynamic nature and its capacity to drive progressive change and innovation within legal frameworks.

As a cornerstone of legal systems, codification embodies the complex interplay among law, society, and governance, shaping the contours of legal discourse and governance in profound and enduring ways.

3. CODIFICATION IN WESTERN EUROPE

3.1. AUSTRIA

The Austrian Empire occupies a significant position in the historical evolution of legal systems, particularly in the inception of modern codification in private law. Stemming from the principles of enlightened absolutism, a series of initiatives were undertaken in the Empire to modernise its legal framework, culminating in the formulation and implementation of the Austrian Civil Code.

The codification endeavour can be traced to the latter part of the 18th century, with the initiation of the 1786 project – an experimental venture intended to reconfigure the legal landscape. However, no tangible progress was seen until 1797, when an incipient iteration of the Austrian Civil Code was enacted in the Galicia province, presently partitioned between Poland and Ukraine. These early undertakings represent the initial strides towards legal modernisation, reflective of the progressive inclinations characteristic of enlightened absolutism.

These efforts culminated in 1812 with the promulgation of the 'final' rendition of the Austrian Civil Code, designated as the Allgemeines Bürgerliches Gesetzbuch (ABGB), applicable to the non-Hungarian

territories of the Austrian monarchy. This comprehensive legal framework, meticulously devised and implemented, served as a cornerstone for the subsequent codification endeavours across various states within the region.

A prominent feature of the Austrian civil code was its all-encompassing nature, transcending linguistic and ethnic confines to accommodate the diverse nationalities within the Habsburg Empire. Following its enactment, official translations of the ABGB were swiftly disseminated in all languages spoken within the Empire, enabling each nationality to adopt the code as its own legal foundation. This linguistic inclusivity facilitated widespread adherence to and application of the code by judicial bodies and legal practitioners throughout the region.

Furthermore, the Austrian Civil Code ignited scholarly discourse and critical analysis, engendering a prolific body of commentary in diverse languages across the Empire. This vibrant intellectual exchange not only enriched comprehension and interpretation of the code but also facilitated its seamless assimilation into the varied legal systems and traditions prevalent within the region.

In essence, the Austrian Civil Code exemplifies the transformative potential of legal codification, transcending geographical and linguistic boundaries to mould the contours of contemporary legal frameworks across East Central Europe. As an enduring emblem of legal reform, its legacy shines as a beacon of enlightenment and progress, guiding the trajectory towards justice and equity in an ever-evolving societal landscape.

3.2. FRANCE

The French Civil Code, officially known as the Code Civil, was adopted in 1804. This legal instrument is esteemed for its lucid and comprehensible definitions, facilitating accessibility for lay individuals to grasp its contents – a feature not shared by its German counterpart. However, despite this advantage, the French Civil Code is criticised for its superficial treatment of some legal matters.

A fundamental disparity between the French and Austrian codes lies in the underlying source of authority they purportedly represent. For instance, the French Civil Code apparently embodies the 'general will' of the populace, whereas the Austrian code ostensibly reflects the will of the monarch, albeit cloaked within the framework of rationalistic natural law theory. This dichotomy underscores the divergent philosophical underpinnings of the two legal systems, at least at their origins.

3.3. GERMANY

The advent of the German Civil Code, known as the Bürgerliches Gesetzbuch (BGB), marks a significant milestone in the history of legal codification. This codification was preceded by the Prussian Allgemeines Landrecht of 1794, which, despite its comprehensive scope covering various legal domains beyond civil law, exhibited a casuistic manner of organisation, overshadowing general principles and abstract concepts. Influenced by the principles of natural law, the Allgemeines Landrecht contained an extensive array of 17,000 paragraphs.

However, the impetus for codification in German territories slowed following the Allgemeines Landrecht, as the dominance of the natural law school was supplanted by the historical school of law. This shift in jurisprudential thought, championed by Friedrich Carl von Savigny, posited that law emerges not as a deliberate creation of legislative wisdom but as a product of organic historical evolution. According to Savigny, German jurisprudence was not yet ripe for codification, as the development of customary law was deemed to be more aligned with the organic growth of legal principles. Accordingly, the task of the legislature and legal scholars was not to impose codification as an instrument of social transformation but to ascertain and interpret the law that had organically evolved from the collective consciousness of the people, encapsulated in the concept of Volksgeist, or the 'national spirit'. This perspective emphasised the role of Volksgeist as the authentic carrier and developer of customary law, blending Roman and Germanic legal traditions.

Nevertheless, despite the dominance of the historical school, the pro-codification views championed by Anton Friedrich Justus Thibaut ultimately prevailed. Consequently, the German civil code, the BGB, was not enacted until 1896, and it came into effect only in 1900. Noteworthy for its logical and coherent system, precise conceptualisation, and comprehensive regulation of major aspects of private law, the BGB stands as a monumental legal achievement. However, its notable strengths are counterbalanced by the code's excessive abstractness and structural complexity, which pose challenges to its comprehensibility and accessibility.

3.4. SWITZERLAND

In Switzerland, the regulation of civil matters is addressed by several distinct laws, each covering different aspects of civil codes. Notably, the Obligations Act (Obligationenrecht) was enacted in 1881, and it came into effect in 1883. Subsequently, the Swiss Civil Code (Schweizerisches Zivilgesetzbuch) was adopted in 1907 and enforced in 1912. Unlike its counterparts, this code is written in the vernacular, rendering it easily comprehensible even to non-legal professionals. Its concise structure and limited number of sections afford judges considerable discretion in its application.

Among the renowned civil codes, such as the Austrian Civil Code, the Code Civil, and the Bürgerliches Gesetzbuch, the Swiss Civil Code is considered one of the foremost legal frameworks globally. Its accessibility, succinctness, and allowance for judicial flexibility contribute to its esteemed reputation.

3.5. ITALY

In Italy, the initial iteration of the civil code was instituted in 1865, which was eventually supplanted by the 1942 Codice civile. The precise year of its enactment remains a subject of debate, as it was promulgated during the era of Mussolini's fascist regime. Despite being hailed as a

significant accomplishment of the burgeoning Mussolini civilisation, the very influence of fascist ideology on the code became a contentious issue. Following the downfall of fascism, mere stylistic revisions and excision of select institutions were enough to update the Italian Civil Code. Nonetheless, vestiges of corporatist ideals can be discerned within the framework of the Codice civile.

4. CODIFICATION IN EAST CENTRAL EUROPE

All the aforementioned civil codes remain in effect, albeit subject to periodic reforms and amendments. Their enduring legacy is evident in their profound influence on the process of legal codification in East Central Europe. Functioning as instruments of reform and modernisation, these codes were instrumental in catalysing significant societal transformations.

In some instances, the introduction of these codes into predominantly agrarian societies presented a novel challenge; yet, they served to bring about profound societal change. Despite rigorous adherence to foreign models in certain cases, the implementation and adaptation of these codes within specific cultural contexts produced unique legal frameworks. When they were applied by courts, these civil codes evolved into living texts, moulded to accommodate local realities and cultural nuances. In certain instances, they underwent alterations to reflect local specificities, becoming integral components of the legal and cultural landscape.

East Central Europe emerged as a locus of legal innovation, going beyond mere replication of Western codification practices. Rather than serving as passive recipients of legal norms, these codes became organic elements of legislation and culture, reflecting the unique legal ethos and values of the region. Consequently, identical legal texts developed independently, fostering original interpretations tailored to specific contexts. This phenomenon underscores the emergence of a distinct East Central European legal tradition, characterised by the synthesis of foreign influences and indigenous legal principles.

Codification in East Central Europe became a complex exchange between common European trends and regional specificities. While influenced by broader continental developments, the process of codification in this region was also shaped by unique historical, cultural, and legal factors. A comparative analysis of the legal history of codification in East Central Europe necessitates considering several key factors, each highlighting the nuances and intricacies of this transformative process.

First, the presence of unitary codes or distinct acts to regulate private law serves as a fundamental criterion for comparison. The choice between a singular comprehensive code and multiple discrete enactments reflects varying approaches to legal organisation and harmonisation within the region. Additionally, the presence of a dualist system, characterised by the coexistence of specific commercial codes alongside civil codes, presents an alternative framework for addressing the legal needs of both individuals and businesses – a stark contrast to the monist system where a single code serves this purpose.

Another crucial dimension for comparative analysis lies in the models used for codification, with distinct influences from Austrian, French, German, and Swiss legal traditions evident in different jurisdictions. The degree of model-following further distinguishes codification processes, ranging from direct adoption or translation of foreign codes to the integration of multiple models or the formulation of original solutions tailored to local contexts.

The intensity of model-following, as determined by important criteria, provides further insight into the dynamics of codification in East Central Europe. From instances of near-complete emulation of foreign codes to the development of hybrid frameworks blending various legal traditions, the spectrum of model-following reflects the diverse strategies employed in shaping legal systems across the region.

Ultimately, a comprehensive understanding of the legal history of codification in East Central Europe necessitates grappling with these multifaceted questions and their implications. By delving into the intricacies of unitary versus multiple codes, dualist versus monist systems, and the intensity of model-following, scholars and practitioners can elucidate the diverse trajectories of legal development within this vibrant

and dynamic region. The culmination of such analysis, presented in this volume, promises to enrich our comprehension of the complexities inherent in the codification process and its enduring impact on legal systems in East Central Europe.

5. FIVE WAVES OF CODIFICATIONS IN EAST CENTRAL EUROPE

5.1. FIRST WAVE: DIRECT IMPLEMENTATION OR ADOPTION OF WESTERN CODES (THE FIRST HALF OF THE 19TH CENTURY)

This era is distinguished by two principal approaches to legal codification. The first trend was the direct adoption of foreign legal codes. For instance, during the Napoleonic wars, the Grand Duchy of Warsaw, established in 1807, implemented the French Civil Code. Similarly, in the French Illyrian provinces from 1809 to 1814, under the governance of Auguste de Marmont, the French Civil Code was introduced. In regions such as Bohemia, Moravia (present-day Czechia), Istria, Dalmatia, and the Military Frontier Zone, the Austrian Civil Code was enforced from 1812 to 1815, persisting until 1946 (in Croatia and Slovenia) and 1950 (in Czechia). However, in the Hungarian part of the Habsburg Empire, the Austrian Code was not introduced, because Hungary had a strong legal culture deeply rooted in medieval customary law.

Conversely, the next option was to transplant foreign legal codes to other territories. This occurred in Moldova in 1817 and in Serbia, both of which were under the jurisdiction of the Ottoman Empire. In these instances, the model used for codification was based on the Austrian Civil Code.

5.2. SECOND WAVE: LEGAL TRANSPLANT AND INNOVATIONS (THE SECOND HALF OF THE 19TH CENTURY)

In 1859, the territories of Walachia and Moldova were amalgamated under the umbrella of the United Principalities, subsequently acquiring the unified designation of Romania in 1862. The attainment of independence from Ottoman rule in 1877 heralded a period of profound modernisation, characterised by a deliberate departure from Byzantine traditions and Turkish influences and favouring Western models. Central to this modernisation endeavour was the adoption of a unified civil code for the newly formed Romania. The Codul civil, which came into effect on 1 May 1865, represented a direct transposition – effectively a translation – of the French Civil Code of 1804. Additionally, the Belgian Mortgage Act of 1851 served as a blueprint for mortgage regulation, with discernible traces of Italian influence as well. While the process of legal transplantation was challenging, it yielded positive outcomes, notably the cultivation of a proficient Romanian legal elite nurtured within the framework of French legal culture. This integration of foreign legal norms not only modernised the Romanian legal landscape but also fostered a broader cultural exchange and alignment with Western legal standards.

In this context, it is worth mentioning the first modern civil code with a higher degree of originality produced in the region. The General Property Code (Opšti imovinski zakonik za Knjaževinu Crnu Goru) represents a notable legislative innovation introduced in the principality of Montenegro in 1888. Crafted by Valtazar Bogišić, a then-professor of law in Odessa and a proponent of the historical school of jurisprudence, this code deviated from the conventional approach of transposing foreign codes and advocated for a method grounded in the study of local customary law, upon which the code's provisions were predicated.

The scope of the General Property Code encompasses regulations pertaining to the law of persons, real rights, and the law of obligations. Bogišić's rationale for this focus lay in his conviction that the domain of family law, particularly the intricacies of succession law, had not yet attained a sufficient degree of coherence to warrant formal codification.

This being the case, he posited that customary law provided a viable framework for addressing these issues effectively.

5.3. THIRD WAVE: THE QUEST FOR LEGAL UNIFICATION (THE FIRST HALF OF THE 20TH CENTURY)

Following World War I, a number of newly established states grappled with the legacy of intricate and fragmented legal systems. It became imperative to unify and modernise civil law across these emerging nations. In Poland, which regained its independence in 1918, the establishment of the Codification Commission marked a significant step towards this goal. Operating from 1918 until 1939, the commission persevered even during the German occupation, continuing its work in a clandestine manner.

In the realm of civil law, the commission's most notable achievement was the enactment of a new law on obligations in 1933. Each provision of this law emerged from a meticulous process of comparative analysis, amalgamating diverse European legal traditions to formulate optimal regulations. Initially, a draft Code of Obligations inspired by Franco-Italian models was considered, but Professor Roman Longchamps de Bérier, a renowned legal expert, dissented, advocating instead for a synthesis of Swiss, Austrian, and French legal principles. Although Longchamps de Bérier was executed by the Nazis in 1941 during the 'massacre of Lwów professors', his influence persisted. Other components of the proposed codification assumed a different trajectory in 1939 when further progress was disrupted with the outbreak of World War II. The unfinished state of this codification underscores the tumultuous historical context in which legal reforms were pursued and the impediments to their progress.

In the aftermath of World War I, the formation of Czechoslovakia marked the integration of various territories, encompassing historical Czech regions (Bohemia, Moravia), territories acquired from Hungary (Slovakia, Subcarpathian Ruthenia), and regions obtained from Austria (Feldsberger and Weitraer Regions) and Germany (Hlučín Region). In terms of private law, the Austrian General Civil Code (Allgemeines

bürgerliches Gesetzbuch - ABGB) governed the Czech regions and former Austrian territories, whereas Hungarian law prevailed in Slovakian regions. Although efforts towards legal unification were initiated, they remained incomplete.

The creation of the Kingdom of Yugoslavia in the post–World War I era involved the amalgamation of Serbia with territories that were formerly part of the Austro-Hungarian monarchy, including Croatia, Slovenia, and Montenegro. This period was characterised by legal particularism, with distinct legal regimes co-existing, such as the 1844 civil code in Serbia, the Austrian Civil Code in Slovenia and Croatia, and the General Property Code of 1888 alongside local customary law in Montenegro. The Austrian Civil Code was also enforced in Bosnia and Herzegovina. Although unification efforts began, no concrete results were produced.

In Greater Romania, which saw significant expansion after World War I, six distinct private law regimes co-existed. Legal unification became a challenging task, with proposals suggesting the extension of laws from the Old Kingdom over the entire state. The minister of justice, Constantin Hamangiu, advocated for this approach, which sparked opposition. Consequently, initiation of drafting new private law codes, namely the Civil Code and the Commercial Code, ensued during the dictatorship of King Carol II. Although considered significant achievements in Romanian legal thought, these codes were never implemented due to the outbreak of World War II. Subsequently, the extension of Romanian private law across the entire country was achieved only in the post-war period, realising Hamangiu's vision.

In Hungary, the interwar period witnessed a fervent pursuit of legal codification, resulting in the elaboration of high-quality official projects. Notably, the culmination of these efforts was the 1928 Private Law Bill, representing a refined version of the 1900 project – a comprehensive civil code. However, despite its elaboration, the bill was not adopted, primarily due to the functional efficacy of the old customary law, which had been reformed and upheld by the courts.

5.4. FOURTH WAVE: COMMUNISM (THE SECOND HALF OF THE 20TH CENTURY)

The fourth wave of codification corresponds to the era of Soviet-type dictatorship in the region. Initially, communist theory postulated the eventual disappearance of civil law, or law in general. However, Soviet practice diverged from this theory, acknowledging the continued existence of law under socialism. Although communist ideology did not openly deny the eventual disappearance of law, it envisioned it as a distant future prospect, maintaining that law could co-exist with socialist governance. A significant influence on civil law codification in the region during this period stemmed from the works of A. V. Venediktov.

Characteristics of civil law during the period subject to analysis. Civil law during this period exhibited the following characteristics:

a) A rupture occurred within the legal tradition with the imposition of a new political, economic, and legal system as external forces reshaped the states of the region. The Soviet Union, as a dominant power, and its local agents sought to mould the region to conform to socialist ideals.
b) Some states adopted new civil codes, while others retained existing codes, albeit with diminished relevance. Private property was predominantly supplanted by state and cooperative property, relegating personal and private property to a secondary role. This era was characterised as one of 'private law without private property'. Special legislation governing state-owned enterprises formed the cornerstone of legal provisions, addressing their role in the planned economy, contractual matters, investments, and dispute resolution through state arbitration. The socialist planned economy marginalised the traditional market-oriented solutions of classical civil law.
c) Despite the decline in civil codes and legislation, they continued to exist, albeit in limited capacities. This facilitated the possibility of subsequent regime changes, with the primary corpus of state-owned property being subject to abolition in favour of re-establishing the dominance of the subsidiary corpus concerning private property.

d) Family law, imbued with socialist morality, was regulated separately and emerged as a distinct branch of law.
e) Contrary to expectations, the quality of legal scholarship and the totalitarian regime were not inherently incompatible. As observed by András Földi, a Hungarian professor, classical Roman jurists and the jurists of Justinian's era both thrived within autocratic empires.

New civil codes were introduced in several Eastern European countries during this period of legal reform. Czechoslovakia implemented new codes in 1950 and 1964, while Poland adopted its revised civil code in 1964. Hungary also joined this wave of codification with the enactment of its first civil code in 1959. In contrast to the Czech code, Hungary's civil code maintained a degree of continuity with past legal traditions, aiming to preserve the established values of civil law. However, this approach was criticised for incorporating concepts and solutions associated with an outdated phase of legal evolution. Some viewed the Hungarian Code as a belated manifestation of civil law principles rooted in a liberal-capitalist economic model, potentially reinforcing the interests of antiquated economic groups. The introduction of the code marked a significant departure for legal practitioners, particularly in Hungary, where customary law had traditionally underpinned private law. The transition to a more structured legal framework necessitated a shift from an inductive to a deductive method of interpretation for judges. This transformation underscored a broader trend in which Soviet-style dictatorships sought to supplant customary-law-based legal systems with more centralised and codified regimes.

During the initial phase of socialist dictatorship in Yugoslavia, significant legal reforms were enacted, notably with the adoption of the Act on the Invalidity of Regulations Adopted Prior to 6 April 1941 and During the Occupation in 1946. This legislation effectively annulled all preceding laws, including the 1844 Serbian Civil Code and the Austrian Civil Code applied in Croatia since 1812, reflecting a stance of legal nihilism. The aim was to introduce a new legal framework, yet the practical applicability of the old legislation, known as stara pravna pravila, prevailed where new regulations had not yet been established, provided they

aligned with the evolving social realities. This transitional arrangement was conceived as temporary, pending the enactment of new laws.

Consequently, various aspects of private law were progressively regulated through piecemeal legislation. The necessity to abolish antiquated laws led to the introduction of partial regulations governing specific social relations. This approach of creating segmented norms through disparate acts proved expedient compared to the protracted process of drafting a comprehensive civil code. Consequently, Yugoslavia opted for regulating subdivisions of civil law through separate acts, such as the Marriage Act (1946), the Inheritance Act (1955), the Obligations Act (1978), and the Act on Basic Ownership Relations (1980). Notably, the quality of these legislative efforts was commendable; for instance, the Obligations Act, primarily modelled on Swiss law, was hailed as a stellar achievement of liberal socialist legislation, demonstrating its efficacy over its nearly forty years of implementation.

In Romania, the 1864 civil code remained in effect during this period, albeit playing a secondary role amidst severe constraints on private property. Although attempts were made to develop a socialist civil code, these endeavours did not fructify.

5.5. FIFTH WAVE: AFTER THE COLLAPSE OF THE SOVIET-TYPE DICTATORSHIP

Romania possessed a pre–World War II civil code that naturally endured for decades following the downfall of communist regimes. Conversely, in other states, such as Hungary, Czechoslovakia (later divided into Czechia and Slovakia), and Poland, post-Soviet transitions prompted reforms of existing civil codes. The primary transformation was informal: civil codes emerged from the relative obscurity in which they lay during Soviet-type dictatorships when separate regulations concerning the planned economy dissipated. Alongside democratic constitutions, civil codes resumed their rightful position as foundational laws governing private property and contractual freedom.

During the transitional phase, civil code reform was not of paramount importance immediately after the regime change. This could

be because civil code reflects a state of normalcy. Instead, the focus was on transitioning from a Soviet-style property regime to one based on private property, necessitating specialised norms to effectuate this shift from a planned to a market economy. Once this transformation was accomplished, considerations for reforming existing civil codes or implementing new ones could be entertained.

The emergence of the fifth wave of codification characterises the 21st century, decades after the collapse of communism in the region. Croatia and Slovenia introduced new acts to regulate traditional realms of civil law, although lacking a unitary civil code. Meanwhile, Czechia, Hungary, and Romania adopted new civil codes (in 2012, 2014, and 2009, respectively, with substantial reforms preceding its enforcement in 2011). These codes are characterised by the utilisation of multiple models and exhibit undeniable degrees of originality within the constraints of feasibility.

Other states such as Poland, Serbia, and Slovakia are currently engaged in the development of new codes. Consequently, the fifth wave of codification continues to unfold across the region.

6. CONCLUSIONS

Given the constraints of space, any comprehensive overview of the history of private law codification provided in this introduction inherently remains partial. Nonetheless, the brief analysis has provided a revealing glimpse into the intricate and compelling legal history of the region. Through historical examination, it becomes evident that political, ideological, economic, and legal factors have profoundly influenced Europe's development, highlighting the interconnectedness between the models adopted and the expression of distinct legal cultures.

The outcomes of the developmental process analysis underscore that each state within the region adheres to its unique private law culture and civil code. This observation emphasises the diversity and richness of legal traditions across the region, reflecting the multidimensional nature of historical, societal, and legal influences that have contributed to the shaping of private law codification.

Nevertheless, questions regarding the pertinence of codification in the 21st century may arise, for instance, about the need for comprehensive codes that encompass a broad spectrum of social relations. While these arguments against such codification merit consideration, the overall response leans towards the affirmative. Concepts such as systematisation, transparency, and legal certainty stand as compelling arguments in favour of civil law codes.

The studies presented in this volume offer valuable insights into an exceptionally diverse array of civil law codification phenomena, spanning both geographical and temporal dimensions. This academic exploration presents a captivating journey, wherein our shared cultural heritage co-exists with our distinctive characteristics. Indeed, it exemplifies the beauty of legal science.

CODIFICATION OF PRIVATE LAW: THE EUROPEAN PERSPECTIVE*

JÜRGEN BASEDOW

ABSTRACT

Although the initiative for a common European Sales Law ended in failure, it appears that the, the rejection of the European Commission's proposal has not signalled categorical refusal. Considering the possibility of a broader harmonisation, it is only appropriate that the still unresolved question of a comprehensive body of rules on private law should be addressed. In this chapter, first, the forces driving codification and their potential significance in the European Union are explored, concluding that economic integration and accessibility of EU law are the relevant factors in the European context. Subsequently, a number of particular acts and cases are examined to show how the absence of a more comprehensive foundation of private law impedes the uniform application and interpretation of specific legislative acts of the Union. Describing the system-building function of general rules as well as their influence on legal education, the chapter emphasises the growing need for a set of general rules on private law that can offer guidance amidst the piecemeal legislation of the European Union. The chapter argues for a body of basic private law rules that is based on the authority of the

* The publication of this chapter is posthumous; the author has thus not approved the final version of the text, which has been finalised by Jannis Gries without any changes or additions to the content.

Basedow, J. (2024) 'Codification of private law. The European perspective' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 37–64. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_3

European legislature and that would provide orientation as well as a common ground for legal education across Europe.
Keywords: *codification, general rules, default rules, harmonisation, EU private law.*

1. RETROSPECTIVE: NATIONAL AND EU CODIFICATIONS AS COMPETITORS

The Hungarian Civil Code was adopted in 2013,[1] that is, at a time, when discussions about a European codification of contract law were still underway. In 2011, the European Commission submitted the Proposal for Regulation on a Common European Sales Law, which was the outcome of more than 10 years of preparatory work within the Commission and around 30 years of scholarly discussions. The proposal also covered numerous aspects of general contract law.[2] Would this be the kiss of death for the Hungarian project? Ever since the Treaty of Rome,[3] European integration had steadily progressed; Commission proposals for further approximation were often amended and sometimes watered down, but they would usually end up in some tangible result published in the Official Journal of the European Union. Could the same outcome not be expected in this case, and would it stop national codification from attaining its target?

In the years prior to the proposal made by the Commission, a Hungarian expert group had addressed the issue of co-existence of a national civil code with fragmentary EU Directives,[4] but had apparently not discussed the prospect of a comprehensive European codification of civil law. The perspective of a progressive European codification must have

1 Act V of 2013 on the Civil Code; an English translation is available on the website of the Hungarian Ministry of Justice: https://njt.hu/jogszabaly/en/2013-5-00-00 (Accessed: 15 September 2023).

2 Proposal for a Regulation on a Common European Sales Law of 11 October 2011, COM (2011) 635 final.

3 Treaty Establishing the European Economic Community (EEC Treaty, Treaty of Rome), signed on 25 March 1957, 298 UNTS 14.

4 Vékás, 2009, pp. 544 et seq.

been grist to the mill of those opposing national codification. The position taken and persistently defended by Prof. Vékás and other advocates of national codification was that the post-socialist States in Central and Eastern Europe could not wait for the success of the European efforts to unify private law.[5] It is a known fact that the European initiative ultimately failed. When a new Commission was appointed in 2014, six Member States, which would have constituted a blocking minority in the Council, wrote a common letter to the Commission and gave notice of their determined opposition to the proposal,[6] which was withdrawn shortly afterwards.[7] The proponents of the Hungarian codification were right to insist on their project. Since then, the European Union has continued with its piecemeal legislation as it had done in the past, over several decades. A slight change can be observed insofar as more recent legislative acts aim to replace the minimum harmonisation of previous years with full harmonisation.

However, the question of a comprehensive body of rules on private law remains unresolved. Was the ambitious development 'towards a European Civil Code'[8] based on wrong assumptions? Or was it initiated at the wrong time? Or were its scope and format wrong? The rejection of the proposal on the Common European Sales Law by some Member States does not appear to signal a categorical refusal. Only four years later, the bilateral Treaty on Franco-German cooperation concluded at Aachen (Aix-La-Chapelle) providing evidence of both States' intention to promote 'bilateral harmonisation of laws, inter alia in the area of

5 Vékás, 2016, pp. 40 et seq.

6 The German version of the letter to the Commission, which was dated 28 November 2014 and signed by the governments of Austria, Finland, France, Germany, the Netherlands, and the United Kingdom is printed in Basedow, 2015, pp. 432–435.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – Commission Work Program 2015. A new start, COM (2014) 910 final of 16 December 2014, Annex II, p. 12, no. 60.

8 This is the title of a book published in several editions and covering almost the entire area of private law with contributions by authors from all over Europe, see Hartkamp et al., 2011.

business law'.[9] The attitude of both governments could be criticised for being contradictory or hypocritical and for indirectly excluding other Member States from the harmonisation process. While this process has not yet been set in motion, the bilateral Treaty demonstrates that the door to a broader harmonisation of civil law in Europe is still open.

Therefore, it is only appropriate that enquiries be made to address the questions mentioned above. To do this, first, we need to understand the motivations that led legislatures in the past to enact civil codes (section 2). Thereafter, we shall examine some of the deficits in the interpretation and application of EU private law that can be ascribed to the absence of a more comprehensive foundation of private law in the law of the Union (section 3). Our further explorations will be dedicated to the systemic role played by a more comprehensive body of rules (section 4). Finally, we submit some final observations and cautious recommendations for the future (section 5).

2. THE FORCES DRIVING CODIFICATION

In the past, a number of factors were responsible for promoting codification of private law in individual states. Legislatures wanted (a) to accomplish statehood (2.1); (b) to establish a common legal framework for a growing economic area (2.2); (c) to respond to an ideological disruption (2.3); and (d) to improve the accessibility of the law for the population at large and lawyers in particular (2.4). In the more than 200 years of codification history, the weight of individual factors has differed from country to country, depending on the respective legal environment and other specific circumstances. In considering a future harmonisation of civil law in the European Union, it is useful to make a closer examination of these factors to fathom their potential significance in the European Union. We find that the underpinning of economic integration plays an

9 See art. 20 of the Vertrag zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration, concluded at Aachen on 22 January 2019, BGBl. 2019 II, 898; see also Scholl, 2019, pp. 441–445.

important role and that accessibility of EU law is of increasing significance, while statehood and ideological factors are less relevant in the European context.

2.1. ACCOMPLISHMENT OF STATEHOOD

The modern state, conceived as the organised form of a society subject to a single and consistent rule, has evolved over centuries. In particular, the Age of Reason or Enlightenment has furthered the evolution of elements of statehood that we presently consider as self-evident: a standing army; common rules of taxation; common weights and measures; pre-established ways of rule-making; common procedures and structures of administration; a common system of schooling and qualifications; and so on. The accomplishment of a state became an object of statesmanship and a special branch of scholarship. The term '*Staatswissenschaften*' continues to be used in Germany, and it now indicates common faculties for economics, political science, and law at some universities.

The existence of common legal rules governing the whole territory of a state was also considered a desirable or even indispensable element of the rational order of a state. While the objective of a common law had already been achieved in England and the Scandinavian kingdoms, which had been subject to a unitary rule, the situation on the continent was different. It was characterised by a hotchpotch of inconsistent laws and regulations because the continental territories had been subject, over the centuries, to a multitude of rulers. The specific regulations imposed by many of them during their rule either partially survived, were partially aggregated, or were partially repealed over time. The rulers had also ceded, pledged, acquired, and conquered parts of these territories. The result was an incredible patchwork of legal rules that were somehow embedded in the Roman law that had been handed down over generations. As a result, the governing law often changed from one village to the next. An illustration of this is given by the jurisdiction of the district court of Gießen in Hesse in the centre of Germany, which, until 1900, had to administer not less than ten different territorial laws

that were in force in different townships.[10] Prior to the first codifications, this was a common occurrence in most continental countries. It goes without saying that the unifying effect of the civil codes was a primary objective of law-makers and highly appreciated.

Alongside this *internal* aspect, the accomplishment of statehood had an *external* dimension as well: the aspiration to an autonomous ordering and design of the law. Both aspects combined to form what is called the building of the nation-state. The pursuit of autonomy was an important driver for the second generation codes in Italy[11] and the Netherlands[12] in the 20th century. This is because both countries had been the object of legislation in the 19th century that was largely imposed on them – the Napoleonic Code – which, in the 20th century, was increasingly perceived as foreign law that had to be replaced by a national and more appropriate codification.

Do these considerations related to statehood support a future codification of private law in Europe? The answer is in the negative. The European Union is a federal entity of a new kind, and not a state. While its own institutions and procedures should comply with requirements of rationality, it is essentially up to the institutions of the Union and up to the Member States to ensure that compliance. The need for a common private law governing the whole territory may flow from other considerations, but it is not supported by the preceding arguments on statehood.

10 See Klippel, 1996, p. vii.

11 For the legal unification of Italy by the Codice civile del Regno d'Italia of 1865, see Ghisalberti 1979, pp. 223 et seq., 257 et seq., 307 et seq.

12 For the French origins of the Dutch Civil Code of 1838, see Algra, 1971, p. 29. Regarding the background of the present civil code, see Basedow, 1980, pp. 135 et seq.; the preparatory work goes back to the 1930s.

2.2. A COMMON LEGAL FRAMEWORK FOR THE ECONOMY

A major part of private law relates to business operations.[13] The unification and codification of private law has always aimed at ensuring a stable and common legal framework for the economy within a state's territory, increasing legal certainty, and thereby facilitating economic exchange. This was the primary purpose of the codification of commercial law that preceded the codification of general private law. It occurred in France as early as in 1673[14] and in Germany in 1866, which was also prior to the codification of general private law.[15] However, the commercial codes did not cover the whole range of economic activities. They were essentially confined to trade and industry, whereas the craft sector, the liberal professions, and the primary production in agriculture, fishing, and mining were not covered. A broad codification of private law would provide the required legal framework for the economy in its entirety.

The economy-related motivation for the codification of private law applies to the European Union as well. The objective of a common market, which has been re-designated as the Internal Market by the Single European Act,[16] can be more easily achieved if the market participants from all Member States can rely on identical or similar legal provisions. These Member States need legal certainty and the enforceability of private rights, particularly in the field of contracts.[17] It has often been claimed that a common market can be realised and function too in the absence of a common law on contracts and related matters and

13 Around 70% of the provisions of the Hungarian Civil Code deal with the law of legal entities, mainly company law, proprietary rights as the objects of transactions, and obligations.

14 Ordonnance de 1673 – Édit du roi servant de règlement pour le commerce de négociants et marchands tant en gros qu´en détail, available on the website http://webuser.unicas.it/salamone/index_htm_files/Ordonnance%201673.pdf (Accessed: 15 September 2023).

15 See the General German Commercial Code of 1866, with commentary by Puchelt and Förtsch, 1894.

16 Single European Act, signed at Luxembourg on 7 February 1986 and at the Hague on 28 February 1986, OJ 1987 L 169/1; the Single European Act, *inter alia*, amended the Treaty of Rome.

17 For an early analysis in this sense, see Basedow, 1996, pp. 1169–1195.

that a unification of mandatory regulations is sufficient, for instance, referring to countries such as the USA. However, in the United States, all states share a common language and a common legal tradition, except for Louisiana, and the laws of the states are all based on the common law. The same is true for Australia and Canada. By contrast, in Europe, highlighting the *national* character of the law has been the prevailing intellectual exercise from the 19th century onwards. This supports the proposition of the late Danish professor Ole Lando that in the absence of a common language and legal background, economic integration has to be achieved by harmonisation.[18]

Admittedly, the broad permission that parties enjoy under the Rome I Regulation to choose the laws governing a contract[19] reduces the problems caused by the divergence of national contract laws. However, this choice is of little use where mandatory provisions of the individual Member States are not subject to the law selected by the parties. This is increasingly the case with regard to individual provisions and the whole regime of specific contracts. As a result, EU measures of legal approximation have mainly tackled and been limited to mandatory laws. It also explains the fragmentary character of EU private law.[20] The creation of a body of uniform private law rules is perhaps less urgent in the area of default rules than it is in the area of mandatory provisions because, we shall see at a later stage that the application of mandatory provisions is often deficient due to the lack of a solid foundation of general private law.

2.3. RESPONSE TO IDEOLOGICAL DISRUPTIONS

Many or even most Civil Codes in Europe have resulted from the fundamental disruptions that have shaken Europe ever since the end of the 18th century and that have brought about fundamental changes in

18 See Lando, 1992, p. 263.

19 See art. 3 of Regulation (EC) no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ 2008 L 177/6.

20 For a detailed treatment, see Basedow, 2021, paras. 1–35 et seq., 1–67 et seq.

the guiding ideologies: the turn from an estate society of feudalism to a system that bestows equal rights acquired by birth on every citizen, subsequent to the French Revolution; the establishment of socialism and a centralisation of most decisions in society following the Russian Revolution and the later Soviet conquests in central and eastern Europe; and the collapse of socialism and the downfall of the Soviet Union, which brought about what has been termed 'the return of civil society and its law'.[21]

Some remarks on the latter transformation, which started in 1990, may explain the profound interconnection between the political and economic changes of those years and the repercussions they had on the respectively affected legal systems, ultimately leading to a new wave of civil codes in central and eastern Europe. In 1995, Ferenc Mádl submitted a comprehensive analysis of that interaction, speaking of the 'legal institutions and instruments *channeling* the transformation'.[22] He referred to (a) the restoration of property as a single institution, (b) the need for a decentralisation of economic decisions and a system of private enterprises, (c) the establishment of financial institutions and markets, and (d) a complete overhaul of the contract system.

Contract law illustrates the need for a new codification: since the production and distribution of goods and services in socialist countries was a matter of central state planning, agreements between the various operative units could deal only with points of minor significance, but not with prices, quantities, and other major technical specifications. Regarding the 1959 Civil Code of Hungary, an official publication of the Ministry of Justice pointed out that contracts 'were no more than formal tools of technical character in the fulfilling of plans'.[23] Although the Hungarian Civil Code maintained a unitary approach covering contracts concluded by all kinds of parties, the central economic plan

21 Mestmäcker, 1991, pp. 177–192.

22 Mádl, 2000, ch. 2 (author's emphasis).

23 Ministry of Justice of the Hungarian People's Republic, Civil Code of the Hungarian People's Republic, Budapest 1982, see the introduction by Petrik, F. at p. 23, pointing to a certain liberalisation under the new economic management system of 1968.

had precedence and was implemented through binding regulations.[24] Other socialist countries, such as the German Democratic Republic, preferred a duplication of contract law regimes, with one regime serving the central economic plan, the other applicable to agreements concluded between state enterprises and citizens or between citizens.[25] Regardless of the approach chosen, huge differences existed between the two types of agreements. Contracts concluded between economic entities in pursuance of state plans were characterised by a duty of conclusion and the principle of specific performance[26]: those under civil law by contractual freedom and implicitly also by the debtor's choice between specific performance and the payment of damages. The end of the state planning system obviously imposed adjustments and unification of the contract law regimes in new civil codes.

The European Union did not emerge from an ideological disruption. It resulted from a cautious attempt to reduce the impact of an excessively nationalist approach across a whole century, which ultimately led to the catastrophe of World War II. The EU is aimed at creating an order in intra-European relations by a gradual and progressive opening of borders and allowing for bottom-up integration. It concerns relations between peoples while societal relations between labour and capital are already similar in all Member States. Consequently, the foundations – concerning the legal capacity of individuals, freedom of association as the basis of corporate law, and recognition of property and contractual freedom – are essentially the same in all Member States. Under these conditions, ideological disruptions are irrelevant for the issue of a European codification of civil law or of some of its major parts.

24 See Section 30 of Act VII of 1972 on the planning of the national economy, and Hetényi, 1976.

25 See the explicit limitation of the scope of application in Section 2 (2), 2nd sentence of the East German Zivilgesetzbuch der Deutschen Demokratischen Republik of 19 June 1975, as amended on the website https://www.verfassungen.de/ddr/zivilgesetzbuch75.htm (Accessed: 15 September 2023). Contracts concluded between the operative economic units were subject to the Gesetz über das Vertragssystem in der sozialistischen Wirtschaft – Vertragsgesetz of 25 March 1982, as amended on the website https://www.verfassungen.de/ddr/vertragsgesetz82.htm (Accessed: 15 September 2023).

26 For East Germany, see Sections 11 and 14 of the Vertragsgesetz, previous fn.

2.4. ACCESS TO THE LAW

When the idea of codification emerged in the 18th century, access to the law was virtually impossible for the public at large and difficult for educated lawyers. The sources of law were scattered over hundreds or thousands of legislative acts of different ages, with concepts and terms often used inconsistently; a major part of the body of law was drafted in Latin of the classical period: Latin was also used in many commentaries in the subsequent centuries. Latin allowed for a European discourse amongst scholars, but it prevented large segments of the population and also many lawyers from understanding the relevant texts. The authors of the Enlightenment wanted to facilitate access to the law by means of a systematic structure, by employing terms and concepts in a consistent manner, and by the use of the native language of the people or at least the dominant language of a territory.

From a modern perspective, these claims may appear technical and of minor significance. In most European countries, public and private initiatives published encyclopaedias, collections of laws and cases, commentaries, etc., which allowed lawyers to find the law. Practice guides drafted in the national language provide some understanding to laypersons insofar as the law is of immediate significance for the profession. Presently, we live in a world of largely codified law, which enables us to search for legal information at the right place in a system or on the worldwide web, and the law is, of course, drafted in our own language. However, this was not the case until the 18th century, which explains the call for and the widespread acceptance of national codifications.

When dealing with codification of private law in Europe, the above concerns become important once again. This does not apply to the language of the law since all legislative acts of the EU and the judgements of the Court of Justice are published in the national languages designated by the Member States. However, certain other properties of EU law have an alienating effect on most lawyers across the Member States. The Directives and Regulations are not part of an overarching system: they are the result of selective policy preferences established from time to time. Many do not distinguish between public law and private law, contract law and tort law, criminal law and the law of administrative fines,

etc. After several decades of such piecemeal legislation, even experts find it difficult to trace and comprehend specific acts or rules. Moreover, EU legislation often provides evidence of difficult political compromises that may result in excessive details or in silence on certain issues in corresponding instruments, thereby hampering understanding. This will be illustrated below in section 3.

An increasing number of inconsistencies within EU legislation can therefore be observed. Legal history has shown that such situations can be addressed by principles covering a broader area of the law. It is understandable that from the perspective of EU law, to cite but one example, civil liability is mainly viewed as an additional sanction that is meant to encourage a certain conduct in compliance with the law. However, this sanction is intended to ensure compensation for the victim insofar as it fits within a traditional systematic approach towards private law that tends to subject different types of liability to common and general rules on the law of damages. The incentivising effect is achieved by its compensatory effectiveness. The interaction between the vertical or sectorial perspective espoused by fragmentary EU acts and the general system of private law cannot be denied. It favours the elaboration of a body of general rules of EU private law. This undertaking is further underpinned by a closer look at particular legislative acts and the way the European Court of Justice has grappled with them.

3. THE ROLE OF GENERAL PRIVATE LAW IN INTERPRETING EU ACTS

The fragmentary and mandatory laws of the European Union have in the meantime penetrated large areas of private law; their application in practice invariably produces the need to demarcate them from other component parts of the legal framework governing particular factual situations and disputes. These other parts usually originate in national law. In private law, they are often laid down in the default rules of national civil codes and commercial codes, often determining the approach of lawyers to special issues. When the national laws diverge in substance – a common occurrence – detrimental repercussions may

ensue on the application and enforcement of the law of the Union in the various Member States.

These aspects undermine the objective of a uniform application of EU law, a point that has been highlighted by the Court of Justice repeatedly over the last 50 years.[27] The Court of Justice has concluded that EU acts have to be interpreted not by reference to a national law, but in a uniform way; this requirement has been espoused by the Court with very few exceptions and is nowadays described as settled case law.[28] However, a closer examination of a number of particular acts and cases shows that the absence of a body of general rules of private law distorts or precludes the uniform application of specific acts in the various Member States and impedes uniform interpretation. The following examples sort through the judicial review of standard contract terms (3.1), concepts of agency (3.2) and of sale (3.3), handling of the prescription of claims (3.4), and the assessment of damages in the law of civil liability (3.5).

3.1. STANDARD CONTRACT TERMS[29]

The Court's case law on unfair contract terms provides a telling example of the disturbing effect of national default rules and the absence of EU default rules. In one of the early cases decided under the relevant Directive, Freiburger Kommunalbauten, a municipal construction company,

27 See e.g., CJEU 16 January 1974, case 166/73 (*Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), ECLI:EU:C:1974:3, para. 2: 'Article 177 [EEC, now, 267 TFEU] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community'. See also CJEU 8 March 2011, Opinion 1/09 (*Unified patent litigation system*), ECLI:EU:C:2011:123, para. 83.

28 See CJEU 17 October 2018, case C-393/18 PPU (*UD v XB*), ECLI:EU:C:2018:835, para. 46; an exception is recognised for the determination of the place of performance of a contract in the context of the Brussels I Regulation, see CJEU 6 October 1976, case 12/76 (*Industrie Tessili Italiana Como v Dunlop*), ECLI:EU:C:1976:133, para. 13.

29 Parts of the following section are reproduced, also posthumously, in Basedow, Default Rules as a Means of European Integration in Häcker / Ungerer, Default Rules in Private Law (2024), pp. 111 et seq.

proposing to build a multistore carpark sold a parking space located therein to a Mr. and Mrs. Hofstetter. In accordance with the contract, the whole of the purchase price was due once the contractor provided a security. When Freiburger Kommunalbauten delivered a bank guarantee, the Hofstetter couple refused to make the payment, alleging that the contract clause at issue violated the German statute on standard conditions of contract, which, *inter alia*, followed the Unfair Contract Terms Directive.[30] They argued that under Section 641 BGB, the relevant provision of the German Civil Code, payment is due only *after* completion of the building and its acceptance by the customers. They said that contractual derogation from this rule was possible, but not by means of a standard clause in a consumer contract.

The German Federal Supreme Court (BGH) was nevertheless inclined to approve the clause because of the security furnished by the contractor. Upon request for a preliminary ruling, the Court of Justice held that balancing the pros and cons of a clause, as needed for an assessment of its unfairness, 'requires that consideration be given to the national law', over which the Court of Justice has no jurisdiction for interpretation.[31] The Court concluded that it may only 'interpret general criteria used by the Community legislature in order to define the concept of unfair terms, [...] [but] should not rule on the application of these general criteria to a particular term'.[32] The latter formula has been constantly repeated in judgements dealing with the Unfair Contract Terms Directive.[33] It has posed a real barrier to the effective enforcement of the Directive, although the Court of Justice has tried to find other ways of implementation more recently.[34]

In the present context, therefore, the absence of a default rule in EU law indicating the time when remuneration is due under a contract for work has been an impediment to the effective transposition of EU law;

30 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L 95/29.

31 CJEU 1 April 2004, case C-237/02 (*Freiburger Kommunalbauten v Hofstetter*), ECLI:EU:C:2004:209, para. 21.

32 CJEU, *Freiburger Kommunalbauten*, previous fn., para. 22.

33 See the survey in Fornasier, 2022, § 305 BGB, para. 45 et seq.

34 Fornasier, 2022, § 305, para. 36 et seq., 51 et seq.

further, the default rules of the Member States cannot fill this lacuna in the law of the Union. Default rules established by EU legislation could provide guidelines for the policing of standard contract terms. In the *Freiburger Kommunalbauten* case, the Directive could have been effectively implemented had EU law contained a simple rule stating that in a contract for work, and in the absence of an agreement between the parties, remuneration is due after or before or simultaneously with the acceptance of the work by the customer. Such a rule would have established the basic principle regarding the sequence of the parties' performances and would have allowed the Court of Justice to proceed to further details, for example, the validity, form, and fairness of a derogating agreement. Similar default rules would also be useful in other contexts that are covered by the Unfair Contract Terms Directive.

3.2. AGENCY

The Court often accepts agency as regulated by national law. Unhesitatingly, it sometimes considers agency as a factual question and identifies the existence of an agency relation as part of the facts submitted by the referring national court.[35] It acknowledges that agents bind their principals and not themselves; consequently, intermediaries concluding agreements on behalf of their principals do not themselves infringe the prohibition of cartels under art. 101 of the Treaty on the Functioning of the European Union (TFEU).[36] In a consumer case, a garage owner (the dealer) obtained a used car from a consumer to sell the car in its capacity as an agent to another consumer. When the defects of the car became manifest and the final buyer brought an action against the dealer, the

35 See e.g., CJEU 27 January 2000, case C-8/98 (*Dansommer v Götz*), ECLI:EU:C:2000:45, para. 8.

36 CJEU 11 September 2008, case C-279/06 (*CEPSA v Tobar*), ECLI:EU:C:2008:485 para. 41, distinguishing the principal-agent relationship that is subject to what is now art. 101 TFEU and the relationship between an intermediary (acting on behalf of the principal) and a third party, one that is outside the scope of art. 101.

Court considered the latter not as an agent, but as a seller for the purposes of the Consumer Sales Directive.[37]

This judgement gives rise to some questions: What would have happened if the final buyer had sued the original owner together with the dealer? Would the Court have asserted, under the Directive, the existence of two sellers (the original owner and the dealer) in a single sales contract? The liability of the first seller would likely be governed by national law since the Directive does not apply to contracts concluded between two consumers. Would the ultimate buyer thus be entitled to contractual claims against the dealer and, additionally, against the original owner? Assuming that the final buyer had also brought a claim against the dealer for compensation of loss suffered, that is, a claim not covered by the Directive but by national law, would the national court apply the Directive against the dealer as a quasi-seller but dismiss the claim for damages against the same dealer acting as an agent outside the scope of the Directive?

The Court based its assessment motivated by considerations of consumer protection and the principle of effectiveness. However, would the same motivation, applied to other sectors, not turn a travel agent selling flight tickets into an operating air carrier and an insurance intermediary into an insurer, both being liable under EU acts when the much larger principals they represent – an airline or insurer – become insolvent?

The Court dwells on the concept of seller and the policy of consumer protection pursued by the Directive. It does not consider the possible complications and ramifications in other areas of the law. The judgement would have been more convincing had the Court focused on the transparency of the dealer's position. Transparency plays an important role in the law of agency, as can be inferred, for example, from Section 164 (2) of the German BGB: 'If the intent to act on behalf of another is not evident, the lack of intent on the part of the agent to act on his own

37 CJEU 9 November 2016, case C-149/15 (*Wathelet v Garage Bietheres*), ECLI:EU:C:2016:840 with regards to Directive 1999/44/EC of 25 May 1999 on certain aspects of consumer goods and associated guarantees, OJ 1999 L 171/12.

behalf is not taken into account'.[38] The same result is achieved elsewhere in referring to reasonableness or good faith,[39] or on the basis of what the third party 'ought to have known'.[40] These provisions apply to the whole area covered by contract law and do not suggest anything special or specific about consumer sales.

Transparency is also acknowledged as a general principle of EU law. It has been invoked by the Court, for example, in matters of public procurement;[41] likewise, art. 4(2) of the Unfair Contract Terms Directive, which requires contract terms to be drafted in 'plain intelligible language', has been interpreted as requiring transparency.[42] By implication, the Court also referred to this in the present case, pointing out that the seller had 'not duly informed the consumer of the fact that the owner of the goods sold [was] a private individual'.[43] The Court should have extended the principle of transparency to contract law, instead of spending a great amount of time and consideration on consumer protection. Again, some default rules of EU law on the basic principles of agency would have been helpful; they would likely have induced the Court to consider the consequences of the expansion of the seller

38 Translation as published on the website of the Federal Ministry of Justice: https://www.gesetze-im-internet.de (Accessed: 15 September 2023). In Italian law, a similar rule requires – under the heading of contemplatio domini – that it must be obvious to the third party that the effects of the agent's contract-related action concern the principal, see Cian, Trabucchi, 1997, art. 1388 para. VI/1.

39 For the Netherlands, see art. 3:35 of the Civil Code (Burgerlijk Wetboek): 'The absence in a declaration cannot be invoked against a person who has interpreted another's declaration or conduct, in conformity with the sense which he could reasonably (redelijkerwijze) attribute to it in the circumstances, as a declaration of a particular tenor made to him by that other person'. English translation from Haanappel, MacKaay, 1990, p. 21.

40 See art. 2.2.4 (1) of the Unidroit Principles of International Commercial Contracts 2016, on the website https://www.unidroit.org → instruments → commercial contracts (Accessed: 15 September 2023).

41 CJEU 8 December 2022, case C-769/21 (*BTA Baltic Insurance Co v Iepirkumu uzraudzības birojs, Tieslietu ministrija*) ECLI:EU:C:2022:973, para. 32.

42 CJEU 10 June 2021, joined cases C-776/19 (*VB v BNP Parisbas Personal Finance*), ECLI:EU:C:2021:470, para. 62, with further references.

43 CJEU 9 November 2016, case C-149/15 (*Wathelet v Garage Biethères*), ECLI:EU:C:2016:840, para. 45.

concept, to substantiate its line of thought, and to provide fertile ground for the application of the principle in other contexts.

3.3. CONTRACTS OF SALE

The previous example leads us to the concept of sale of goods, a notion defined by the 2019 Sale of Goods Directive, which replaced the prior Consumer Sales Directive.[44] Under art. 2 of the new Directive, a 'sales contract means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof'. The term seller is defined as 'any natural person or any legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession, in relation to contracts covered by this Directive'. The explicit reference to another person acting in the seller's name as instrumental to the seller appears to exclude the classification of that other person as the seller himself, contrary to the judgement in the case discussed above.[45] This is an additional argument for focusing on transparency and for EU rules embodying some basic principles of the law of agency.

The opinion of the Court of Justice in *UsedSoft* confirms the observation regarding the concept of sale becoming subject to loose handling. The Directive, addressing the legal protection of computer programs, provides that the distribution right of the rightholder is exhausted as soon as a copy of the program is *sold* in the Internal Market by the rightholder or with his consent, for the first time.[46] In the case before

44 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ 2019 L 136/28.

45 See above at fn. 42.

46 See art. 4 (2) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ 2009 L 111/16.

the Court of Justice, the rightholder, Oracle, distributed its programs by allowing purchasers to download them from its website and conclude a digital license agreement. The Court of Justice considered the combination of these measures as being equivalent to a 'sale' within the meaning of the Directive. It consequently held that Oracle's right was exhausted and that UsedSoft, one of the purchasers, was allowed to resell the 'used' program. The Court held that the operations mentioned above, examined overall, involve a transfer of the right of ownership of the copy of the computer program in question.[47]

While the extension of the principle of exhaustion of the IP right to licenses granted in this factual situation is understandable, the way the Court chose to implement this solution is not, because eventually this would give rise to the question of whether other rules of sales law apply to the license at issue: whether, for example, the non-delivery of updates entitles the licensee to remedies under sales law. The proper methodological device would have been an analogy and not the extension of the concept of sale. Here again, default rules of EU law on contracts of sale in general could have provided some guidance to the Court.

3.4. PRESCRIPTION

A further area of private law that would benefit from default rules regulating certain key issues is the *prescription of claims and actions*. Time limits are intended to restore legal certainty and, as it is said in German, to establish *'Rechtsfrieden'*, that is legal peace. They are an indispensable corollary of every claim, and multiple rules of this kind have been

47 CJEU 3 July 2012, case C-128/11 (*UsedSoft v Oracle International*), ECLI:EU:C:2012:407, paras. 42 and 46.

adopted in the law of the Union itself.[48] Every claim must be subject to a time bar *in extremis*. It is thus disconcerting when the Court holds, as it recently did, 'that an application brought by a consumer for a declaration that a term in an agreement concluded between a seller or supplier and a consumer is unfair cannot be subject to any limitation period'.[49] Would this be the case even when distant heirs commence litigation 100 years after the claim arose? This was not the problem in the case decided by the Court, but its statement is misleading and would be more understandable if it was made against the backdrop of a default rule of EU law ordering a general prescription after a period of some decades. Such a period would be absolute, and it would start with the event giving rise to the claim.

More reasonable and even suitable for codification is another rule established by the Court: It provides that the period of time limitation does not start to run before the creditor becomes aware of the facts giving rise to its claims.[50] This is a sound principle for shorter prescription periods. It precludes the fact that a prescription period expires before the creditor can take notice of the claim. It applies in the years preceding the lapse of the absolute prescription period mentioned above. More recent acts of national legislation within and outside the EU feature such prescription rules; they often add additional and absolute prescription periods that start from the occurrence of an objective

48 For damages claims arising from the non-contractual liability of the Union (art. 340 (2) TFEU), see, e.g., art. 46 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union, OJ 2016 C 202/210; art. 10 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1; art. 10 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

49 CJEU 10 June 2021, joined cases C-776/19 (*VB v BNP Parisbas Personal Finance*), ECLI:EU:C:2021:470, para. 38.

50 CJEU, *BNP Parisbas Personal Finance*, previous fn, para. 46; see Straetmans and Werbrouck, pp. 188 et seq; in the same sense with regards to a claim of damages arising from an anticompetitive agreement, CJEU 28 March 2019, case C-637/17 (*Cogeco Communications v Sport TV Portugal*), ECLI:EU:C:2019:263, para. 49, 51 and 53. The principle is now laid down in art. 10 (2) of Directive 2014/104, above at fn. 47.

circumstance.[51] EU rules embodying both principles, perhaps together with some provisions on the suspension and interruption of prescription, would provide helpful guidance for the development of EU law.

3.5. ASSESSMENT OF DAMAGES IN CIVIL LIABILITY

Under the General Data Protection Regulation, the victims of infringements of that act are entitled to compensation, which explicitly includes material and non-material damages.[52] By comparison, the Directive on Damages Claims for Breach of Competition Law grants the right to obtain full compensation, which is defined as comprising actual loss and loss of profit, plus the payment of interest; it explicitly excludes overcompensation, whether by means of punitive, multiple, or other types of damages.[53] The Products Liability Directive awards material damages caused by death or injury as well as compensation for the destruction of or damage to property. It may thus be inferred that pure economic loss is not covered; regarding non-material damage, the Directive refers to national law.[54]

A reader of these provisions may be puzzled: What about immaterial damage resulting from an infringement of competition law? It may accrue, for example, in cases where the victim of abusive conduct of a market dominant firm is compelled to go out of business and to give up his trade. Is the compensation for such damage excluded under Directive 2014/104, or is it left to the applicable national law as decreed by the Products Liability Directive? Further, what about punitive damages

51 On the trend towards a two-tracked regime of prescription periods, see Zimmermann, 2012, pp. 1307 et seq.

52 See art. 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

53 See art. 3 of Directive 2014/104/EU above at fn. 47.

54 See art. 9 of Directive 85/374/EEC, above at fn. 47; the proposed renewal of the Directive refines the provisions of art. 9 but does not provide for substantial changes, see art. 4 (6) of the Proposal for a Directive of the European Parliament and of the Council on defective products, COM (2022) 495 of 28 September 2022.

under the Data Protection Regulation? Can it be inferred from the silence of that instrument that it is excluded? Or are punitive damages again left to the applicable national law? Do the Data Protection Regulation and the Products Liability Directive preclude a Member State from granting punitive damages as the Directive on Damages for Breach of Competition Law does? Interest is mentioned only in the Directive on infringement of competition law. Is it therefore excluded in the other instruments or simply left to national law?

It would certainly be easier to find consistent answers to these questions if there were some general principles on the assessment and calculation of damages in EU law. In their absence, the Court of Justice will give random answers to corresponding preliminary questions in the referral procedure, depending on the facts of the case and on the skills of a national court in submitting pertinent preliminary questions.

3.6. SUMMARY

The above-mentioned examples reveal the growing need for a set of rules on general issues of private law that could provide guidance to the Court of Justice and to national judiciaries. The increasing use of Regulations in EU legislation, that is, instruments that are directly applicable in national courts, aggravates the problems for national courts. Given the high case load of the European Court of Justice, referral of every legal issue arising from the application of secondary EU law is not a workable solution. Guidance is required: it could be given by a body of basic private law rules that is based on the authority of the European legislature. The rules need not be mandatory. In terms of orientation, they function even more as default rules that enunciate certain structures of Union private law. This purpose is further elucidated if we look at other, more general contexts where national civil codes are important.

4. CIVIL CODES AND THE LEGAL ORDER

4.1. SYSTEM BUILDING

Alongside the guidance given to courts, a second function of general rules is of significance for the legal order while remaining less visible. General rules are components of the overall framework of rules, principles, concepts, and values that shape the legal mind and constructs that we usually refer to as the legal system. This framework helps to allocate cases and issues to places in this system; it presages the legal analysis in the minds of lawyers. It is like the layout of a building; although we may need and seek only specific rooms for specific purposes, such as a bedroom for sleeping, a kitchen for cooking, or a bathroom for washing, the layout is the device that helps us understand how the various rooms relate to one another and where to find what. EU legislation focuses on the single rooms, simply building one after another and becoming a labyrinth in which no one can find the destination they seek.

A comprehensive network of general rules may be irrelevant in the sense that no private actor is really bound by these rules; they would apply only in the absence of mandatory rules, more specific rules, and private agreements. However, they are essential for the intellectual grid that facilitates access to the individual pieces of legal information required to cope with a particular situation and conflict. Such a network is not the only aid that helps build such a grid; other expedients include the basic principles of EU law that drive legal developments, the procedural embeddedness of its implementation, and the basic freedoms of the Internal Market; however, a comprehensive network of non-binding rules of private law is an indispensable element in the long run.

Given the multi-ethnic and multi-cultural composition of European institutions, such a grid of orientation is unlikely to emerge solely from the interactions among the EU judiciary, national courts, and legal scholarship. As opposed to the short-run measures that are adopted every year and respond to the political programmes established by the European Commission in five-year-intervals, the authority of legislation

could play an important role in the task relating to the long-term legal unification of Europe.

4.2. LEGAL EDUCATION

The outlined functions of default rules for the evolution of EU law in the long-term perspective leads the analysis to a final consideration concerning legal education. We teach law students not only to deal with the problems of the present, but also to enable them to solve problems of the future, to settle disputes that may arise after ten or twenty or thirty years, or even beyond. What they need for that distant future is precision in the handling of language and a capacity to conduct legal analysis, to establish links between the general and the specific, to forge legal arguments that appear plausible or even convincing to others, and to draw conclusions from multiple and often contradictory values for specific conflict situations. While the instruments laying down the positive law frequently change, these abilities have to be developed with the expectation that they will be of future and lasting assistance.

However, with regard to the law of the European Union, these skills can hardly be acquired based on the fragmentary legislation of the Union that is often intended to accommodate specific conflicts of the moment in response to specific political goals. Participating in such discussions on legislative policy is important, but it cannot substitute for the capacity described above, which is geared towards orienting lawyers in a complex and changing environment of statutes and case law. A comprehensive body of default rules covering the major parts of the law of obligations would certainly be a useful contribution to the foundations that form the legal mind. It would help to acquaint students all over Europe with the same intellectual grid that facilitates the allocation of multiple specific enactments and provides for a common ground in cross-border debates.

5. CONCLUSION

This chapter has reiterated and elaborated on the fragmentary and mandatory nature of EU private law, which is subject to rapid and repeated change. It explains how EU private law contrasts with the comprehensive and default character of private law in the Member States as enunciated by the civil codes. Default rules are rare in EU legislation. While the Court of Justice has acknowledged the contractual freedom of private parties,[55] the legal rules abrogated by contractual arrangements usually originate in national law. Thus, there is little need for the Court of Justice to clarify the extent of freedom of contract. Advocate General Szpunar has understood this problem by referring to freedom of contract as the 'elephant in the room'; 'it is there, but no one can see it'.[56] The elephant would certainly gain clearer contours if the Union were to adopt sets of dispositive rules on essential matters of private law.

The absence of default rules in EU law weakens the implementation of certain enactments of the Union, and this renders the application of others insecure. The important point is the lack of general principles providing a benchmark for the interpretation of specific legislative acts of the Union. Eventually, the absence of default rules would become problematic in that it could create or augment the risk of disorienting lawyers and law students in the complex legal environment resulting from the uncoordinated co-existence of a large and ever-growing mass of fragmented measures. All this would not be beneficial for European integration, which is understood as a process of social and intellectual convergence.

Legal scholars who have made important contributions with towards codification of EU private law over recent decades should resume their work. However, they should not aim at a code incorporating existing mandatory acts. As shown above, major driving forces of codification,

55 CJEU 18 July 2013, case C-426/11 (*Alemo-Herron v Parkwood Leisure*), ECLI:EU:C:2013:521, para. 32.

56 Opinion of Advocate General Szpunar of 5 July 2021 in case C-261/20 (*Thelen Technopark Berlin v MN*), ECLI:EU:C:2021:620, para. 76.

such as the accomplishment of statehood or ideological disruptions, are largely irrelevant at the level of the EU. The designation as a code should be avoided; similar to the term 'constitution', it is probably too closely linked to the nation-state, arousing a broad opposition regardless of its content.

Sets of general rules and principles would mainly be useful for improving access to the growing mass of fragmentary EU legislation. A non-binding comprehensive set of principles and rules would provide a grid of orientation that clarifies and harmonises concepts and allows an allocation of specific binding measures at a later stage. Of course, such default rules would be superseded by the manifold specific provisions of EU law as *leges speciales*, most of them of a mandatory nature. This set of default principles and rules should be comprehensive, albeit not complete. It would aim at establishing the described grid and constitute a common ground for legal education across Europe. It could also serve as a point of reference when the courts have to interpret provisions of binding and usually mandatory EU law, such as the Unfair Contract Terms Directive.

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CURRENT TOPICS AND THEORY OF PRIVATE LAW CODIFICATION

J. MICHAEL RAINER

ABSTRACT

Codification is a worldwide phenomenon in different fields of law; the common understanding is that it is a largely complete collection of rules. Private lawyers are confronted with civil codes, commercial codes, procedural codes, and even consumer codes. In order to understand the actual role of codification, history should provide some crucial hints.
Keywords: *philosophy of law, customary law, codification, civil law, Europe.*

1. HISTORICAL INTRODUCTION

To understand the substantial importance of codification within a legal system, above all, the terminological problems must be addressed. The word *Codex* was first used in relation to lawbooks in late Antiquity; it referred to a structured, mostly complete, collection of a certain category of laws. Originally the word codex was used in the modern sense to describe a bound book written on parchment, while the Latin liber was a papyrus-roll. It is a well-known fact that towards the end of the 3rd century, two eminent lawyers collected imperial constitutions and named these collections as *Codex Gregorianus* and *Hermogenianus*. These

Rainer, J. M. (2024) 'Current topics and theory of private law codification' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 65–80. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_4

codes were private collections, extremely useful not only in teaching law but also in the courts. In 439 AD, Emperor Theodosius II ordered for such a collection of imperial constitutions since the reign of Constantine the Great (312–337 AD); thus, the *Codex Theodosianus* became a lawbook, composed by an official commission. Imperial constitutions were on the one hand decisions made by the emperor as supreme judge of the Roman Empire and on the other legal dispositions in different fields, including in private law. Both were recognised as having legal force and were called leges (laws). At the very beginning of his reign, Emperor Justinian (527–565 AD) entrusted his minister of justice, Tribonian, to revise the existing code. After a first attempt, the final code entered into force in 534 AD and was officially called *Codex* as we know from the constitution *'Cordi'* by which it was enforced, enacted on 16 November 534 AD. The new code comprised more than 4.600 imperial constitutions from the reign of Hadrian (117–138 AD) to that of Justinian. About 400 constitutions were enacted during the first seven years of Justinian's reign. Therefore, it is evident that more than 90% of the laws of the code had already been in force, and they had been assembled and elected to be the only applicable constitutions. Nevertheless, in these cases, we should speak of them as a compilation and not a codification, a concept that should be reserved for the assemblage of new laws. Justinian's Code was divided into books and titles.

For many centuries thereafter, the word codex in the sense of a lawbook was exclusively used for the *Codex Iustinianus*. To underline the *'imperial'* position of King Louis XIV, a part of his legislation regarding civil and criminal procedure was called by his contemporaries as *'Code Louis'* in his honour, without it becoming an official name. Only in the year 1756 was a new lawbook in Europe named after Justinian's Code as the *'Codex Maximilianeus Bavaricus Civilis'*, a comprehensive codification in the sense of the creation of a new legal text structured in four parts. These parts were divided into chapters (eight in the first part, eleven in the second, twelve in the third, and eighteen in the fourth part). Each chapter was further divided into paragraphs (§§).

2. PRIVATE LAW – CIVIL LAW

Private law and civil law codifications codify, 'a Code' (in English), 'un Code' (in French), 'un Codigo' (in Spanish), 'un Codice' (in Italian), and a 'ein Gesetzbuch' (in German): the modern understanding of code is a largely complete and structured legislation of a particular legal field, for example, civil law, criminal law, procedural law, commercial law, etc. It is unfortunate that there is no Code of private law when most of us assembled here are private lawyers. This leads us to a systematic and historical reflection about private law and civil law. As far as private law is concerned, the ancient Roman terminology of *ius privatum* may still be considered valid in the sense that all those legal dispositions created for regulating the personal and economic affairs of persons either as individuals or in a relationship with others may be related to the term private law. The Roman terminology of civil law on the contrary was used to refer to the sources of the law and not its content. *Ius civile* in republican times was only the law enacted by a legislative procedure through a law (*lex*). So why Civil Code? This could be because one of the most outstanding and interesting lawyers of postmedieval Europe Jean Domat (1625–1696), who, in his fundamental work *'Les lois civiles dans leur ordre naturel',* gave a new order to the whole private law of the Roman Digest, a modern interpretation of its content in a modern language, and used the term 'civil laws' for the content of the private law he found in the famous Justinian lawbook.

3. FRANCE-AUSTRIA-GERMANY

The first modern constitution of France was established in 1791 at the end of its first title: Fundamental provisions guaranteed by the Constitution mentioned that 'A code of civil laws common to all the kingdom shall be made'. It is well known that this project was finally entrusted to Jean Etienne Marie Portalis (1746–1807), a former practising lawyer of Aix en Provence in the summer of the year 1800, and some months later, he was able to achieve this goal. Portalis came from a part of France

where the Roman law was still in force in the form of the lex Romana Visigothorum, an important legislation of the Visigoth king Alarich II for the Roman population of his reign in the year 506 AD. At Aix University, the young Portalis had also been taught the Justinian lawbooks, above all, the Digest. Having actively participated in the French Revolution, Portalis was finally exiled by the directory in 1797, and he had to migrate to Germany, where he started intensively studying German philosophy, mostly Kant.[1] On finishing the first draft of his Code, Portalis explained his methodology of codification in a preliminary speech. The results and essential traits are as follows:

1. The so-called institutional system was to place, at the beginning of the code the law of persons, with the inclusion of family law, followed by real rights (rights in rem) with the inclusion of the law of successions, followed by a general part of the law of obligation with the inclusion of civil liability, followed by the special contracts, and ending with particular dispositions as prescription and usucapio.
2. Comprehensive wording: clear and simple.
3. A high level of abstraction.
4. The structure was ordered by books, titles, and articles from 1 to 2283.

The code started with very few general rules (arts. 1–6) followed by the first book:

1. book: right of persons.
2. book: On goods and the different modifications of ownership (arts. 516–710).
3. book: On the different ways to acquire ownership (arts. 711–2283), starting with succession (arts. 718–892) followed by the general part of obligations (arts. 1101–1369), quasi contracts and delicts (arts. 1370–1386), special contracts (arts. 1387–2203), expropriation (arts. 2204–2218), and prescription (arts. 2219–2283).

Most of the contents found in Domat's book on civil laws were expanded on by Portalis. He honoured his predecessor by mentioning him, the

1 Rainer, 2020, c. XXXV.

only lawyer, along with Montesquieu, in his famous preliminary speech. Thus, in March 1804, the code was enacted: the world became aware of a Civil Code with concrete content, a particular style, and a rejection of case law and judicial practice. Finally, I would like to emphasise that the author of the Code was solely responsible for thinking up the code, writing it down, and creating the 'genre' of the civil code. The other three members of the formally created codification commission, François Tronchet, Felix Bigot de Préameneu, and Jacques de Maleville made their contributions in the form of discussions with the team leader.

However, only a few years later, the substantial unity of private law in one code was abandoned with the enforcement of the commercial code in 1807.

As an Austrian lawyer, I should underline the fact that Portalis's Code was not the first enacted code in a European country: in the Austrian state, in 1797, when first in the region of West Galicia, actually Krakov in Poland, and then some months later in East Galicia, actually Lwiw, Lemberg, an equally complete civil-law Book was enacted. However, it had not been given the name Civil Code (Bürgerliches Gesetzbuch) but was simply called Law Book (Gesetzbuch) although it had the same main traits as the later French Civil Code. In other words, it contained the whole private law of the Digest in the order of the Institutes of Justinian in comprehensive, simple terms and an abstract formulation of the single norms. The law book was immediately translated into the Polish language, revealing that the Austrian legislator had understood the importance of language for modernity. As in France some years later, the author was an eminent lawyer, professor, and a judge of the Supreme Court, Karl Anton von Martini (1726–1800). Franz von Zeiller (1751–1828), Martini's successor as professor, judge, and member of the commission for legislation declared that Martini's Westgalizisches Gesetzbuch should be enforced in the so-called German part of Austria (thus, not in Hungary) in 1811. Finally, in Austria too, the law book was enforced as a BGB, or as the Civil Code. It was called Allgemeines Bürgerliches Gesetzbuch (ABGB).[2] Both Martini and Zeiller were convinced that rules of interpretation should be an integral part of the code.

2 Rainer, 2020, c. XXXI–XXXII.

The ABGB is thus structured into one introduction: On the civil laws in general (§§ 1–14) and three parts: rights of persons (§§ 15–284)-rights of things (§§ 285–1341)-common provisions related to the rights of persons and rights of things (§§ 1342–1503).

The German BGB that came into force in 1900 was based on the legal science of Savigny and his followers, the historical School. This was a technical-scientific interpretation and elaboration of the content of the Roman Law sources, above all, the Digest. The results achieved by reinterpreting the Justinian lawbooks were therefore the basis for the huge manuals produced for legal education and equally for legal practice. Many professors published such manuals called Pandektenlehrbücher, but the most important one was by Bernhard Windscheid (1817–1892).[3] Windscheid was one of the outstanding members of the first commission established by the German Bundesrat in 1874 to prepare a new German lawbook on civil law. The commission finished its work in 1887, but the publication of the draft drew a storm of criticism. A second commission had to be set up then with the inclusion of some practitioners, while the first commission had essentially comprised only theoreticians. Although they worked hard, the second draft was approved only in 1896, and finally enforced on 01 January 1900. With the new exposure of Roman law in the Pandects manuals, the order of the Code changed, and since the most outstanding characteristic of these books was the general part dedicated to the Legal Act (Rechtsgeschäft), which could be considered a huge and scholarly introduction, this very theoretical part became part of the Code that was structured into five books: 1. book: general part (§§ 1–240)/ 2. book: law of obligation (§§ 241–853) with a general part of the obligations at the beginning (§§ 241–432), followed by the special contracts (§§ 433–811), unjust enrichment (§§ 812–822), and civil responsibility-torts (§§ 823–853)/ 3. book: real rights (§§ 854–1296) starting with possession (§§ 854–872) followed by ownership (§§ 903–1011), easements (servitutes) (§§ 1018–1093), security rights (§§ 1113–1296)/ 4. book: family law (§§ 1297–1888)/ 5. book: succession (§§ 1922–2385). The wording became more technical and less comprehensive, but the formulation of the single paragraphs (§) is again a rejection

3 Rainer, 2020, c. XL.

of case law and judicial practice. Already, in 1897, a commercial code, HGB, had been enforced.

4. THE FOLLOWERS

Many countries worldwide had already enforced a Civil Code during the 19th century, mostly adopting the French one or adapting it. An outstanding example of one such country in Europe is Italy, which adopted a very 'French' code in 1865. Others followed during the first half of the 20th century while some others changed their Codes or rewrote them; however, the classical example remains Italy in 1942. The Italians not only recodified most of their former 'French Code', but also incorporated commercial law into the Civil Code. They did the same with the existing norms on labour law, thus creating a complete Private Law Code, but still calling it 'Codice Civile'.

Shortly after World War II, a famous Dutch lawyer Eduard Meijers convinced the government of the Netherlands to substitute the existing 'French Civil Code' with a new one based on German Pandectism. Meijers, one of the greatest lawyers of Europe of the first half of the 20th century, who had survived Nazi German imprisonment in Theresienstadt could not achieve his masterpiece, and after his death in 1954, work proceeded rather slowly.

5. A NEW ERA OF CODIFICATION

A new era in the history of codification had begun by the mid-20th century. New developments in society, economics, and technology led to a more sectorial legislation; further, an increasing number of laws in the classical field of civil laws were no longer inserted into the Codes, for example, the marriage law, in Austria. Thus, in 1979, Natalino Irti[4] was able to write his famous book on decodification. However, European legislation soon delivered a mortal blow to codification. In general,

4 Irti, 1999.

European rules and directives remained as particular legislation, except for the Codes, and therefore the Codes no longer represented the entirety of the Private Law. However, things changed again, mostly with the fall of communism in central and eastern Europe. The option now was to reform the old-fashioned Civil Codes or create one where a civil code did not exist as an expression of national legal culture, as was the case in Hungary, the Czech Republic, Slovakia, Croatia, Estonia, Lithuania, and Slovenia. Further, an increasing number of lawyers insisted on reinserting European rules of private law into the existing civil codes. Without any compulsion, quite naturally, in Europe and elsewhere, a new wave of codifications started.

In this context, I distinguish between different models:

1) The Dutch Wetbook, a work balancing tradition and modernity
2) The renewal, an adaptation of existing Civil Codes and the creation of new ones in the former communist countries
3) Reform of the existing Codes
4) New Civil Codes of the 21st century

I shall focus on points 1, 3, and 4 as other chapters will explicitly deal with the former communist countries.

5.1. THE DUTCH CIVIL CODE ENACTED IN 1992[5]

Meijers' intent had been to change the existing French lasting civil code into a more German-Pandectist one, that is, one that is more a technical book. After a spate of discussions, finally, in 1992, a provisional draft was enacted comprising 10 books:

1. book: Natural persons and family law (arts. 1.1–1.462)
2. book: Legal persons (arts. 2.1–2. 455)
3. book: Property law in general (arts. 3.1–3.326)
4. book: Law of succession (arts. 4.1–4.233)
5. book: Real property rights (arts. 5.1–5.147)
6. book: Obligation and contracts (arts. 6.1–6.279)

5 van den Herik, Hondius, Voerman, 2022; Minke, 2021.

7. book: Particular contracts (civil and commercial) (arts. 7.1.–7.902)
7a. book not yet renewed
8. book: Transport law (arts. 8.1–8.1836)
9. book: intellectual property not yet codified
10. book: International Private Law (arts. 10.1–10.165)

The amazing order in the way the articles are counted within the books is an outstanding novelty that few have dared to follow. The technical aspects can be seen in many general parts and provisions; however, the most important aspects cannot be found at the beginning, as would have been useful, but only at the beginning of the third book. Finally, the code is full of cases, a true example of an exuberant case law, the most fascinating example being the single book on transports.

5.2. REFORMS OF EXISTING CODES: CODE CIVIL, CODICE CIVILE, BGB, ABGB

In all these cases, a major question was how to handle the so-called field of consumer protection with EU law. No unitarian solution had yet been found, although we do observe partial insertions either through the adaption of existing rules within or outside the codes or by the creation of a Consumer Code attached to the Civil Code (France) or not (Italy), the creation of a partial code (Konsumentenschutzgesetz in Austria), or the existence of many single laws. Partial reforms of the law of obligation have been accomplished in 2002 and 2022[6] in Germany and in 2016 in France.[7] The law of succession has also been the goal of various reforms, for example, in Austria in 2017.

Even if the assertion is heard often that without the reforms, the Codes would have suffered substantially, they endured due to their structure and content. The most important changes were the insertion of particular interpretations by the courts, which had become an authentic Richterrecht. The best example of this is the new wording of

6 Brönneke, Föhlisch, Tonner, 2021.
7 Babusiaux, Witz, 2017, pp. 496–507; Cartwright, Vogenauer, Whittaker, 2009.

an old issue, the cause, in the reform of the French law of obligation. The term 'cause' disappeared, but the presuppositions for the validity/voidness of contracts did not. So, we find in different articles terms to substitute the 'cause' terms that had been developed by the Cour de Cassation: In art. 1128 'contenu licite', in art. 1162 'but', in art. 1169 'contrepartie illusoire et dérisoire in art. 1186 'éléments essentiels', and so on. Substituting a general concept by a fragmented terminology is bound to cause legal uncertainty and thus lead once again to new and more complex interpretations, and, therefore, not every 'reform' can be viewed as an improvement: they may also lead to a 'reformatio in peius'.[8]

Three new Codes reveal how deeply the traditions of the 19th century are still alive: Brazil 2002/3, Argentina 2014/15, China, 2021/22. I shall present here their fundamental structures.

5.3. BRAZIL (IN FORCE AS OF 2003)[9]

1. General Part: 3 books, persons, goods, legal Acts (arts. 1–232)
2. Special Part
1. book: Law of obligation (arts. 233–965)
Title 1 general part (arts. 233–285)
Title 2 transmission of obligations (arts. 286–303)
Title 3 performance and extinction (arts. 304–388)
Title 4 non-performance, breach of contract (arts. 389–420)
Title 5 general part of contracts (arts. 421–480)
Title 6 special contracts starting with the sales contract and all the typical contracts of Roman Law and agency/transports/assurancy (arts. 481–853)
Title 7 negotiorum gestio / enrichment (arts. 854–886)
Title 8 credits (arts. 887–926)
Title 9 civil responsibility with a general clause art. 927 very close to the French Civil Code (arts. 927–954)

8 Th. Genicon, 2022, pp. 715–732.
9 Velasco, Filho, 2023, pp. 315–328.

Title 10 Pledge preferencies and privilegies (arts. 955–965)
2. book: Company Law (arts. 966–1195)
3. book: Real 'things', rights and possession (1196–1510)
Title 1 possession (arts. 1196–1124)
Title 2 general dispositions on real rights (arts. 1125–1127)
Title 3 ownership (arts. 1128–1368)
Title 4 superficies (arts. 1369–1377)
Title 5 general dispositions on servitutes (arts. 1378–1389)
Title 6 ususfructus (arts. 1390–1411)
Title 7 usus (Arts. 1412–1413)
Title 8 habitatio (arts. 1414–1416)
Title 9 right of promising purchaser (arts. 1417–1418)
Title 10 pawn pledge (arts. 1419–1510)
4. book: Family Law (arts. 1511–1783)
5. book: Law of Succession (arts. 1784–2027)
Complementary book final dispositions (arts. 2028–2046)

5.4. ARGENTINA (ENFORCED 2015)[10]

Titulo preliminar (arts. 1–18)
1. book: General Part, Persons, and Legal Acts (arts. 19–400)
2. book: Family Law (arts. 400–723)
3. book: Obligations (arts. 724–1881)
Title 1 general dispositions on obligations (arts. 724–956)
Title 2 general dispositions on contracts (arts. 757–1091)
Title 3 consumer contracts (arts. 1092–1122)
Title 4 typical contracts and leasing, services, transports, banking contracts, assurances contracts (arts. 1123–1707)
Title 5 other sources of obligation (arts. 1708–1881)
4. book: Real rights (arts. 1882–2276)
Title 1 general dispositions (arts. 1882–1907)
Title 2 possession (arts. 1908–1940)
Title 3 ownership (arts. 1941–1982)

10 Basset, 2018.

Title 4 co-ownership (arts. 1983–2036)
Title 5 horizontal ownership (arts. 2037–2072)
Title 6 real estate complexes (arts. 2073–2113)
Title 7 superficies (arts. 2114–2128)
Title 8 ususfructus (arts. 2129–2153)
Title 9 usus (arts. 2154–2157)
Title 10 habitatio (arts. 2158–2161)
Title 11 servitutes in general (arts. 2162–2183)
Title 12 real garanties (arts. 2184–2237)
Title 13 possession and ownership claims (arts. 2238–2276)
5. book: successions (arts. 2277–2531)
6. book: common dispositions between personal and real rights: prescription, international private law (arts. 2532–2671)

5.5. CHINA (IN FORCE AS OF 2021)[11]

1. book: General part (arts. 1–204)
2. book: Real rights (arts. 205–462)
1. part: general provisions (arts. 205–239)
2. part: ownership (arts. 240–322)
3. part: Ususfruct and servitutes (arts. 323–385)
4. part: security interests (arts. 386–457)
5. part: possession (arts. 458–462)
3. book: Contracts
1. part: general provisions (arts. 463–594)
2. part: typical contracts (arts. 495–978) starting with the sale (arts. 595–647) followed by supply and consumption of electricity, water, gas and heat, gifts, loans, suretyship, leasing, factoring, construction, transport, technological contracts, custody of property, warehousing, entrustment, property management services, brokerage, intermediary, and partnership (company).
3. part: quasi contracts negotiorum gestio/unjust enrichment (arts. 979–988)

11 Liu, 2023, pp. 203–222; Wang, 2023, pp. 341–364.

4. book: Personal rights including life, corporeal integrity, health, name, likeness, reputation and honour, privacy (arts. 989–1039)
5. book: Marriage and Family (arts. 1040–1118)
6. book: Succession (arts. 1119–1163)
7. book: tort liability including products, motor vehicles, medical malpractice, environment, buildings, animals, and ultra-hazardous activities (arts. 1164–1258).

A look at the three most recent codifications shows the perdurating importance of codification. All the three are structured as proposed already by the French Civil Code and the German BGB. The style is more French than German, less technical, clearer, and more comprehensible. They are not a collection of case laws, and they remain abstract. They are related to the German BGB insofar as they have general parts, not as structured as the BGB, which means it is not within one compact book, but scattered in different parts. All three have adopted the German concept of Legal Act (Rechtsgeschäft). Finally, and I would add with some pride and astonishment, these codifications are in the central parts of patrimonial law, in the field of real rights, obligation, and succession and extremely similar to Roman Law.

Therefore, three very new and coherent Codes are rooted structurally and substantially deeply in our common legal traditions.

6. CONCLUSIONS

I am deeply convinced of the perennial importance and usefulness of codifications, and as the most recent examples have shown, they can also encompass consumer protection and commercial law, thus developing the idea for a complete codification of private law.

Creating a new code or adapting an existing one is a major intellectual exercise aimed at bringing forth a unitary book in wording, style, and structure. The importance of general parts – now often present in these codes, even those which did not initially have one – is evident in the recent codifications. Adopting, reforming, or renewing is essential in a determinate legal culture or legal system: legal science and jurisprudence must work steadily and permanently on a code to ensure that

the intellectual, economic, and social evolution of the state will be able implement new laws based on tested experiences to produce useful and necessary changes. Legal science and internationally minded jurisprudence should be able to examine different experiences, thus starting a constant dialogue among different legal cultures. This is the enormous importance of comparative law and also a call for an in-depth study of different legal experiences, different models of codification, and the options regarding individual legislation. In a scientific way, this can be achieved only by studying languages. However, all the new or renewed codes have revealed an extraordinary bulk of legal institutes deriving from our common Roman Law heritage. In this sense, Domat was definitely right, and the evolution since the year 1700 proves convincingly that civil laws represent the lois immuables, or immutable laws, that need to be adopted and completed periodically but also should fundamentally remain the inexhaustible bases of the whole private law. This is also why, together with comparative law, a truly learned and scientifically operating lawyer should have the necessary knowledge of legal history, particularly of Roman law. Hence, a lifelong training in law and legal culture for judges seems the best guarantee for continuous dialogue with legal science and for keeping the codes updated. The codes as legal monoliths can be focus of primary interest of different kinds of lawyers and legal experts. This interest in the most important and all-embracing nature of all private laws will guarantee a permanent evolution of codes to serve 'users' in the best possible way. Many fields in the domain of civil law are interconnected, for example, family law and succession, ownership and contracts, etc. In this sense, codes play an important role in harmonising these laws with society. No single law or particular legislation can lead to such a collective interest in the entire legal system. Thus, codes are essential for social stability and human progress.

I believe that the abstract and comprehensible wording and style of the French legislation in the Code Civil, which can be found in the three recent codifications, is a true distinction of these codes and that no future codificator should insist on case laws.

My suggestion is that, in the future, a good civil code should contain

1) a general part or at least a general part of obligation.

2) the 'classical' fields real rights/obligation (consumer protection-contracts-torts-unjust enrichment) /succession/family law and an optional commercial law.
3) reform and adapt rules regarding interpretation essential to permit application of the codes and à la longue continuously through legal science and jurisprudence.
4) key words to permit a continuous interpretation and application of the whole in as good faith, reasonableness, and fairness (e.g., § 242/138 BGB) as may be. In this context, definitions may be helpful, but only if they are flexible enough to permit the term of exercise its functions: omnis defintio in iure civili periculosa est is mentioned by Modestinus in Digest 50,17,202.
5) a concrete and elaborate legal language appropriate to a nation's legal culture.

Finally, I am convinced that Codes are the deepest and most valuable expression of the legal cultures that rely on them. There does definitely exist more than one model within the concept 'Code' as I have demonstrated that a fruitful variety can coexist and be adapted to the exigencies of each legal system and society Civil Law or Private Law, European rules or not, abstract styling, or even cases. This variety adds an enormous richness, and each new codificatory effort is an inspiration for future reformers in other countries. Codes are the utmost and highest expression of the cooperation of legal science and legal practice, above all jurisprudence. Codes cannot exist without them and, vice versa, without a civil law science, there can be no civil code.

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AN ALTERNATIVE APPROACH: PRIVATE LAW IN THE COMMON LAW SYSTEM

HUGH BEALE

ABSTRACT

The Common Law appears to present a sharp contrast to codified systems. The judge-made law seemingly adopts piecemeal solutions that are not always consistent, and that, despite the system of precedent, are subject to revision by the courts. Legislation on contract, tort, and unjust enrichment is also piecemeal or (as with the Sale of Goods Act) only partial. However, it can be argued that the Common Law has developed principles that may be applied unless there is good reason not to do so; that sudden changes are prevented by a process of incremental development and by a close-knit legal profession that shares values; and that the Common Law has flexibility, adopts a pragmatic approach, and accommodates policy concerns in an open fashion. Nevertheless, instances of 'judicial reform' of the law exist to enable parties to achieve what they want. This system seems well suited to the 'commercial' nature of English law, in particular with its aim to be 'the law of choice' for international transactions. However, the legal profession shows no enthusiasm for codification.

Keywords: *Common Law; law of obligations; case law; precedent; law reform.*

Beale, H. (2024) 'An alternative approach: Private law in the Common Law system' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 81–113. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_5

1. INTRODUCTION

As a common lawyer, I understand the many advantages of civil codes. They present a largely complete system of private law, one that is usually coherent and logical. Such a law will be accessible to courts and practitioners, who should be provided with ready guidance: in principle, at least, they should be able to deduce the answers to the issue before them from the provisions of the code. The code can be drafted in terms that are understandable to at least some citizens: the Napoleonic Code, for example, has been hailed as *'a people's law'*.[1] Nevertheless, in actual practice, things are not always so clear-cut. Many codes are not complete in the sense that they do not address all the issues of private law that courts have to deal with and therefore have to be supplemented by case law, often grounded on a general clause of the code. Furthermore, inconsistencies may exist. The articles may often be at a level of generality that necessitates extensive judicial interpretation to reach concrete results. In fact, not all codes are drafted in a way that non-lawyers can understand them. Nonetheless, a code can provide a fairly complete picture of at least the main ideas of a jurisdiction's private law.

Private law in the Common Law systems presents a completely different picture. It is nearly all judge-made. This may be true of the general part of contract law, of tort (civil responsibility), and of unjust enrichment. The law is contained in case law that has developed over hundreds of years.

This system appears to have its own disadvantages, some of which I will introduce in next section of my paper, although later I will argue that at least some of the points are as much strengths as weaknesses.

1 Lobingier, 1918, pp. 131–132.

2. SOME CHARACTERISTICS OF THE ENGLISH COMMON LAW

2.1. MULTIPLE SETS OF RULES[2]

First, the Common Law has not always been considered a particularly coherent system. Historically, even Royal Justice was administered by several courts – Common Pleas, Exchequer, and King's (or Queen's) Bench – all of which purported to apply the Common Law but frequently adopted somewhat different approaches. These differences are now a matter of history – the three Common Law courts were amalgamated in the 19th century, with only the Queen's Bench surviving simply because the Chief Justice of that court outlived the Chief Justices of the other two courts. However, the effects of the division between the courts of Common Law[3] and the courts of equity continue to prevail. The Chancellor, who administers the courts of equity, developed rules of equity to supplement and sometimes correct the Common Law. A plaintiff who is unable to get an adequate remedy through Common Law might be able to get one by going to the court of Chancery. For example, in Common Law, a party could avoid a contract on the ground that it had been induced by the other party's fraud, but a party is said to have committed fraud only if they said something that they knew to be untrue, or were reckless about not verifying its likelihood of being false.[4] Equity took a wider view and ultimately accepted that a contract could be set aside for *innocent* (i.e., non-fraudulent) misrepresentation.[5] Since the Judicature Acts, all courts have to apply both systems, and the Supreme Court

2 For a fuller account of the material in this section, see Zweigert, Kötz, 1998, pp. 198–199. The authors provide references for further reading.

3 Note that the phrase 'Common Law' is often used in at least two different senses: common law as distinct from, say, civil law, and common law as distinct from equity.

4 *Derry v Peek* (1889) 14 App. Cas. 337.

5 *Redgrave v Hurd* (1881) 20 Ch. D. 1.

of Judicature Act 1873 provides that the rules of Equity will prevail.[6] However, difficulties persist in terms of the differences between the rules of equity and of the Common Law. For example, there is an ongoing debate over whether a contract that was induced by an innocent misrepresentation can be avoided by the misrepresentee giving notice to the misrepresentor, or can only be set aside by a court order.[7] Had our law been codified, these differences would have been easily sorted.

2.2. INDUCTION BEFORE DEDUCTION

Second, the process of reasoning that lawyers employ in the Common Law system is different from that in the code system, and the former may seem more complex. It is not a question of deducing the answer from a general principle set out in the code. In the Common Law, the lawyer may have to identify the underlying principle (if there is one…) by looking at all the individual cases, a process of induction from the particular to the general. Only then can the lawyer begin to deduce the answer to the problem from that general principle.

6 s 25(11).

7 In *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [240]–[242], Foxton J suggested that, in balancing of a large number of conflicting authorities, a court order is not required for rescission at common law for fraud, but is required for rescission in equity, although if ordered, the rescission will be retrospective to when the misrepresentee gave notice. However, it can be argued that Parliament has adopted the view that rescission for non-fraudulent misrepresentation is effected by notice to the other party, as the wording of s.2(2) of the Misrepresentation Act 1967, 'if it is claimed … that the contract ought to be or has been rescinded', would seem inappropriate were a court order required: see Beale, 2023, paras. 10–131. When the *SK Shipping* case went to the Court of Appeal, the point was left for another case to decide: [2022] EWCA Civ 231, [2022] 2 All E.R. (Comm) 784 at [91]. In *IGE USA Investments Ltd v Revenue and Customs Commissioners,* [2021] EWCA Civ 534, [2021] Ch. 423 at [91] Henderson LJ remarked that,
'… whether, or to what extent, or in what sense, rescission in equity for fraud is properly to be characterised as a self-help remedy which does not require the intervention of the court … is a notoriously difficult subject, on which the authorities are in such a state of disarray that, in my judgment, only the Supreme Court can reconcile them.'

2.3. PRECEDENTS THAT MAY BE DISTINGUISHABLE

Third, the Common Law works on a system of precedent, with exceptions that I shall return to later, and courts are bound to follow prior decisions. However, this applies only when the facts of the previous case are the same as the earlier case. If the earlier case can be '*distinguished*', it is not binding. A great debate may arise about whether the facts of the earlier and of the present case are sufficiently similar such that the two cases are indistinguishable, and very often this has to be settled by a court ruling one way or the other.

2.4. RELUCTANCE TO ADOPT GENERAL PRINCIPLES

Fourth, development occurs in slow increments, and the courts are reluctant to decide more than is essential to resolve the particular case before them. They are particularly reluctant to adopt general principles, especially in contract law. As Lord Justice Bingham said when discussing the continental principle of good faith,

> *In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith [...] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.*[8]

2.5. NO OVERALL REVIEW

Fifth, perhaps the biggest disadvantage is that private law has never been reviewed as a whole, and oftentimes it appears incoherent in terms of policy. Indeed, a cynic would say that English law has never been put

8 *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] Q.B. 433, 439.

into logical order since the mediaeval period when the law was set out in Abridgements comprising a list of legal topics in alphabetical order.[9]

2.6. INACCESSIBILITY

Last, because so many of the laws have to be derived from the cases, they prove to be largely inaccessible to anyone without a legal training.

3. LEGISLATION IN ENGLISH PRIVATE LAW

3.1. PIECEMEAL REFORMS

Of course, these statements that I have made can be qualified. Perhaps, the most important point is that English private law now involves a significant amount of legislation. However, in the fields of general contract law, tort, and unjust enrichment the legislation deals only with specific issues where reform was required, for example, to allow contractual rights to be conferred on third parties,[10] to deal with the liability of occupiers of land,[11] and to deal with the effects of when a contract has been *frustrated* because performance has become factually or legally impossible.[12] Moreover, these reforming statutes are still interpreted as if they were intrusions on the Common Law.[13] Statutes only change the law as far as necessary to provide effect to the express wording or implication of the statute. The implication of the statute may now be

9 The best-known example may be *La graunde abridgement: collect par le judge tres-reuerend monsieur Anthony Fitzherbert* (1565) (written in the 'law French' still used at the time): see https://lawlibguides.usc.edu/c.php?g=777451&p=5675046 (accessed: 04 September 2024).

10 Contracts (Rights of Third Parties) Act 1999.

11 See the Occupiers Liability Acts of 1957 and 1984.

12 Law Reform (Frustrated Contracts) Act 1943.

13 See Zweigert, Kötz, pp. 265 et seq.

deduced from its purpose,[14] but it is not possible for an English court to use a statute as the basis for an analogical development of the Common Law.[15]

3.2. PARTIAL 'CODIFICATIONS'

It is true that during the 19th century, England adopted a number of what are sometimes termed *'codifications'*. These were attempts to restate areas of law that had become a confusing mass of cases. Thereby, we had the Bills of Exchange Act 1882, Partnership Act 1890, and the Sale of Goods Act 1893. The first two Acts have largely retained their original form; the Sale of Goods Act has been modified several times and was replaced by an updated version in 1979. However, these Acts are not codes in the civil law sense, nor even American-style restatements of the law. They are incomplete and have to be supplemented by the principles of Common Law and Equity[16] and, like the specific statues mentioned earlier, they are interpreted literally and narrowly. They are not drafted with the aim of being understandable to the non-lawyer.

Nevertheless, this approach changed somewhat during the 20th and 21st centuries. The Supply of Goods and Services Act 1982 was principally aimed at making the law accessible to consumers. It no longer applies to consumers because their rights in terms of when goods, digital content, or services are now set forth in the Consumer Rights Act 2015. The 2015 Act was also supposed to be drafted in a way that it could be understood by non-lawyers, although in my view it is little better than the earlier Acts. Moreover, the Consumer Rights Act is still incomplete.

14 Ibid., pp. 266–267.

15 Compare the way in which the *obligation de renseignement* was developed in French law, partly by analogy to legislative provisions: see Ghestin, 1993, 151 et seq.

16 For example, the Sale of Goods Act 1979 s 62(2) provides that 'The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of legislation including this Act … apply to contracts for the sale of goods'. The Act says nothing about offer and acceptance or about the grounds on which a sale contract can be set side, such as misrepresentation or duress.

Where provisions of the Sale of Goods Act were still to apply equally to consumers and other parties, they were not repeated in the Consumer Rights Act, which thus has to be supplemented by the Sale of Goods Act; and both Acts have to be supplemented by the principles of Common Law and Equity.

3.3. AN ATTEMPT TO CODIFY CONTRACT LAW

The philosopher Jeremy Bentham called for a proper codification of English law, but nothing came of it.[17] However, there has been an attempt to codify at least the general part of contract law. In 1965, the Law Commissions Act established permanent Law Commissions for England and Wales and for Scotland. One of their early undertakings was a joint project between the two Law Commissions to codify general contract law, and a contract code was drafted by the late Professor Harvey McGregor. However, in 1972 the project was abandoned, partly because the commissioners on each side had irreconcilable views on the substance of the law. For example, on the English side it was accepted that the new law should do away with the old doctrine of consideration, which means that an agreement does not amount to a contract unless it involves an actual or promised exchange: under the new code, the promise of a gift, if the promise was accepted by the donee, is equivalent to a contract. The Scottish law already recognised that a gratuitous promise may create an obligation,[18] but the Scottish commissioner insisted that this could not be a contract; it must be treated separately as a *'pollicitatio'*.[19] However, the biggest problem arose when the English Commission prepared the draft for the legislation. As is traditional in England, this work was done by specialist government lawyers known as Parliamentary Counsel. Parliamentary Counsel traditionally take the approach that the legislation should provide answers to every possible situation.[20]

17 See Zweigert, Kötz, p. 197.

18 The promise now has to be in writing to be enforceable, unless it is made in the context of a business: Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

19 See Gower, 1973, pp. 257, 264; see also North, 1982, pp. 493–494.

20 See Zweigert, Kötz, p. 267.

As a result, provisions that in McGregor's draft required a couple of short paragraphs were sometimes replaced by several pages of text. As one of the Scottish law commissioners put it to me, the English did not want a code, they wanted a statute. When the project was abandoned, the draft produced by McGregor remained unknown until Professor Gandolfi, who had convened a group to work on a European Contract Code,[21] arranged for it to be published in Italy.[22]

More recently, Professor Sir Roy Goode argued that we should adopt a commercial code,[23] just as was done in the United States; Dame Mary Arden, a former Chair of the Law Commission for England and Wales and until recently a Justice of the Supreme Court, also agrees with this.[24] However, neither the judges nor the practitioners seemed enthusiastic about the project as they believed that the law is perfectly understandable and works well enough as it is. The same belief in the excellence of English sales law seems to underlie the U.K.'s reluctance to adopt the Vienna Convention on the International Sale of Goods. Why adopt a new system of rules when we already have a perfectly good one?

3.4. WORKING WITHOUT A CODE: PROBLEMS AND ADVANTAGES

I need to address two questions to clarify this. First, how do we manage without a code? Second, why is there no real enthusiasm for a code? It is true, as Zweigert and Kötz[25] have pointed out, that there has never been a political need for a code. England and Wales have been a single legal unit since the 16th century, and England has been one since the 12th century if not earlier. The nearest we have had to a revolution – be it the restoration of the monarchy in 1660 or the *'Glorious Revolution'* of 1689, when James II was deposed and was replaced by Mary II and her

21 Prepared by the Academy of European Private Lawyers, see https://www.eurcontrats.eu/acd2/ (accessed: 04 September 2024).

22 McGregor, 1993. For the surprise felt when McGregor revealed the text, see the Preface to the Code, p. vi.

23 Goode, 1988, p. 135.

24 Arden, 2015, ch 13.

25 Zweigert, Kötz, p. 181.

husband William or Orange – occurred years before codification became a fashion. Therefore, there has never been the need to adopt a code for political reasons such as to reinforce unification.

However, English law prizes itself for its certainty. Is the Common Law not a recipe for uncertainty?

I will take the questions of how we manage and the problems and possible advantages of a Common Law system together and suggest a number of possible answers. Some of these may suggest that the differences between codified systems and the Common Law are exaggerated, while some of the differences may indicate the strengths of the Common Law rather than its weaknesses.

3.5. PRINCIPLES IN THE COMMON LAW SYSTEM

Even in a caselaw system, the courts frequently develop principles, sometimes of considerable width. A well-known example is the general rule of liability in tort (i.e., civil responsibility) for negligence that was laid down in the case of *Donoghue v Stevenson*.[26] The plaintiff was injured when she consumed a part of a bottle of ginger beer (a soft drink) that had been bought for her by a friend, before discovering that the remaining ginger beer contained the decomposed remains of a snail (allegedly – the law was discussed as a preliminary point, and the case was settled before any findings of fact had been made). Previous caselaw suggested that a consumer would have an action against the manufacturer only if the defect had been known to the manufacturer or if the product was inherently dangerous (e.g., a gun);[27] otherwise, the manufacturer was considered to owe a duty only to the party with whom it had a contractual

26 [1932] AC 562. Like a number of other famous tort cases, the case was technically decided on Scots law, but, unlike the law of contract, the law of negligence is the same on both sides of the border.

27 See [1932] AC 562, 569.

relationship.[28] In *Donoghue v Stevenson*, the House of Lords accepted that a consumer who had been harmed by a product that was defective because of negligence on the part of the manufacturer would have an action in tort against the manufacturer. However, the case is now better known for a broader principle stated by Lord Atkin, building on and rationalising the caselaw, the so-called *'neighbour principle'*:

> *[…] in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of* 'culpa'*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*[29]

Over the years, this principle has been accepted to the extent that there is always a duty to take care to avoid causing personal injury or property damage, unless there is some particular policy reason why there should not be liability in a particular situation.[30] However, as we will see, it has

28 The so-called contract fallacy. Probably the manufacturer had a contract with a wholesaler, or possibly with the retailer. The purchaser would have had an action in contract against the retailer (the owner of a café, who had sold her the ginger beer); but it was not the purchaser who suffered the personal injury.

29 [1932] AC 562, 580.

30 See *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [83].

not been applied when negligence has caused purely economic loss, that is, financial loss not resulting from an injury to the claimant or damage to the claimant's property; in such cases, liability exists only if the defendant had assumed responsibility for the claimant[31] or the parties were in a close relationship of some kind.[32]

General principles have been developed by academic and practitioner authors. Text books have no formal authority in English law, which has no equivalent to the notion of '*doctrine*' in French law. For much of the last century, it was uncommon for academic writing and similar secondary sources to be cited in court – indeed, as a student, I was taught that it was not permissible to cite the work of a living author, only that of a dead one, because a living author might change his or her mind. I am glad to say that this has changed, and doctrinal writing is now cited regularly. More importantly, however, the courts have adopted principles that were developed by academic writers. Perhaps the best example in recent times is the courts' adoption of the principles of restitution that were set out in the works of writers such as Goff and Jones[33] and Birks.[34]

3.6. PRECEDENT

The doctrine of precedent may seem to be of limited effect when it can be argued that the earlier case involved different facts;[35] nonetheless, the doctrine has the effect of making judge-made laws become much more predictable and manageable. Our Supreme Court (formerly the House of Lords), at one time, held the view that it was bound by its own previous decisions.[36] This changed in 1966,[37] and the Supreme Court has

31 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.
32 E.g., *Smith v Eric S. Bush* [1990] 1 A.C. 831.
33 See Mitchell, Mitchell, Watterson, 2022.
34 Birks, 1985; Birks, 2005.
35 See above.
36 E.g., *London Tramways Co Ltd v London County Council* [1898] AC 375.
37 See the Practice Statement of 16 July 1966, [1966] 1 WLR 1234.

reversed its own decisions on many occasions,[38] although it normally does so only after a hearing before a greater number of justices than is usual. However, the Court of Appeal is bound by its own decisions unless the decision is inconsistent with a decision of the Supreme Court.[39] High Court judges are not obliged to follow each other's decisions though they commonly do so and, if they disagree with a fellow judge, they would be expected to explain clearly why. Decisions of the county court and lower courts do not set precedents – in that sense, these courts are not *'Courts of Record'* – and are not normally reported.

3.7. A SMALL AND COHESIVE GROUP OF HIGHER COURT JUDGES AND ADVOCATES

England's judiciary is relatively small in number, especially the number of judges who sit in the Courts of Record. The High Court has three divisions. The King's Bench Division, to which most cases focussed on private law obligations will be assigned, has 71 judges; the Chancery Division, which deals primarily with property disputes and company law matters, has 18; and the Family Division has 19. The Court of Appeal has only 40 judges; and the Supreme Court, which, for normal cases sits in panels of 5 Justices, has 12 justices in total. These figures are slightly misleading, in that senior barristers are often brought in to sit as deputy judges, and retired judges are brought back to help out in the High Court and the Court of Appeal; nonetheless, the numbers are quite small. The senior judiciary is also a fairly cohesive body; nearly all

38 A well-known example is *British Railways Board v Herrington* [1972] AC 877, in which the House of Lords, overruling the earlier case of *Robert Addie & Sons (Collieries) Lt. v Dumbreck* [1929] A.C. 358, decided that in some situations, an occupier of land may be liable for injuries sustained by a trespasser on the land. See also the case of *Murphy v Brentwood District Council* [1991] 1 AC 398, discussed below.

39 See Young v Bristol Aeroplane Co Ltd [1944] KB 718, 730–731. If the court decides that two of its own decisions conflict, it must decide which to follow; and it can refuse to follow a decision that was 'incuriam', i.e., made without knowledge of legislation or binding caselaw, which means that the decision must be wrong.

judges on it have been senior practitioners, principally at the Bar, which is itself quite small.

Advocacy in the higher courts is mostly done by barristers. The Bar Standards Board says that it currently regulates 17,357 practising barristers.[40] Since 1990,[41] it has been possible for solicitors to obtain the right to represent their clients in the higher courts,[42] rather than engaging a barrister to do so; according to the Solicitors Regulation Authority, in July 2023, some 4.174 solicitors had Higher Rights of Audience in the civil courts.[43] However, the number of barristers and solicitors who regularly appear in the higher courts is much smaller than these figures might suggest.

This means that the Bench and the Bar form a fairly small group, largely a cohesive group that shares values, understandings of *'how things should be done',* and many social attitudes. Indeed, the Bar has long tried to inculcate cohesiveness among its recruits. Every barrister must belong to an Inn of Court, and all new entrants must both attend training sessions and eat a number of dinners at their Inn – although the number of dinners that is compulsory has gradually been reduced now to ten.

3.8. CLOSE RELATIONSHIP BETWEEN BENCH AND BAR

A close working relationship also exists between judges and advocates,[44] reinforced by professional standards. The Bar Standards Board Handbook[45] sets out an advocate's *'core duties'*, the first of which is the duty to

40 https://www.barstandardsboard.org.uk/for-the-public/about-barristers.html (accessed: 28 August 2023).

41 Courts and Legal Services Act 1990, s.17.

42 See The Solicitors' Higher Rights of Audience Regulations 2010.

43 https://www.sra.org.uk/sra/research-publications/regulated-community-statistics/data/higher_rights_of_audience/ (accessed: 04 September 2024).

44 See also Zweigert, Kötz, pp. 192–193.

45 Now in Version 4.6 (December 2020): see https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&audience=&csrfToken=D0F1DEC03D5EED1AC759BB11E8539CF1&q= (accessed: 04 September 2024).

the court; this overrides all the other core duties,[46] even the duty to act in the best interests of each client. The duty to the court includes the duty to *'take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions'*,[47] including decisions and provisions that are unfavourable to the advocate's case. I suspect that the close working relationship is strengthened by the fact that advocates appear in person to argue their case. Although a written *'skeleton'* argument is now required for trials in both the higher courts and appeals,[48] hearings normally involve oral argument over any points of law that arise. The close relationship between judges and advocates almost certainly implies that, in any given case, the lawyers will have a clear sense of the kind of arguments that are likely to be considered carefully by the court, as is the range of likely outcomes. This makes the outcomes more predictable.

3.9. INCREMENTAL DEVELOPMENT

The development of the Common Law is also controlled by the strong preference of the courts for incremental development, as opposed to sweeping change. The Supreme Court frequently states its preference for incremental change: as Lord Reed put it in a recent case on the law of negligence,

> *where established principles do not provide an answer* [...] *the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority.*[49]

This is of course linked to its preference for 'particular solutions' to observed problems, which I noted earlier.

46 Rules C3 and C4.

47 Rule C3.4.

48 Practice Direction 52A, Section V.

49 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [27]; see likewise Lord Mance at [83].

3.10. CERTAINTY AND UNCERTAINTY IN THE LAW

The preference for incremental development could be attributed to the fear that adopting a broad standard will lead to uncertainty. Take for example what Moore-Bick LJ, until his retirement a couple of years ago one of our leading commercial judges, said of a trial judge's attempt to solve a problem by applying a principle of good faith:

> *[…] the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organising principle' drawn from cases of disparate kinds […] There is […] a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.*[50]

We need to be careful over what we mean by *'certainty'*. It is not as if an English lawyer can always tell what the law is on a particular point. With no clear authority, it may be difficult to tell whether a court can be persuaded to take even an incremental step in order to impose liability, or will refuse to do so. Moreover, courts have been known to reverse direction.

A good example of this, and of the courts rejecting a general principle in favour of incremental change only, is provided by cases on liability in tort for *'pure economic loss'* caused by negligence, that is, where the defendant's negligence has caused neither physical injury to the claimant nor any loss or damage to the claimant's property, but caused only financial loss to the claimant.

To provide a brief summary, *Donoghue v Stevenson* involved a negligent act leading to physical injury. The original decision was about the liability of manufacturers for defective products, but the courts gradually came to accept Lord Atkin's 'neighbour principle' as a guideline to be applied in deciding whether there should be a *'duty of care'* in novel

50 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [45].

situations.[51] As I have said earlier, it is now generally the case that a defendant who has acted carelessly and has caused physical injury or property damage directly to a plaintiff will be liable, provided, first, that it was foreseeable that the plaintiff might be injured in the way it occurred, and second, that there is nothing in the relationship between the parties, or in a network of contracts of which they both part,[52] to suggest that the normal duty should not apply. However, where the defendant's negligence was a case of carelessness leading only to financial loss, it had for long been considered that there was no liability in tort; the plaintiff could recover only if it could be shown that the defendant had broken a contract under which he was obliged to use care in giving information.

However, in 1963, the House of Lords held in the case of *Hedley Byrne & Co Ltd v Heller & Partners*[53] that there might be liability in tort for economic loss caused by a negligent misstatement, if a sufficiently close relationship existed between the parties. This remains the case, at least where it can be said that the defendant voluntarily assumed responsibility towards the claimant,[54] and if the defendant gave the incorrect information knowing, at least in general terms, by whom the information would be acted on and for what purpose.[55]

At one time, liability for pure economic loss seemed to be more extensive: in particular, it was thought that there would be liability when a plaintiff bought a house that a defendant had negligently built or allowed to be built in a dangerously defective fashion. In *Dutton v*

51 E.g., in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, Lord Reid said that the neighbour principle 'is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion'.

52 E.g., *Norwich City Council v Harvey* [1989] 1 WLR 828 (CA).

53 [1964] AC 465.

54 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. There will be no liability if the defendant disclaims responsibility, as in *Hedley Byrne v Heller* itself, although see *Smith v Eric S Bush* [1990] 1 A.C. 831, in which the disclaimer was held to be unreasonable and therefore invalid under Unfair Contract Terms Act 1977, s 2(2).

55 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

Bognor Regis Urban District Council,[56] the defendant Council had statutory power to inspect the foundations of houses under construction, but its surveyors negligently failed to stop the house in question being built on inadequate foundations, in contravention of building regulations. The Court of Appeal allowed a subsequent owner of the house to recover the cost of repairing it from the Council. Lord Denning MR and Sachs LJ were prepared to treat the loss as physical damage;[57] they said that the builder should have been equally liable. The third member of the court, Stamp LJ, agreed that the Council was liable but did not agree that the builder was liable: he considered that the complaint against the builder was essentially that the plaintiff had bought an inferior product, which might have been a contractual liability had there been a contract between the parties (there was no contract between them in this case) but not liability in tort for negligence.[58]

The liability of councils in similar circumstances came before the House of Lords in *Anns v Merton London Borough Council*.[59] The House of Lords said that the neighbour principle should apply unless there were 'considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach [...] may give rise',[60] and held that, as the purpose of the statutory powers was to ensure that houses were built in compliance with the building regulations, the Council would be liable for the cost of any repairs necessary to remove any danger to the health and safety of the occupants through non-compliance if negligence on the part of the Council or its employees was proven.

However, during the 1980s, opinion in the House of Lords changed. In a number of cases, liability for economic loss was denied, and it was said that Lord Wilberforce's two-stage test was not appropriate for such cases. For example, in *Caparo v Dickman,*[61] the House of Lords said that the 'neighbour principle', as developed in the *Anns* case, should not apply

56 [1972] 1 QB 373.
57 See [1972] 1 QB 373, 396, 403–404.
58 See [1972] 1 QB 373, 414–415.
59 [1978] AC 728.
60 Lord Wilberforce at [1978] AC 728, 752.
61 [1990] 2 AC 605.

to cases of pure economic loss; the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed'.[62] Further, in *Murphy v Brentwood District Council,*[63] the House of Lords overruled its own earlier decision in *Anns*, and held that if the defect had not caused personal injury, neither the local authority nor the builder would be liable in negligence to the houseowner. As Stamp LJ said in *Dutton v Bognor Regis UDC*, the loss their negligence had caused to the homeowner was purely economic – in effect, the homeowner had spent good money on a bad product. This was recoverable only on the basis of contractual liability, but that would require a contract between the relevant parties.

Therefore, even though English law prefers an incremental approach, it cannot always claim to be certain what the law is – incremental steps can lead backwards as well as forward. However, I should add that changes like this are often anticipated within the profession as possible or even likely – doubts about a decision or apparent rule may well be discussed in the Inns of Court, even if they have not appeared in print in case notes or articles.[64]

62 Quoting from the speech of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] A.C. 728, 752.

63 [1991] 1 AC 398.

64 An interesting example is the decision in *Siebe Gorman & Co Ltd v Barclays Bank* [1979] 2 Lloyd's Rep 142, in which Slade J. held that a bank could take a fixed charge (which would have priority over an insolvent company's preferential creditors) over a company's receivables without preventing the company from drawing on the bank account into which the receivables were to be paid. The correctness of this decision was questioned long before the case was overruled in *Re Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680, in which a very similar arrangement was held to create a floating charge, not a fixed charge, with the result that the preferential creditors had priority over the charge.

3.11. CERTAINTY IN TRANSACTIONS: PACTA SUNT SERVANDA

What concerned Moore-Bick LJ in the passage cited earlier was not so much the uncertainty over what the law would be as certainty in a different sense, which applies to contract law more than to tort. His concern was that what the parties have agreed to should not be subject to a general judicial control such as good faith, because it may lead to unpredictable qualifications or even an overriding of what the parties have agreed to. Except in narrow and well-defined circumstances, such as under misrepresentation or duress, the parties should be held to what they agreed on – *pacta sunt servanda*. I think the relative strictness with which English law applies the notion of *pacta sunt servanda* – or, to put it another way, the relatively few situations in which the courts will either add to or qualify what the parties agreed – is an important characteristic of English contract law, one that distinguishes it from many civilian systems; however, although I will mention the point again, essentially, it is a topic for another paper.[65]

3.12. PRAGMATISM

English law tends to be pragmatic rather than principled. A good illustration of this, and an interesting comparison to French law, is illustrated by two cases involving swimming pools. In the English case,[66] Forsyth, a tall man, stipulated that his indoor pool should be built to a depth of 7 feet 6 inches (2.28 metres). By mistake, it was built to the standard depth of 6 feet. In English law, specific performance was not

65 I will just note that English law does not give relief on the grounds of mistake, unless either the mistake was induced by a misrepresentation by the other party or a shared mistake by the parties means that they have agreed to something that is impossible; it does not recognise fraud by silence or have duties of disclosure except in few types of contract such as insurance or partnership; it has no doctrine of *laesio enormis*, and only a limited doctrine of unconscionable dealing; further, it does not allow adjustment of a contract for hardship caused by a change of circumstances not amounting to impossibility.

66 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

then available in cases like this,[67] but when the builders brought an action for the price against Forsyth, he made a counter-claim for damages for the cost of increasing the depth of the pool, which would have meant completely reconstructing it, some £21,500. The trial judge held that a depth of 6 feet was perfectly adequate, even for diving off the side of the pool (which was the only diving that would be possible, as there was no space indoors for a diving board), so Forsyth was ordered to pay the contract price and, on the counter-claim, he was awarded only £2,500 for '*loss of amenity*' – seemingly to compensate Forsyth for any slight and baseless worry that he might hit his head when diving. The Court of Appeal disagreed and increased the damages award to £21,500, on the ground that the damages should enable the plaintiff to get just what he had contracted for, but the House of Lords restored the trial judge's decision: it would be wholly unreasonable to rebuild the pool when rebuilding it would neither increase its usefulness nor add to its value. By contrast, in the French case, the contract to build a swimming pool stipulated that the pool should have four steps leading down into the water, but it had been built with only three steps. The employer demanded that the steps be rebuilt. The cour d'appel refused to grant this order on the ground that it had not been shown that having only three steps caused any inconvenience. The Cour de Cassation quashed the decision as having no legal basis: (former) art. 1184 of the Code civil provided that where an obligation is not performed, the claimant could require the other party to perform unless the performance was impossible, which was not the case here. Compared to the English decision, the French decision seems to emphasise more on the principle of *pacta*

67 Principally, because in English law specific performance is generally not awarded if 'damages would be an adequate remedy'. In this case, damages would be adequate because the plaintiff could employ a third party to do the work. It is not clear what the outcome would be in the present scenario. Forsyth was a consumer, and the Consumer Rights Act 2015, s 55 has enabled consumers who have contracted for work that has not been carried out correctly to demand 'a repeat performance' that is in conformity with the contract; the court may make an order of specific performance if necessary (s 58). The court should not refuse on the grounds of adequacy of damages, but it is an open question whether the court would refuse an order as a matter of discretion when the reconstruction of the pool would be pointless: see *Chitty on Contracts*, Vol. II, para. 41–620.

sunt servanda than on pragmatic considerations such as whether the expenditure is worthwhile.

However, may be pragmatism is becoming more widespread. When the Code civil was reformed in 2016, the new art. 1221 provided that a creditor is not entitled to seek performance in kind 'if there is a manifest disproportion between its cost to the debtor and its interest to the creditor'.[68]

3.13. DETAILED CONSIDERATION OF THE FACTS

The pragmatic approach involves detailed consideration of the facts of each case. This is obvious from English courts' judgments, which normally provide a very detailed account of the facts of each case, partly to enable the trial judge to reach a decision and partly to ensure that, if the case goes to appeal, and the Court of Appeal thinks that the trial judge has not applied the correct principle, and that the case should be decided on some other ground, the Court of Appeal will have all the relevant facts and will not have to send the case back for further findings of fact. Detailed findings of fact may seem unnecessary to civilian lawyers; however, they are not only essential in a system of binding precedents but also make for more pragmatic solutions.

3.14. OPEN CONSIDERATION OF POLICY

It is also evident that the pragmatic approach may involve the court considering issues of policy. This might seem worrying. If courts were making decisions not just as a matter of legal principle but with a policy-driven agenda that was unstated, it would tend to make decisions unpredictable. However, compared to many judges in continental Europe, English judges are open about considering policy issues. As Lord Mance said recently:

68 Cf § 275(2) BGB.

> *It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations. No one now suggests that the common law has not changed since the Saxon era, merely to be revealed from time to time by an increasingly perceptive judiciary. As Lord Reid said famously […]: 'There was a time when it was thought almost indecent to suggest that judges make law – they only declare it […] But we do not believe in fairy tales any more';*[69] *see also Lord Goff's comments on the declaratory theory of the common law in* Kleinwort Benson Ltd v Lincoln City Council.[70] *The courts are not a Law Commission, but, in recognising the existence of any generalised duty in particular circumstances they are making policy choices, in which considerations such as proximity and fairness, justice and reasonableness must inhere.*[71]

Sometimes these policies are already recognised in the rules of law: for example, the *Ruxley* decision is really just an application of the well-established '*duty to mitigate*'[72] – not a true duty but rather an *Obliegenheit*, a rule that claimants cannot recover damages for losses that they could have avoided by taking reasonable steps. However, on other occasions, the policy considerations are external to private law. Policy is regularly considered when the courts are asked to extend liability beyond the existing position, for example, when it was argued that the police should be liable if they had failed to act on a call for help from a victim of domestic violence, which had led to her being killed before they arrived. One of the arguments for denying liability was as follows:

69 Lord Reid, 1987, p. 180.

70 [1999] 2 AC 349, 377–379.

71 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [84].

72 The case most frequently cited is *British Westinghouse Electric Co Ltd v Underground Electric Railways* [1912] A.C. 673, although in that case the duty to mitigate itself was not the issue. The plaintiffs had been supplied with turbines that were not as efficient as required by the contract and in response had done more than could reasonably be required of them: they installed turbines of a new design of greater efficiency than the contract called for. The question was whether the resulting savings in running costs should be considered in assessing the damages. The House of Lords held that it should.

> *The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two.*[73]

A similar concern also seems to have influenced the House of Lords when, as explained earlier, it reversed its decision in *Anns v London Borough of Merton*: the effect of holding a local authority liable when its inspector failed to spot that a house was being built with inadequate foundations was to impose on the public the burden of providing compensation for *'private financial losses'*. This was something that the legislature could decide on but not the courts.[74]

Similarly, in considering the level of damages that should be awarded in personal injury cases for pain, suffering, and loss of amenity, the Court of Appeal considered the effect of their decision on insurance premiums and, in medical negligence cases, the cost to the National Health Service.[75] Public policy was also considered when it was decided that a barrister was immune from an action for negligence at the suit of a client with regard to his conduct and management of a cause in court: in particular, the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, while actions for negligence against barristers would make the retrying of the original actions inevitable and thus prolong litigation, which would be against the public interest.[76]

73 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [122]. See similarly *Stovin v Wise* [1996] AC 923 (local authority should not be liable for failing to make a road junction safer for motorists).

74 *Murphy v Brentwood District Council* [1991] 1 AC 398, 482.

75 *Heil v Rankin* [2001] QB 272 at [32].

76 *Rondel v Worsley* [1969] 1 AC 191, 227–229.

3.15. LAW REFORM

Another possible advantage of the Common Law system is that reforming the law may be easier here than in jurisdictions that have a civil code. There are two aspects to this: legislative reform and judicial reform.

It must be easier to legislate on a particular issue where change is needed if the legislation is limited to a particular topic, as has often been the case in English law.[77]

'Judicial reform', in the sense of a decision introducing a wholly new principle, also happens occasionally. We have had some *'reforming judges'*, notably Lord Denning, who tried to introduce (1) a *'deserted wife's equity'*, which would have protected a woman who had been deserted by her husband from being evicted from the family home, oftentimes in the husband's name only, by the bank to which the husband had mortgaged the house;[78] and (2) a doctrine of inequality or bargaining power.[79] Neither was directly successful as both were rejected: by the House of Lords, the deserted wife's equity in *National Provincial Bank v Ainsworth*[80] and the doctrine of inequality of bargaining power in *National Westminster Bank v Morgan*.[81] In the latter case, Lord Scarman took the orthodox position that interference with freedom of contract was a matter for the legislature.[82] The legislature has not seen fit to make further provision for inequality of bargaining power, save for consumer contracts, where the UK had to implement the Directive on Unfair Terms in Consumer Contracts.[83] Ironically, Parliament did introduce legislation to protect

77 See above.

78 See *Bendall v McWhirter* [1952] 2 Q.B. 466. The husband himself could be restrained from evicting his wife by an order made under section 17 of the Married Women's Property Act 1882.

79 *Lloyd's Bank v Bundy* [1975] Q.B. 326, 339.

80 [1965] AC 1175.

81 [1985] AC 686.

82 [1985] AC 686, 708.

83 Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/21; see Consumer Rights Act 2015, s 62. This protection for consumers has not been affected by Brexit.

deserted wives, which achieved pretty much what Lord Denning had wanted.[84]

3.16. JUDICIAL REFORM TO HELP BUSINESS

Interestingly, English judges have been much more ready to change the law when the result of the change would not restrict parties in any way but would enable them to achieve what they want, or enhance business opportunities. An example of the first is that for a long time we needed to enable parties to create contractual rights that could be enforced by third parties – a reform that was recommended as early as in 1937.[85] This was proposed to be implemented by legislation, but when Parliament did not act, Lord Scarman (as we have seen, not an advocate of judicial reform in other contexts) suggested that the House of Lords should itself reform the law by reconsidering the principal decisions that had established the doctrine of privity of contract.[86] Whether this would ever have happened we do not know, because ultimately Parliament passed the Contracts (Rights of Third Parties) Act 1999 – a mere 62 years after reform had first been recommended. However, we have at least two examples wherein the courts did introduce radical changes that were considered business-friendly.

The first example is in relation to penalty clauses. These are invalid in English law, but the test of what amounts to a penalty (as opposed to a valid '*liquidated damages*' clause) was changed dramatically by the decisions of the Supreme Court in two cases heard together, *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*.[87]

84 The Matrimonial Homes Act 1967 gave the wife a statutory right of occupation against the husband and, if registered, against third parties; see Family Law Act 1996 Part IV.

85 Law Revision Committee (Sixth Interim Report (Cmd 5449) Section D. Proposed legislation was introduced but was abandoned with the outbreak of World War II, see Beatson, 1992, p. 1.

86 See *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* [1980] 1 WLR 277, 300.

87 [2015] UKSC 67, [2016] A.C. 1172.

It was previously believed that an *'agreed damages'* clause (a clause providing that if a party commits a breach of contract it must pay an agreed sum to the other) clause was valid only if the agreed amount was a genuine pre-estimate of the likely loss, or at least not substantially more than the estimated loss – the sum must not be in terrorem, that is, designed to pressure the party into performing.[88] However, in *Cavendish Square,* the Supreme Court held that if the other party had a legitimate interest in obtaining performance rather than damages – for example, because damages would not fully compensate it for the losses it would suffer – it is permissible to have a deterrent clause, provided the amount payable is not disproportionate to the payee's interest in performance.[89]

The second example of judicial reform to help business relates to small or new businesses – although it was a two-stage process and the first stage was, once again, to protect wives. Someone starting a small business usually needs a loan to get going. Potential lenders want security. By the 1980s and 1990s, borrowers in England could often provide this because house prices had increased rapidly, leaving them with a considerable amount of *'equity'* in the home (i.e., the difference between the value of the home and the amount of money, if any, that was outstanding on the mortgage they had used to buy the house in the first place). However, by this time, most homes were jointly in the names of both the husband and the wife; hence, the budding entrepreneur – typically the husband – would have to get his wife's consent. The wife might be reluctant, and some husbands resorted to abuse of the wife's trust or emotional manipulation,[90] misrepresentation, or even duress to coerce the wife to agree. If this had happened, the business had not prospered, and the lender had tried to enforce the security, could the wife resist on the ground that her consent had been obtained improperly? The law had appeared to be that the lender would only be affected by the husband's wrongdoing if the lender knew if it. However, in *Barclay's*

88 The traditional test was set out most fully in the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] A.C. 79.

89 [2015] UKSC 67, [2016] A.C. 1172 at [32].

90 These amount to 'undue influence', a ground for avoidance of the contract in English law: see *Chitty on Contracts*, ch 11.

Bank v O'Brien,[91] the House of Lords held that if the loan was apparently not directly benefitting the wife, the lender would be treated as having *'constructive notice'* of the husband's wrongdoing unless it had made enquiries to check that nothing untoward had occurred. It was not clear, however, how the lender could ensure this in practice; and this would mean that lenders were reluctant to accept the only form of security that the entrepreneur could offer. Hence, in a second decision, the House of Lords laid down a clear procedure that the lender should follow in order to avoid being treated as having constructive notice – in essence, to get a letter from a solicitor representing the wife, confirming that the solicitor has been given information by the lender and has advised the wife.[92] This made it possible to rely on offers of the matrimonial home as security, and thus, small businesses were helped again.

3.17. THE COMMERCIAL NATURE OF ENGLISH LAW

Why is there this apparent willingness to propose judicial reform when it seems to help businesses by making it easier for them to achieve their ends, be it to confer rights on third parties, to allow what used to be regarded as penalty clauses, or to take reliable security? This may be attributed to the commercial nature of English private law, especially the law of contract. English judges have inherent authority to develop the law as they decide cases that involve new situations; they do not need a general clause to rely on as do judges in a code system. However, they have developed fewer controls over the behaviour of contracting parties and over the terms of contracts than exist in many continental systems. As a result, we can point to a number of key differences between the common law systems of Europe and the laws of, say, France or Germany. English law does not have a doctrine of *culpa in contrahendo* or recognise liability for breaking off negotiations at the last moment. It seldom imposes a duty of disclosure, not even recognising fraud by silence, and it does not give relief when one party has entered a contract

91 [1994] 1 A.C. 180.
92 Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773.

under a mistake of fact unless they were misled by information given by the other party. Apart from the rule against penalty clauses mentioned earlier, few controls are observed over the contents of contracts between businesses. English law does not recognise adjustment on the ground that a radical change of circumstances has occurred. It relies on damages rather than specific enforcement, assuming that there will normally be a market in which the aggrieved party can find someone else from whom to obtain goods or services.

Why does English law take this individualistic, market-orientated approach? One reason is that English law is not an academic product. True, academic writing has helped to organise it into recognised rules and principles, but those rules and principles have to be derived from cases, which are mainly decided without much, if any, academic input. Nor is the law seen, as was the Napoleonic Code, as a guide to how businesses or other parties should behave. Its focus is simply on resolving disputes; and at least in contract, this is seen primarily as deciding whether the parties have stuck to their agreement – and, if they have not, making them pay compensation.

This, and the generally commercial character of much of English private law, seems to reflect the cases that come before the law-making, that is, higher courts in England and Wales.[93] At least the contract cases are usually commercial disputes involving large sums of money, most often between parties who either had legal advice when negotiating the contract or who are *'repeat players'* that make the kind of contract in question on a regular basis and are conversant with the risks. These are not the kind of parties who need the same protection as the little businesses who, I have the distinct impression, appear more frequently in French and German cases.

3.18. ENGLISH LAW AS THE LAW OF CHOICE

The *'hard-nosed attitude'* of the English judges and English law is probably increased by the desire to attract international businesses to adopt

93 I have developed this argument elsewhere: see Beale, 2010, p. 501.

English law as the governing law, the *'law of choice'*[94] (and often at the same time, to opt for both insurance and arbitration in London). English law goes out of its way to attract parties who have no other connection with England; and, rightly or wrongly, it is of the firm belief that international business people want the maximum certainty and the minimum risk in ensuring that what they have agreed will not be enforced. When the Unfair Contract Terms Act 1977 was adopted, a deliberate decision was taken that it should not apply to either international supply contracts or contracts that are subject to English law only because the parties have chosen that law to govern the contract.[95] The Law Commission said:

> *The effect of imposing our proposed controls in relation to those contracts might well be to discourage foreign businessmen from agreeing to arbitrate their disputes in England* [...][96]

3.19. PROFESSIONAL CONSERVATISM

However, hand in hand with the stress on freedom of contract is a characteristic that is frequently frustrating to anyone interested in improving the law, even if the improvement is aimed at making business easier: this is the high level of conservatism in the English legal profession. In my experience, large firms of solicitors are particularly resistant to change. For example, for years we have been trying to introduce a sensible system of registration and priority of security over moveable and intangible property, largely along the lines of art. 9 of the Uniform Commercial Code or the Canadian Personal Property Security Acts, which

94 See Kötz, 2010, p. 1243.

95 See sections 26 and 27.

96 Law Commissions, *Exemption Clauses Second Report* (Law Com No 69, Scot Law Com No 39, 1975), para. 232.

have been widely adopted around the world.[97] The law firms seemed implacably opposed to changes even when the changes would make their clients' lives easier. They preferred to live with what they have. The same attitude appeared when the Common European Sales Law[98] was proposed, and re-appears whenever – as seems to happen every couple of decades – a government department asks whether the UK should adopt the Vienna Convention on the International Sales of Goods.[99] Why? For several reasons. One is simple path dependency – we have always done it this way, and we do not want to change. Another, particularly in relation to the CESL and the CISG, is a fear of losing business to lawyers in other jurisdictions – English firms know more about English law than anyone else, whereas firms from all over Europe might know as much about the CESL, and lawyers from many countries in the world might know as much about the CISG. However, the main reason could be that the law firms have developed ways of working with the existing law and ways of *'working around'* any problem it poses. This, and the banks of precedents that are based on their experience, are an important part of their knowhow, of their intellectual capital. They do not want to lose it.

4. CONCLUSION

The Common Law system may appear less coherent and less principled than a code-base system. A case law system certainly does have its disadvantages. It may not be easy to say what the law is; the law develops piecemeal and is apt be changed by judicial decision; and, to some minds,

97 Adoption of an art. 9-type system was first proposed by the Report of the Committee on Consumer Credit (1971), Cmnd 4596; then by A. L. Diamond, *A Review of Security Interests in Property* (1989) (written for the Minister of Corporate and Consumer Affairs); and in 2005 by the Law Commission, *Company Security Interests* (Law Com No 296, 2005). A detailed account of the various attempts at reform can be found in Beale et al., 2018, ch. 23.

98 The European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)). For an account of the fate of the CESL see Beale, 2016, pp. 431, 459–462.

99 See also Moss, 2005-2006, p. 483.

the results are unprincipled. However, English lawyers defend it as being pragmatic and flexible. Hence. despite not having a code, English law at least muddles on, and arguably it has strengths that codified systems lack. Do not expect England to move to a codified system, even to a code of just contract or commercial law, any time soon!

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CODIFICATION OF CIVIL LAW IN HUNGARY: THE CIVIL CODE AS A PART OF THE SYSTEM OF LAW

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ABSTRACT

The law is a heterogenous body of legal norms wherein regulation is contrasted to law. Law is an autonomous order of society where norms are created via judicial adjudication by deciding individual cases. Written law, like a civil code, does not distinguish in terms of interpretation of rules, concretisation of general clauses on a case-by-case basis, and prioritisation among competing rights. The courts actually construe the law instead of applying it. Private law is built on a bottom-up-approach even in codified legal systems. Private law transmits social values that are to be assessed as described in Walter Wilburg's Bewegliches System. *Thus, courts do not apply but actually create law; the same is the case in the system of private law based on a written law. The civil code, where it exists, determines methodology and structure of argumentation, provides legal framework for social and economic phenomena, establishes basic evaluation, may implement direct policy, and may confirm, reflect, or overrule trends in court practice.*

Keywords: *civil code, courts, evaluation, law and regulation, methodology, lawyers, law making,* ad hoc *legislation.*

Menyhárd, A. (2024) 'Codification of civil law in Hungary: The Civil Code as a part of the system of law' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 115–137. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_6

1. THE NATURE OF LAW

In the upper layer of law, norms, organised in a hierarchy of sources of law, traced to, and legitimated by legislative or judicial authority, are created by members of society, that is, people for people. Law is not supposed to originate from an authority above society but is to be derived as a social product. It organises individual actions into collective action, coordinating the behaviour of the members of society to achieve specific goals. The key to this is the ability to think in the abstract and to create myths and beliefs divorced from physical reality. Only this kind of thinking can create a social consensus, without the need for justification by material reality, on phenomena that are the building blocks of law (the concept of state, property, legal person, contract, family, to name but a few). It is on these foundations that the abstract system of law is built, in its entirety, independent of physical reality.

Law is a product of society, but in the social division of labour, the production of law is the task of a small part of the community, the professional community of lawyers. This monopoly of lawyers is also based on social consensus. Lawyers are tasked with shaping social values into rules of conduct, to which the community holds its members accountable to the state.[1] Here, we do not even attempt to define the concepts of state and law. Whatever concept one adopts in this connection, it is safe to say that the content of law is determined by jurists. The source of law, then, is the professional community of lawyers in the social reality. Of course, this assertion does not change the fact that in the system of legal thought, individual elements of the legal system of norms are considered the source of law. The statement implies that the content of this system of norms is determined by the community of jurists. This community is said to perform its task well if it is able to translate social values into rules of conduct enforced by the state, that is, if the rules of conduct are followed in accordance with social values.

It is therefore worthwhile to approach law from the perspective of the social function of the community of lawyers. In fact, one could

1 Habermas, 1998, p. 255.

say that law emerged in society with lawyers; law does not exist independently of lawyers but is created by them. The closed professional community of lawyers and, within it, primarily the judges shape the law. If we want to focus on law as a social phenomenon, we do not need to pay attention to the legal texts or theory, only to the position and place of lawyers in society.

One example of this role of lawyers can be illustrated in referring to the period of social and legal development in Hungary after World War II. The market economy and democracy were dismantled, means of production were taken over by the state, and economic turnover was centrally controlled in accordance with centrally prescribed plans. Private property was limited to personal property, and society and the economy were controlled by the party. Although the economic mechanism of 1968 marked an opening up to market-based thinking, the system of central redistribution remained unchanged. However, the research directions of jurisprudence were still able to address the fundamental issues of the institutions that served as the pillars of the market economy. The so-called *red corners* remained well separated in the individual works, and the results of the science were distinctly up to date. This is true not only of jurisprudence but also, with certain limitations, of legislation and jurisprudence. The 1959 Civil Code was never a socialist code. It was, in fact, a direct follow-up of the development from the 1900 draft of the Hungarian General Civil Code through the 1928 'Private Law Bill' to the 1959 Civil Code. The direction of development has been to raise the level of abstraction and, at the same time, to simplify the rules. The 1959 Civil Code fitted in well with this codification process. It was created as a code that was extremely, and in some cases excessively, streamlined and abstract leaving those rules out that were not deemed useful in practice or could be derived from the logic of existing legislation (and were therefore considered superfluous). It was not a socialist code, as mentioned earlier, buy it was essentially adapted to the socialist system only insofar as the rules relating to social values and property were modelled on the socialist social and economic foundations. After the change of regime, these provisions were removed from the law, and the terms were replaced by terminology reflecting the values of civil society and the market economy. The result was a code of law that was applied

in practice in the context of civil society and the market economy without major problems. Considering that by 1959 the lessons, mistakes, and weaknesses of European codifications could be identified from the judicial practice of European countries and that the Hungarian legislator could bear them in mind, and that the 1977 amendment to the Civil Code, which was intended to reflect the new economic mechanism in private law promulgated in 1968, also reflected the latest developments in European law, Hungary's civil code for decades had been the most modern code in Europe. The lack of foundations due to the socioeconomic system could be addressed by broadening the horizon, which was primarily represented by the scientific method of legal comparison.

The explanation for this phenomenon is that the Hungarian community of lawyers, even within the socialist social order that built communism, carried on the values of private law that were not only in line with civil society and the market economy, but also the knowledge related to it. It was also able to pass on this knowledge to future generations. Thanks to this, Hungarian legal culture was able to return to traditional private law after the change of regime, in the socioeconomic order of civil society and the market economy, as if it had simply picked up a thread that had been dropped. This knowledge, which was not supported by the socioeconomic order and which, according to the social order of the time, might even have been considered superfluous, lived and developed as a subsurface flow. This result is not the consequence of some self-evident law, but of human convictions. It is the work and social responsibility of the members of a community that form the basis for teaching the same responsibility to future generations.

Something similar has been observed by Thomas C Grey as well, who argued as follows:

> *Someday the point may go without saying, but now it remains important to keep repeating that under the robes, federal judges are ordinary members of the comfortable classes – not so different from those on the Senate Judiciary Committee or your state public utilities commission. It does not overcorrect much to think of the Justices of the United States Supreme Court, in the exercise of their majestic power of judicial review, as members of a nine-member committee reviewing the decisions of a dispute-resolution*

bureaucracy, deciding many minor political issues and a few important ones, guided in those decisions by what their committee has said and done before, by their sense of the professional and the popular culture, and, in a relatively few cases, by the words of the Constitution.[2]

2. LAWYERS AS INSTITUTIONALISED COMMUNITY: COURTS AND SOCIAL VALUES

The role of lawyers in modern society is highly institutionalised. Judges and courts have the most important role in determining the content of the law. The interpretation of written legal norms is the task of the courts. Interpretation is in fact the determination of the content of the norm. Legal texts, like religious texts, require interpretative authority. In context of legal texts, courts are vested with this authority, just as in the case of religious texts, the authority is with the priests of the relevant church. If the result of the interpretation of the written norm in the given case is not compatible with the values of the good society, the court may override the general legislative command by applying general clauses. Considering the role of the judge, what could that role be but to enforce the values of the right society by formulating the law applicable to the case?[3] The content of the written norm created by the legislator can be determined by interpretation, but in determining the content, the creation and application of the law are not separated. In fact, the court does not determine the content of the law but constructs it. In private law, the distinction between legislation and the application of law is relative; a judgement delivered by a court does not in fact constitute the law. The court, by defining the content of the law, does. It does this not only by applying abstract norms (concepts) to concrete cases, but also by giving concrete form to norms with an open content (general clauses).

The court's task is to secure the subjective right of the subjects of the law based on what is considered socially correct, and the written law is

2 Grey, 1984, pp. 1–25.

3 Menyhárd, 2019, pp. 69–73.

only partly the source of this right to enforce justice; more precisely, what we today call substantive law – substantive private law – is not the source of the subjective right, but only a means in the hands of the court to enforce justice, that is, the values prevailing in society, by deciding the dispute in question. In the traditional model of thinking, the legislator creates the law, and the court applies it. This thinking presupposes a hierarchy in which the court, as the law enforcer, carries out the legislator's orders. However, this is not true or, at least, is only partially true, with strong limitations. Judicial decisions necessarily imply prioritisation of values. The fundamental values accepted in society (or, more precisely, those considered to be accepted in a proper society) play a different role in different factual situations. The prioritisation of values is based on a balancing of the interests carried by the facts of the case, where the main decision-making principle is that identical cases should be assessed the same way and different ones differently. The written norm only establishes the basic assessment formulated by the legislator, but this can be overridden by the court: either by interpretation of the law or by the application of general clauses (such as the requirements of good faith and fair dealing, prohibition of immoral contracts).

The subjective right of one subject vis-à-vis another cannot be other than that which he or she is entitled to according to the correct social values. This also follows from the fact that the function of the law is to represent social values and priorities among social values as norms of conduct. If it is for the court to determine the existence or otherwise of a subjective right, it follows directly from this that it is for the court to determine the rule of conduct (norm). The difference between the legislator's authority and that of the judiciary is primarily a difference in the degree of legitimacy. The social consensus on the role of the judge plays a central role in this, just as the legitimacy of judicial decisions must be underpinned by a social consensus. This role is directly related to whether the law is seen as a manifestation of power as well as a framework for social functioning that transmits and implements the values of a just society.

If there is a written law (like a civil code), the court is required to anchor its decisions into the legal norm postulated by the will of the legislature in order to ensure the legitimacy of the decision. The judgement

shall also fit into the conceptual and logical framework of legal doctrine, primarily in order to check the consistency of the decision, that is, that the court judges similar cases in the same way and different cases in different ways. This is also the basis for understanding the content of the rule and for the predictability of substantive law. This is why the model of decision-making can be distinguished from the model of supporting the decision. This dichotomy, however, is not a problem, but a natural consequence of the way social evaluation is expressed as a rule of conduct and, thus, the way values are translated into law.

3. THE ROLE OF COURTS AND JUDGES IN PRIVATE LAW

This contribution addresses a methodological issue: what difference a civil code can make in the private law of a legal system. Traditionally, codified legal systems and jurisdictions based on case laws or judge-made laws (either as precedents or not) are contrasted and a line is drawn distinguishing between these two systems. It is argued here that this distinction is much less significant than is usually considered in legal scholarship.

In 1897, Oliver Wendell Holmes, in 'The Path of the Law', mentions the main feature of the legal system as follows:

> *in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.*[4]

4 Holmes, 1897, pp. 457–458.

> *The role of the courts as described by* Holmes *is just the same in legal systems, regardless of it having a written law, either as a civil code or as a largely comprehensive act. This comes from the institutional function of the courts. Courts are institutions for providing justice to the community, and the model for this is rather obvious: the citizen, seeking justice turns to the sovereign, and the sovereign vested with the power of the community provides that justice. Although the sovereign, by its legislative power, can give orders to the courts on how to give that justice, courts have the monopoly of interpreting the text provided by the legislator. This way, the courts establish the content of the legal norm. Arguments are used to find the hypothetical will of the legislator to give the judgement legitimacy. Thus, the main difference between codified and non-codified legal systems is legitimacy: in a system of common law, legitimacy is allocated to the courts, and in written law, it is allocated to the legislative power.*

In describing the system of common law, Benjamin Cardozo in 1921 said the following:

> *What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew.*[5]

The question is whether the existence of a civil code does make a difference or not. In the model of judicial decision-making in private law,

5 Cardozo, 2005, p. 6.

it is task of the court to establish rights and obligations. The source of rights and obligations is the law. While establishing the content of private law, the source of the law must be identified. In this contribution, it is argued that private law cannot be identical to written rules. It is more to be understood as normative materialisation of the values prevailing in the society. It is the task of the court to enforce social values through establishing the content of the law. Thus, the task of the court is the very same as the task of the legislator. In other words, enforcing social values between the parties by providing a social evaluation of the case. Consequently, the relationship between the courts and the legislator cannot be described as a hierarchy based on the subordination of the courts to the supremacy of the legislator. In short, as far as establishing the content of legal norms is concerned, no difference exists between legislative and judicial power. The relationship linking legislation and the judiciary is more a division of the tasks of social engineering based on aspects of efficiency and legitimacy rather than of hierarchy.

4. THE FLEXIBLE SYSTEM OF PRIVATE LAW

The working of private law is best described as the judgement of the court as a process of evaluation. In such a system, the court decides the case based on a limited number of relevant values by counter-weighing them in context of the facts of the case. Finding whether a party has the right against the other party is the result of such evaluation. According to this model, propounded by the Austrian scholar Walter Wilburg, private law shall be seen as a flexible system.[6]

In this flexible system, for example, the binding force of contract depends on counter-weighing four fundamental values: private autonomy, protection of reliance on the other party's conduct and statement, objective evaluation of the intended exchange, and self-reliance.[7] The strength of the value of private autonomy depends on how informed the parties were in the course of contracting, and whether their decision on

6 Wilburg, 1950; Wilburg, 1964, p. 364.

7 Bydlinski, 1999, pp. 9–20.

contracting was voluntary. Private autonomy is one of the fundamental values of a market economy and civil society. Mistake, misrepresentation, and duress, however, are market failures. If the consent was not an informed one or contractual will was not free, the transaction is not a market-based one. In other words, it shall not be enforceable. Further, the manner in which the required information and the required level of voluntariness is to be determined depends on moral base-lines as well.[8] Protection of reliance on statements and conduct of the other party is equal for the parties in cases of equal bargaining power. The parties are, from this point of view, in equal positions in contracting. The basic evaluation is that each party has to take care of his own interest. If, due to a change of circumstances or a change of position of parties the performance becomes so burdensome that it is not reasonable to enforce it anymore, or the changes make the performance burdensome, while the risk of such changes shall not be implied in the contract (hardship), the court may amend the contract or establish that it shall not be enforceable (owing to frustration of purpose, impossibility of performance). Objective evaluation of the intended exchange is less relevant if contracting was informed and voluntary. On the contrary, less voluntary or less informed contracting indicates a lower probability of enforcement of the bargain if an objective imbalance exists between the value of the performances. This is the ground for judicial and legislative control of contracting with standard contract terms too. Responsibility and self-reliance indicate that as a moral value, promises are to be kept.[9] The written law provides for this only the conceptual framework: duress, mistake, hardship, impossibility, usury, immoral contracts, or public policy but normally does it in such a flexible way that it leaves an extremely wide playing field for the courts to weigh the relevant social values and enforce policy for social engineering.

In context of tort law, the general rule of liability is designed on similar lines in different jurisdictions: the tortfeasor shall have the obligation to pay damages if loss was caused unlawfully, and fault implies establishing the burden of the wrongdoer. Thus, the prerequisites of

8 Trebilcock, 1997, 78 et seq.

9 Koch, 2002, pp. 545–548; Bydlinski, 1999, 9 et seq.

liability are damage, unlawful conduct, and a causal link between them and fault. Compensable damage, relevant cause, fault, and unlawfulness are, as abstract legal norms, open to a wide range of judicial interpretations. If the certain loss was compensable, moral evaluations are considered as well: lost profit shall not be compensated if it was illicit, and often fierce debates arise over the issue of whether childbirth can be a basis for claiming damages. The concept of non-pecuniary loss has emerged in court practice, and its limits are to be drawn by courts. Fault is a concept expressing the required standard of conduct. Standards, by the nature, are always meant to be established and assessed by courts on a case-by-case basis. To establish causal link and the relevant cause (legal cause) on the basis of the chain of natural causation (condition sine qua non or a but-for test) is a task left to the courts by nature and by all legal systems as well. In other words, in addressing liability, the task of the legislator shall be restricted to providing specific rules where necessary and some basic evaluation (e.g., that fault is needed in order to establish liability) but no more.

The limits of liability are inherent to tort law, and cases of pure economic loss are a good example of this. The main conceptual feature of pure economic loss is that it is a loss without antecedent harm to the plaintiff's person or property, which is not a consequential loss in the same patrimony in which property has been damaged and which is not the loss of the plaintiff, who as person has been injured.[10] Pure economic loss is 'harm not causally consequent upon an injury to the person (life, body, health, freedom, or other rights to personality) or to property (tangible or intangible assets)'.[11] Compensating pure economic loss is a challenge for all jurisdiction owing to its unclear contours. Normally, courts do not award compensation for such loss in order to keep the floodgates shut against claims that could be unpredictable in terms of the amounts or the number of potential plaintiffs. Helmut Koziol, in considering the compensability of pure economic loss and searching for elements of risk allocation in the flexible system of tort law, identifies the following factors of evaluation: number of potential

10 Bussani, Palmer, 2003, p. 5.

11 Koziol, 2004, 141 et seq.

plaintiffs, existence or absence of additional duty of care, proximity and special relations, dangerousness, dependence, obviousness and actual knowledge, clear contours, negligence and intent, the importance of violated financial interests, and the importance of the defendant's financial interests.[12] In general, judgements of the court in tort cases are the result of counter-weighing these elements and balancing the interests of the tortfeasor and victim in line with the weight of the factors relevant under the given facts of the case. The risk allocation in the judgement is provided accordingly. Thus, the judgement is the outcome of balancing of the interests. The preconditions of liability are called for only in order to anchor the judgement in the civil code and maintain the conceptual framework for liability. However, interpretation of written law does not arise in this context.

The same holds for enforcing inherent rights of persons in the context of private law, where fundamental rights are to be prioritised by the courts. The Lüth-judgement delivered by the German Constitutional Court is a good example of this.[13] The Bundesgerichtshof and the Bundesverfassungsgericht agreed upon the relevant values, that is, human dignity on the one hand and freedom of speech on the other but disagreed upon which one to prioritise. Thus, the mechanism was the very same. The legislator did not play a role at all in establishing the rights and obligations of the parties.

In this evaluation-based flexible model, the content of the norm referred to by the court in the judgement is not provided as a result of interpreting the written legal text but by establishing a social evaluation of the case. The social evaluation is actually provided by the court with the judgement. This mechanism is very similar to the one based on which constitutional courts come to conclusions providing the '*interpretation*'[14] of the constitution after counter-weighing constitutional values and balancing interests.

12 Ibid., pp. 141–161.

13 Judgment of 15 January 1958, 1 BvR 400/51.

14 For more details in Hungarian scholarship, see, e.g., Tóth, 2009.

5. LEGISLATION VS JUDICIAL ADJUDICATION

Of course, the written rule provided by the legislator is not irrelevant in this model either. Its role, however, cannot be described as an order that comes from a higher hierarchical level. The function of written rules provided by the legislator is complex.

Written rules provide the basic evaluation and the set of values that can be relevant in the course of deciding cases. Such an evaluation is provided along with freedom of contract (private autonomy), rules addressing unequal bargaining (gross disparity, unfair standard contract terms, hardship), specific rules in tort law for liability in cases of extra-hazardous activity (consequences of dangerousness and avoiding externalities), opportunity to reduce damages on equitable grounds (considering the relevance of financial situation of the tortfeasor and of the victim), or exclusion clauses that limit the liability for death, personal injury, and health damage unenforceable (ranking the protected interests). The court has to overrule the basic evaluation provided by the legislator only if – and insofar as – another relevant risk allocation element (value) is strong enough to establish such an overruling. On the level of legislation, such an opportunity for overruling written rules is provided with general clauses.

An important difference between legislative and judicial law-making is the level of legitimacy. In democracies, the source of legitimacy of legislative power is the election (which provides a strong legitimacy in a proper election system), while the legitimacy of the courts is the system of choosing and appointing the judges. The legitimacy of judicial power primarily seems to be a question of state organisation. The legitimacy of legislative power comes to the foreground in cases where social evaluation is uncertain or lack of consent is seen among the community of lawyers on the understanding and evaluation of a case. Such an issue

emerged in Hungarian court practice in the context of the concept of exclusive state property[15] or damages claims for childbirth.

One specific group of cases in medical malpractice relates to where a child was born with a genetic or teratological deficiency (e.g., Down syndrome) owing to the failure of the doctor who was negligent in revealing and disclosing the obvious risk to the pregnant mother during pregnancy, thus depriving the parents of the opportunity to decide on abortion otherwise permitted by law in such a situation. In such cases, the parents may have a claim for damages as a compensation of giving life to child with a mental or physical handicap (*'wrongful birth'* claims). It is also a question whether the child could have such a claim in her own name (*'wrongful life'* claims). While wrongful birth claims are normally accepted, considerable arguments follow against allowing wrongful life claims. In Hungary, the Supreme Court established[16] that the child shall not be entitled to claim either pecuniary or non-pecuniary damages from the medical service provider for being born with genetic or teratological deficiencies on the grounds that, during the pregnancy, her mother could not have decided on an abortion because of the incorrect information given to her by her medical service provider if an abortion would have been otherwise permitted in such a case. The scope of the unificatory resolution is to be restricted to wrongful life cases, that is, to cases where the genetic or teratological deficiency is of a natural origin and has developed independently of the activity of the medical service provider or its employees. Thus, claims for damages as compensation for prenatal injuries (compensation for injury suffered as a

15 Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic] judgement no. Pfv. I. 21.446/2008. (BH 2009.175.). The question was whether exclusive state property would mean that objects (real estates or tangible things) belonging to this category do not exist in the eye of private law (French model) or that such ownership is limited in its public functionality (German model). Courts were divided on this issue. Finally, the Supreme Court followed the French model, but legitimacy provided was too weak, and the legislator set forth specific rules by means of Act CXCVI of 2011 on national property.

16 *No Damages for Wrongful Life*, Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic], Jogegységi Határozat [Unificatory Resolution] no. 1/2008, 12 March 2008, Magyar Közlöny [Official Journal of the Hungarian Republic] no. 2008/50 (26 March 2008).

result of intervention of doctors during the pregnancy) are not covered by the resolution. However, the resolution does not affect the claims of parents.

The necessity to pass such a resolution concerning damages for wrongful life arose because, although the Supreme Court followed a settled practice of accepting such claims,[17] this interpretation did not correspond to the practice of some of the high courts in Hungary, which also declared and published their interpretation rejecting such claims brought by the child.[18] Not only the tension created by the diverging practice of high courts but also the obvious deviation from the trends presented by European legal systems[19] led the Supreme Court to revise its practice in such cases. As a result, obviously influenced by court practice of other European jurisdictions and with the clear intention of harmonising Hungarian court practice with the trend of rejecting such claims in most European jurisdictions, the Supreme Court decided to revise its former decisions and adopt a uniform practice of rejecting claims for damages for wrongful life.

The result of passing such a resolution in Hungarian law meant laying down the law covered by the resolution with the effect of an authoritative interpretation that might – perhaps should – have been given by the legislator too. The necessity of passing such a resolution in Hungarian law supports the argument that such sensitive issues may and should be addressed by the legislator even if this does seem incompatible with the flexible system of tort law. The process of making a law, in a democratic society, designed for channelling and harmonising different social values and interests – in such sensitive areas – seems to be a more appropriate way of fixing such principles than using court decisions.

The question of whether giving life to a child regardless of the child being healthy or not could be the basis for damages claims may impose a

17 Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic] judgement no. Pfv. III. 22.193/2004. (EBH 2005.1206) reported by Menyhárd, 2006, pp. 9–11.

18 Opinion of the Civil Law College to the Regional Court of Pécs no. 1/2006. (VI. 2.), Opinion of the Csongrád County Court, referred to in the explanatory notes to the Unificatory Resolution of the Supreme Court.

19 Explicitly referred to in the explanatory notes to the Unificatory Resolution of the Supreme Court. See also Koch, p. 608.

heavy moral burden on judges. It may not be appropriate to impose such a burden on judges, or courts may not have a strong enough legitimacy for deciding such issues. In France, the court practice was reversed by legislative acts[20] on the same issue; in Hungary, the same revision was performed by the courts. It made no difference whether the step was taken using legislative or judicial measures.

In Hungary, as it happened in other Middle-East European countries, a majority of the citizens had become overburdened due to bank loans denominated in Swiss Francs. These consumer loans became a huge social problem threatening mass insolvency of households. Many claims were brought to the courts arguing that shifting the risk of changes in currency rates to the debtor consumer was unfair and unenforceable. In order to avoid the flood of claims, the legislator enacted a law that declares such clauses explicitly unenforceable.[21] The courts could have come to the same conclusion with the same result by applying the rules providing unenforceability of unfair standard terms in the Civil Code.[22] However, it seemed more efficient to provide a legislative solution instead of deciding thousands of claims in court procedure. The only difference between the legislative step and the solution provided with judicial adjudication was the efficiency.

Underlying these examples can be observed the fact that the difference between judiciary and legislative measures cannot be found in hierarchy but in legitimacy and efficiency. In other words, there is no difference between judicial and legislative power.

20 Loi no. 2002/303 du 4 mars 2002 ('Loi Perruche').

21 2014. évi LXXVII. törvény az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről [Act LXXVII of 2014 for the amendment of certain consumer loan contracts relating to their currency and interest].

22 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Hungarian Civil Code] § 6:103.

6. LAW VS REGULATION: THE LEGAL NATURE OF A CIVIL CODE

The law is not a heterogenous system. The origins of content of norms are also different. Originally, civil codes like the BGB or the Code Civil had multiple functions, and this was reflected by the heterogeneity of the norms that emerged too. Primarily, norms were created in order to make the norms established by the judgements of courts transparent. Further, norms were also meant to make diverging court practice into unified law: diverging law is incompatible with the idea of sovereignty. Furthermore, beyond such attempts, rules were incorporated for transmitting direct policy (e.g., the *lésion* in Code Civil).

In order to assess the nature of written law, one needs to distinguish between law and regulation. Although both are mostly termed as 'law' in common legal parlance, addressing law as regulation is misleading. Law is a system of norms transmitting social values and implementing social evaluation. Law is a self-coordinating, autonomous order of the society that emerged in a bottom-up-approach and is created and established by courts through addressing social conflicts by judgements. Courts establish policy. Constitutional law and civil law are '*law*' in this sense. Regulation, on the contrary, is a direct order of the legislator prescribing clear-cut rules for social coordination. Regulation does not necessarily reflect values. It implements direct policy of the regulatory power and assumes that law is the order of the sovereign instead of taking it as an autonomous order of the society. Regulation follows an up-to-bottom approach and is based on the prediction of the legislator.

While, in the context of regulation, the written norm is a tool of the legislator for communicating the direct order to the members of the society, in the context of law, the written norm is an abstract formulation of the pillars of the autonomous order derived from judgements of courts.

This distinction also determines the role of the court: in the context of regulation, the court simply applies the order of the sovereign while in context of law, the court is the part of the system of creating law.

In the realm of law, the court and the legislator create law together. Whether and how far evaluation of cases is left to the courts (i.e., the playing field provided for them) may depend on factors like legitimacy or efficiency. Whether the legislator or the court has stronger legitimacy in the society depends on the legal and social culture and on the system of selection and appointment of judges. Efficiency depends on the number of potential cases: the more individual the potential number of cases, the less efficient is the legislative solution.

7. IMPORTANCE OF STRUCTURE AND COHERENCE AND THE ROLE OF POLICY IN PRIVATE LAW

In addressing a legal problem in private law, we assume that the judgement is the outcome of closed lines of arguments. These arguments point to one and only one correct conclusion. Thus, the outcome of the case is not arbitrable but is determined by principles. Sometimes, the solution is a policy judgement. Such judgements are to be handed down when there are no answers derived from the existing legal provisions or when there is an answer, but the result is unacceptable from the point of view of social evaluation. Policy judgements are also expected to be consistent as they are to comply with the requirement; in other words, similar cases are to be decided in similar ways, while different cases are to be decided differently. Explanation of policy issues and the conclusions on such grounds, however, are also expected to fit into the logical structure of private law. This would imply that the judgement is to be seen as the only logical consequence of premises that are relevant in the given case.

This internal logic resembles the system of mathematics. There is a consent about axioms (premises) that we never doubt. They make the conceptual basis of private law. The basic structural concepts like person, ownership, contract, liability, etc. provide the domain for the validity of the conclusions. Arguments, presenting the line of conclusions, are to be drawn by the logic on the basis of the concepts (axioms) as they are related to the social relationship, that is, the facts of the case. If we change the concepts, then arguments and conclusions based on them

are not valid anymore. Syllogisms, on the basis of axioms and premises, establish a conclusion that is inevitable. This is the scientific element in the art of law, because the correctness or failure of syllogisms can verify or falsify the consequences, which is the basic criterion of science. The methodology, used in order to obtain conclusions in individual cases with the application of the law, is based on consent of the interpretive community of lawyers in the society.[23]

The underlying difference between the way of thinking of mathematics and law is that, in legal adjudication, the logical consequences can and shall be assessed, and if necessary, overruled in the light of social values relevant in the given case. Such overruling, however, should also fit into the logical structure. General clauses open the line of arguments for social evaluation. Concepts, premises, and syllogisms create a system that forms the basis of the common understanding of lawyers, that is, the interpretive community of society entrusted with the task of social engineering. Judgements or legislative measures that do not comply with this system, undermine the common understanding and are to be deemed detrimental.

As mentioned earlier, private law can be considered a flexible system,[24] where judgements are the result of balancing relevant values and interests. This is how law actually works as a mechanism of transmitting and implementing social values.[25] As such valuations of cases cannot be structured to build a system on: arguments anchored in legal provisions, as well as standards and doctrines, are required to do that. In the absence of such a structure, professional discourse and common understanding of the arguments would be impossible. If there is no such common understanding, one can neither establish the scope of conclusions nor predict the consequences to other cases.

In private law, the content of norms is to be established by the judges via interpretation and application of standards, doctrines, and general clauses. These are the tools of opening the line of arguments for social evaluation. Insofar as enforcing policy is part of the methodology, the

23 Popper, 2002, pp. 17, 27.
24 Wilburg, 1950; Wilburg, 1964, p. 364.
25 Habermas, 1998, p. 255.

system remains coherent. The consequence of the role of courts is that the content of private law actually consists of statements predicting the outcome of hypothetical cases.[26] The logical structure steered by considering policy issues and social evaluation results in a specific method that brings law close to the nature of *art*.[27]

8. AD HOC LEGISLATION AND THE STRUCTURE OF PRIVATE LAW

One of the consequences of *ad hoc* legislation is that the system of written norms of private law becomes a mixture of broadly defined rules, formulated on a high level of abstraction (law) and norms defined in a concrete and specific way and of a regulatory nature. Both legislation and judicial adjudication may be seen as an intervention of state in the relationships of individuals. Especially, in context of contract law, this intervention limits the freedom of contract, mostly in order to protect public interest or correct market failures. From the model of private law follows the fact that regulation, as a legislative intervention, is necessary if and insofar as judicial adjudication is not a proper tool for the intervention of the state in private law relationships. *Ad hoc* legislation is mostly regulation rather than law in the sense described above.

It is a historical experience in the development of private law that the more detailed and specific the applicable norms are, the less compatible the result of the application is with the social evaluation of the specific case. This is the consequence of narrowing the room of judicial adjudication. The structural impact of *ad hoc* statutory intervention can be positive if it can increase legal certainty or make social evaluation clearer. Its impact on this level depends on how coherent it is with the structure of the existing law, including court practice. A regulatory approach is, generally, not the standard methodology of private law. In order to distinguish cases and to provide justice for parties in individual cases, enough room must be allowed for judicial adjudication.

26 Menyhárd, 2019, pp. 69–82.

27 See the reference to *ars* in the maxim 'ius est ars boni et aequi' by Ulpian.

One of the problems with *ad hoc* legislation is that, in most of the cases, it narrows the playing field. The other is that mostly the consequence of such legislation increases the uncertainty in the flexible system of private law, because it does not clarify whether cases that do not fall under the scope of the specific regulation but are similar to that are to be distinguished and decided differently or are to be decided the same way.

Consumer protection is a good example of how specific legislation can make the contours of the structure of private law uncertain. The goal and the underlying policy of consumer protection are clear. The division of private law on the basis of subjective qualification, however, raises the question of whether contracts of small- and middle-sized enterprises, individual entrepreneurs in particular, with big companies are to be assessed the same way as consumer contracts or are to be assessed differently. On some points, in order to avoid inconsistency, the rules that are relevant in consumer protection legislation could be shifted to the general level. This was the solution followed by the Hungarian legislation when implementing the general concept of unfair contract terms in standard form contracts, making such contract terms unenforceable not only in consumer contracts but in contracts in general. It is, however, unclear, to what extent unfairness (non-compliance with the requirement of good faith and fair dealing) is to be assessed differently based on the bargaining power of the parties. In other words, it is not possible to predict if a contract term declared unenforceable in a consumer contract would be – and if yes, under what circumstances – unenforceable in a *'B to B'* contract as well if the parties had vastly different bargaining powers. In such cases, the policy arguments underlying consumer protection may suggest the same outcome while policy arguments underlying commercial law may suggest a different conclusion.

9. CONCLUSION

A distinction is to be made between law and regulation. Private law is more law than regulation and shall be assessed accordingly. The main difference between codified and non-codified legal systems is

legitimacy: in a system of common law, legitimacy is allocated to the courts; in written law, it is allocated to the legislative power. Whether the legislator or the court has stronger legitimacy in society depends on the legal and social culture and on the system of selection and appointment of judges. Efficiency depends on the number of potential cases: the more individual the potential number of cases are, the less efficient is the legislative solution. The Civil Code has different functions. Such functions, however, are not about providing the content of law, because the content of private law emerges in a bottom-up-way, even in a codified system. This is the consequence of how civil codes are designed, never independent of court practice. Further, the role of lawyers as an interpretive community shall be considered while assessing the content of law. The Civil Code (1959) in the history of codification of private law is a good example of this. The law transmits social values. In the flexible system of private law, the civil code provides the basic evaluation, which can be overruled by the courts via interpretation of written norms, deciding *'hard cases'*, application (concretisation) of general clauses, or establishing priorities amongst competing values. The main functions of a civil code are to determine methodology and structure of argumentation, provide a legal framework for social and economic phenomena through basic evaluation (e.g., invalidity on the grounds of excessive benefit) of implementing direct policy (e.g., rules on consumer protection, or limiting liability to foreseeable losses); the civil code may also confirm and reflect trends in court practice (e.g., strict liability for breach of contract, protection of inherent rights of persons) and may also overrule such trends (like revising non-pecuniary damages during codification).

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OBJECTIVES AND CRISES OF CODIFICATION OF PRIVATE LAW IN FRANCE

GUSTAVO CERQUEIRA

ABSTRACT

Modern French codification of private law is, above all, the written expression of a doctrinal work, a sort of official legal science petrified in state law. As an approach to the creation of legal rules, this codification stands out for its aim to create a well-ordered legal framework, composed of logically consistent and accessible rules. Its guiding principles were and remain constituted by the dual objectives of creating a political nation under unified rules and maintaining this legal system as an attractive option for legal transplants and model rules worldwide as a method of integrating it into the international legal order. This chapter presents the methods by which the political project of codification was achieved, the theoretical foundations of the norms considered during the initial phase of the 19th-century codification, as well as the effects of this codification, which manifested in a veritable model-code of the following two centuries, internationally. Next, the shortcomings of the current status of the code are examined, such as the process of 'decodification', by which significant rules are recast as special norms (e.g., regulating economic life) outside the body of the code and the associated trend of recodification whereby various segments in the body of the code

Cerqueira, G. (2024) 'Objectives and crises of codification of private law in France' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 139–179. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_7

are constantly modified. Finally, experimental legislation is mentioned as a risk to the stability of codified rules of statutory law.
Keywords: *Code civil, codification of civil law, codification of commercial law, model for international codification efforts, legislative inflation, experimental legislation, France.*

1. INTRODUCTION

French codification of private law[1] is formally marked by the impetus for diversification and classification of legislative rules, characteristic of the French spirit, *'which is accustomed to organizing all knowledge in a logical manner'*.[2] A highly specialised codification has resulted from this perspective since the time of Napoleon to the present day. On the susbstance, modern French codification of private law is, above all, the written expression of a doctrinal work, an official revelation of the attempts to formulate natural law accumulated by modern authors over several centuries, a sort of official legal science petrified in state law.[3] Also, it is influenced, like many others, by historical and contextual factors,[4] which serve as keys to understanding the objectives and limitations of codification in each period under consideration. Indeed, codification as

1 The bibliography on French codification is too extensive to be included in this contribution. The reader may find it useful to consult, e.g. Fenet, 1827–1828; Locré, 1827–1832; Portalis, 1844; Halpérin, 1992; 1996; p. 200; Beignier, 1996a; Oppetit, 1998; Cabrillac, 2002; Pouvoirs, 2003; Lequette, Leveneur, 2004; L'esprit du Code civil, 2005; Université Panthéon-Assas, 2007; Cour de cassation, Institut André Tunc de l'université Paris 1, 2007; Université Panthéon-Assas, 2010. More recently, in the English language: Cannarsa, 2023, pp. 65–87.

2 Jauffret-Spinosi, 2002, pp. 265–275. To realize this, one only needs to consider the title of jean Domat's monumental work: Les lois civiles dans leur ordre naturel, published in 1689. Foreshadowing the codification of 1804, this foundational treatise offers a structured and Cartesian systematization of civil laws (that is, Roman law), written in clear, precise, and exact language.

3 F. Zenati-Castaing, 2021, pp. 54-55.

4 Cartuyvels, 1993, pp. 85–107; Lefebvre-Teillard, 2004, pp. 77–85. Paradoxically, when it carries 'an intention of political renewal', codification also reflects 'a hope to halt the course of history' (Carbonnier, 2004, p. 199). See also: Carbasse, 2003, pp. 276 et seq.; Halpérin, 1992; Wijffel, 2010, p. 245 *et seq.* and 293 *et seq.*

a phenomenon[5] occurs episodically.[6] Codifying periods in France were from 1804 to 1810 and from 1949 onwards, while from 1810 to 1948, no codification took place.[7] Therefore, it is difficult to assume the existence of an equivalence of significance – and hence objectives – between the Napoleonic codifications and more recent ones unless we consider, from a historical perspective, that since the French Revolution, codification has always been associated with the cult of the *Loi*.[8]

Although striving to achieve completeness, systematisation, and logical coherence, any codifying work, whether innovative or compilatory, is always subject to improvement. Portalis was aware of this: *'a code, however complete it may seem, is no sooner finished than a thousand unexpected questions arise for the judges'*.[9] Indeed, regardless of the time of their promulgation, codes are immediately or shortly after subjected to criticism,[10] mainly from professors, practitioners, politicians, and even public administration bodies. Sometimes, the criticisms reveal a genuine crisis in the codification process itself. Regarding the objectives,

5 Halpérin, 2004, p. 60 *et seq.*

6 On the episodic nature of codification, see: Oppetit, 1998, p. 7 *et seq.*

7 However, it is worth noting the adoption of three codes during the interwar period: the Maritime Labor Code and the Disciplinary and Penal Code of the Merchant Marine in 1926 (still in force today), the Wheat Code in 1936 (repealed in 2006), and the Tax Procedure Book in 1938 (still in force today).

8 Halpérin, 2004, p. 63; Carbasse, 2003, p. 276; Wijffel, 2010, p. 293. However, it is important to emphasise that Portalis positioned himself in opposition to revolutionary legal positivism by advocating legislative minimalism (Portalis, 1844, pp. 7–8):
'*We have also guarded against the dangerous ambition of wanting to regulate everything and foresee everything.* [...] *The role of the law is to establish, through broad principles, the general maxims of the law, to establish fruitful principles and not to delve into the details of questions that arise in each matter.*'
Consequently, the judge is granted significant leeway in their role of interpreting the law, as stated in art. 4 of the Civil Code: '*A judge who refuses to judge, on the grounds of the silence, obscurity, or inadequacy of the law, may be prosecuted for denial of justice*'. See more broadly: Rémy, 2003, pp. 22–36.

9 Portalis, 1844, p. 8.

10 For a concise presentation in civil matters, see: Halperin, 1996; in commercial matters, see sections 2 and 3.1.

certain factors help us in understanding the crises affecting the codification of private law in France.

At the heart of this dual problematic lies a fact of paramount importance: the method of codification. Indeed, *'what is codification if not the spirit of method applied to legislation?'* [11] Since the Revolution, two methods have coexisted.[12] On the one hand, is *codification-innovation*,[13] which involves reforming existing laws by creating new laws.[14] At the core of this method is *codification-constitution*, which aims to establish the *tissu juridique* of civil society by adopting a code. This ambition is particularly embodied by civil codification: *'there is no true civil code that does not bear the founding principles of a society'*.[15] For example, Portalis defines the Civil Code as *'a body of laws intended to govern and define the relationships of sociability, family, and interests among individuals belonging to the same city'*.[16] The conceiving of a *'Code of Civil Laws'* was actually planned by the Constitution of 1791,[17] with the Civil Code becoming the constitution of private relations.[18] Innovative or even constitutional, its preparation

11 Portalis 1844, p. IV.

12 See Oppetit, 1998, pp. 17 *et seq.*; Sourioux, 1989, pp. 145.

13 Sourioux, 1999, p. 145. Other classifications are proposed by legal scholars, such as, for example: 'codification-modification' (Cabrillac, 2002, *passim*); 'codification-qualitative' (Cartuyvels, 1993, *passim*); 'real codification' (Carbasse, 2003, p. 297); 'modern codification' (Zenati, 1998, pp. 217–253).

14 In the case of recodification, codification-innovation can lead to the replacement of one code with another, as seen in the 1994 Penal Code codification, or to the gradual overhaul of a specific area within a code, as exemplified by the reforms that the Civil Code underwent starting in the 1960s. For instance, Cabrillac, 2009, p. 60.

15 Grimaldi, 2005, p. 24.

16 Portalis, 1844, p. 92.

17 The first title of the 1791 Constitution – Fundamental Provisions Guaranteed by the Constitution – indeed stipulated that 'a Code of civil laws common to the entire Kingdom shall be established'.

18 According to legal scholars, the Civil Code is often referred to as the 'constitution of French civil society' (Demolombe as quoted in Mazeaud, 2004, p. 155) or even as 'the true constitution of France' (Carbonnier, 1986, p. 309:
'*The true constitution of France is the Civil Code* [...] *sociologically, it has the significance of a constitution because it encapsulates the ideas around which French society was formed after the Revolution and continues to be formed to this day, developing these ideas, perhaps transforming them, but never disavowing them).*'
See also Mazeaud, 2004, pp. 152–159; Cabrillac, 2005a, pp. 245–259.

is often entrusted to legal scholars due to the complexity of the reform needed both in substance and in form. On the other hand is *codification-compilation*, which involves organising existing and scattered statutes without creating new rules. Of an administrative nature, this codification has been conducted since 1989 by the Superior Codification Commission.[19] The codified provisions then completely replace the previous statutes.[20] This codification is known as '*à droit constant*'. The codification of consumer law in 1993, the recodification of commercial law in 2000, and the labour code in 2008 are the most notable examples of codification-compilation, while the Civil Code of 1804 and the penal codes of 1791 and 1810 are the best examples of codification-innovation.[21]

Although opposed, these methods each contain an element of the other. The compilation work always includes an element of innovation, while the innovative work cannot disregard the past.[22] Thus, when codifying *à droit constant*, the French parliament authorises the government to make modifications

> *that may be necessary to ensure respect for the hierarchy of norms, the drafting consistency of the texts thus assembled, harmonize the state of the law, remedy any errors, and repeal provisions, codified or not, that have become obsolete* [...][23]

The same applies when codifying for innovation: like the 1807 Commercial Code, the Civil Code of 1804 was also 'more a work of compilation at its origin than truly original work'.[24] Indeed, except for a few rare solutions – such as the conception of property exclusively in its

19 Established by Decree No. 89-647 of September 12, 1989, and placed under the authority of the Prime Minister.

20 Suel, 1993.

21 On criminal codification, see Carbasse, Vielfaure, 2014, pp. 211 et seq. and 459 et seq.

22 Dunand, 2003, pp. 195–226.

23 Art. 84, II of Law no. 2004-1343 of 9 December 2004, on the simplification of the law. These exceptions, for the most part, were already provided for in art. 1 of Law no. 99-1071 of 16 December 1999, authorising the government to proceed, by ordinances, with the adoption of the Legislative Part of certain codes. See Molfessis, 2000, pp. 186–194.

24 Beignier, 1996b, p. 3.

individual/State dialectic (art. 544) or the absolute equality of legitimate children inheriting from their parents (art. 745) – the Civil Code is based on unifying choices among different but all legitimate legal solutions.[25] Thus,

> *contrary to what has sometimes been claimed, neither the binding force of contracts nor the general obligation to compensate for damage caused by one's own fault are the result of an individualistic philosophy embraced by the drafters of the Code under the influence of the Enlightenment.*[26]

Whether innovative or compilatory, French codification embodies several ideas: those of prestige, power, culture, and identity, as well as of rationality and, of course, coherence and simplicity.[27] In short, it is 'a symbol of modernity',[28] of legal rationality. In the French experience, this modernising perspective of the law through codification is met with clearly discernible objectives (2). However, the codifying vocation of France can play many tricks. Indeed, the vicissitudes affecting codification reveal more than the imperfections of one code or another: they expose the limits of the codification policy itself to the point of revealing its crises (3).

2. OBJECTIVES

The history of codification teaches us that any codifying work can succeed only with strong political will.[29] Otherwise, it is doomed to fail.[30] Adhering to the idea of codification – and its rise – responds to various

25 Sériaux, 1997, p. 101.

26 *Ibid*. In the 'transaction' carried out by the drafters of the Civil Code, the definitions and legal effects of contracts and civil liability can trace their origins back to the works of Domat and later to those of Pothier.

27 Compare with Malaurie, 1996, p. 200.

28 Oppetit, 1998, p. 8.

29 Cartuyvels, 1993, pp. 85–107.

30 Cabrillac, 2004, pp. 74–75.

requirements, which are not mutually exclusive.[31] These requirements are either political (expressing power combined, most often, with a philosophical or ideological orientation), social, or technical in nature. These requirements can all be encompassed in each political project.

The French codification of private law is no exception to this, and in fact, it is the modern archetype of codification. Considering its emergence in the 19th century and its more recent revival, French codification seems to have a dual ambition, which ultimately constitutes its justification. On the one hand, the Napoleonic codification was aimed at implementing a political project for the nation (2.1); on the other hand, the strategy followed in post-war codification to integrate itself into the international legal market was to make the French legal system attractive (2.2).

2.1. IMPLEMENTATION OF A POLITICAL PROJECT

The codification of French private law at the beginning of the 19th century aimed to establish a national law[32] to shape the identity of the new political order in post-revolutionary France.[33] It emerged from the grievances presented in the *cahiers de doléances* addressed to the *États*

31 Oppetit, 1998, pp. 8 et seq.; Jean and Royer, pp. 127–142.

32 At the beginning of the 19th century, the legal system was neither uniform nor stable nor simple. On the one hand, there was Roman law, revitalised by the interpretations given to Justinian's compilations, and it was often referred to as *jus commune* to describe its empire beyond borders (Halpérin, 2004, p. 18). On the other hand, there were customs and statutes, which were initially regional or local before becoming national. This latter set of sources constituted the *jura propria*, including a few royal ordinances applicable throughout the empire (Carbasse, 2003, p. 85). In 1789, France still had 65 general customs and 300 local customary variations in the northern part of the kingdom, while the south followed Roman law as 'ratio scripta', albeit with variations according to parliamentary jurisdictions (Bouineau, Rux, 2004, p. 35).

33 Wijffel, 2010, pp. 245–246.

Généraux in 1789[34] and was realised under the leadership of Napoleon Bonaparte,[35] in the spirit of a nation in the process of unification.[36]

However, French codification was not *'self-established'*.[37] A genealogical perspective on the codification process reveals that the principle of a systematic and reform-oriented code, which emerged from 1750 onwards in Europe, resulted from the dynamic introduced by the state consolidation of law in the modern era. These projects found their basis in a legal ideal of an orderly compilation of sources that was already present in Roman times.[38] However, codification was also seen as a political expression of power. Indeed, codification '*played a significant role in the actions of Bonaparte, who saw in the Civil Code not only an instrument for restoring civil peace but also, above all, a major component of his government and reform work*'.[39] From this perspective, French codification perhaps symbolically embodies more than any other the trend towards political centralisation observed in Europe since the 16th century, with the code becoming the instrument for consolidating royal or princely legislation '*to the detriment of other sources of law relegated to a subsidiary role to ensure a centralized redistribution of power relations over a given territory*'.[40] In its social dimension, French codification aimed to '*promote a new social order in a spirit of reconciliation between the old order society and the new aspirations for freedom and equality*',[41] thus revealing the predominant philosophical and ideological approaches following the extreme conflicts of the revolutionary period.

34 Oppetit, 1998, p. 10.

35 Regarding the connections between codification and the Napoleonic regime, you may want to refer to Halpérin, 2003, pp. 11–21. Regarding the role of Napoleon in the preparation of the Civil Code, consult Sourioux, 2004, pp. 107–121.

36 Lefebvre-Teillard, 2004, p. 83; Fourré, 1985, p. 14.

37 Cartuyvels, 1993, pp. 85–107.

38 *Idem*. The goal was to enhance understanding of the law and address legal uncertainty, thereby improving the lengthy, costly, and uncertain litigation that came before the magistrates. Even though 'the political function of the code as a factor of political unification and centralization is probably not entirely absent from the Roman emperor's thinking, it is not evoked' (*ibid*., 87 *et seq*.).

39 Oppetit, 1998, pp. 8–9.

40 Cartuyvels, 1993, p. 94.

41 Oppetit, 1998, p. 10.

Codification thus constitutes an important aspect of the history of French legal sources and civil order. By proposing rationalisation of the law through a systematic organisation of laws, codification strengthened the very authority of the law. This was Napoleon's political project: to promote a social order based on the rule of law under which all citizens are equal. The authority of the law was shaped by an authoritarian ideology that prioritized collective interests over individual ones – such as the concept of freedom – by placing them under surveillance, particularly in contract law and family regulation, all in the image of and in service to the nation.[42]

This authority of the law was further reinforced by the fact that Napoleonic codification aimed to be a comprehensive and totalitarian work. The codification of civil law excelled in this double objective: it aimed to bring together, exclusively, the entire law that governed various aspects of social life. In contractual matters, for example, it left only one provision regarding the proof of commercial acts in the Commercial Code (the former art. 109). The general abrogation of the old law governing the subjects covered by the Civil Code by art. 7 of the Statute of 30 Ventôse Year XII attests to the totalitarian aspect of civil codification, as does Napoleon's desire for his Civil Code to become eternal[43] and his fear of seeing it transfigured by its interpreters.[44] This dimension is also expressed through the standardisation achieved by codification. According to Portalis, '*the mere existence of a uniform Civil Code is a monument that guarantees the permanent return of the state's internal peace*'.[45] This peace would be guaranteed more specially as the Civil Code aimed to unify the nation by mediating between written law and customs and between old law and revolutionary legislation, erasing the humiliating

42 Halpérin, 1996a, p. 23.

43 At Saint Helena, Napoleon is said to have stated: 'My true glory is not to have won forty battles: Waterloo will erase the memory of so many victories. What will never be erased, what will live eternally, is my Civil Code' (Tristan de Montholon, 1847, p. 401, as quoted in Halpérin, 2003, p. 11).

44 It is a famous phrase attributed to Napoleon: 'Mon code est perdu', regarding the publication of the early commentaries, an idea found in Las Cases, 1956, p. 153, as quoted in Halpérin, 2003, p. 19.

45 Portalis, 1844, p. 302.

distinctions introduced by political law between individuals and infiltrating civil law.[46] In conclusion, Napoleonic codification was linked to a historical process of centralising political power, which was incompatible with the pluralism of sources.[47] From this perspective, the Civil Code of 1804, the Civil Procedure Code of 1806, the Commercial Code of 1807, the Code of Criminal Procedure of 1808, and the Penal Code of 1810, each in its own way, contributed to the affirmation of this power.[48]

Although codification was intended to implement a political project, it gradually proved incapable of fully ensuring it. Drafted to provide access to the people, the Napoleonic codes quickly revealed the limits of their sobriety. The polysemy of the texts, like many provisions of the Civil Code, gave rise to controversies leading to interpretation, recourse to the judiciary, uncertainty, and often unpredictable evolution.[49] Then, sobriety justified the emergence of a normative jurisprudence. The legislator had foreseen this by requiring judges to decide despite the obscurity or inadequacy of the law.[50] Finally, designed to govern the future, the Napoleonic codes may have too deeply embodied the spirit of compromise with the past, which gradually made them anachronistic in the light of the significant transformations that French society and the economy would undergo from the second half of the 19th century onwards.[51] Consequently, as soon as they were completed, civil and commercial codification faced competition from numerous special

46 Fenet, 1827–1828, as quoted in Niort, 2009, pp. 121–160.

47 However, it should be noted that, unlike the Law of 30 Ventôse Year XII on the consolidation of civil laws into a single body under the title of the Civil Code of the French (art. 7), the Law of 15 September 1807, implementing the Commercial Code, did not repeal the old commercial usages. Furthermore, the Civil Code repeatedly instructs compliance with these usages. For example, it anchors contractual relationships in the practice of trade by providing in its former art. 1135 (current art. 1194) that contracts bind not only to what is expressly stated but also to all the consequences, especially those arising from usages. The same applied to partnership contracts, as the former art. 1873 reserved for them the application 'of the laws and usages of commerce'.

48 Leyte, 2004, pp. 123–130.

49 Malaurie, 2004, p. 4.

50 Civil Code, art. 4.

51 Jean and Royer, 2003, pp. 127–142.

legislations in areas such as rural law, housing, urban planning, specific contracts, and labour. However, the destinies of the two codes were not identical. Despite failed attempts at its comprehensive revision in 1904 and 1945,[52] and the rise of special legislation in the areas it covered,[53] the survival of the Civil Code of 1804 was ensured thanks to the revival of both its spirit by jurisprudence[54] and its letter by the legislator (reforms initiated between 1964 and 1977 in the fields of personal status and family law and, from 2006 onwards, in the fields of obligations and security interests).[55] It is true that the symbolic strength acquired by the Civil Code in the 19th century has since constituted a psychological obstacle to the prospect of comprehensive recodification.[56] By contrast, the survival of the Commercial Code was compromised. Indeed, the subject matter underwent a true process of '*decodification*' from 1838 onwards with the adoption of special legislation on bankruptcy and insolvency.[57]

Over the years, legislative appetite has only grown, leading to a revival of codification since the *Libération* with the creation of the Higher Commission in 1948 responsible for studying the codification

52 In modern times, some still advocate for the advent of a new civil code, see Atias, 1999, p. 200.

53 Rémy, 1998.

54 *Ibid.*

55 Cabrillac, 2004, pp. 73–82.

56 Cabrillac, 1999, pp. 211–220; Cabrillac, 2009, p. 53; Rémy, p. 5.

57 See section 3.1.

and simplification of legislative and regulatory texts.[58] However, this time, codification responds to different challenges.

2.2. INTEGRATION INTO THE INTERNATIONAL LEGAL MARKET

In contemporary times, French codification does not seem to respond to either the desire of the head of state to assert his authority or a political project for the nation, even though political issues – such as geographical

58 The Decree 48-800 of 10 May 1948, for which the report justifies its adoption states as follows: '*In recent years, laws and regulations have multiplied due to the expansion of state interventions in the economic and social domain, as well as financial difficulties and necessities resulting from war or liberation. These new texts, sometimes hastily crafted under the pressure of urgent needs, have generally been superimposed in a fragmentary manner on the old fundamental laws. These texts, multiple, scattered, difficult to gather, and not always appearing to be consistent, often lack the convenience and clarity that legislation and regulations should possess. As a result, citizens find it extremely challenging not to be ignorant of the law, and they are frequently compelled either to seek the assistance of business agents orbiting around legal professionals whose professional activity can no longer meet all demands or to establish specialized legal services within their enterprises. In this way, they are excluded from the production process of new elements, the often-high remuneration of which increases the cost of productive elements. Even specialized officials themselves, despite their specialization, have difficulty recognizing themselves in this labyrinth of legislation and waste precious time searching for applicable texts and determining their scope. Finally, judges in the judicial or administrative order are increasingly called upon to rule on disputes. To remedy this situation, it is essential to undertake a comprehensive codification effort that will encompass the entirety of existing legislation and regulations.*'

cohesion and the defence of legal tradition[59] – are not entirely absent. Instead, it pursues a legal objective, coupled with an economic and international perspective to address contemporary challenges.

After World War II, France, like the rest of the world, had to face the globalisation of the economy, which consolidated with China's opening up to the market economy in 1978 and the definitive fall of the Soviet Empire in 1991. Globalisation of the economy was accompanied by significant legal reforms in many countries to create a legal and economic environment favourable to both domestic and international investments. Besides modernising various branches of substantive law directly or indirectly related to business, these reforms also targeted rules relating to the international jurisdiction of state courts, to arbitration (both domestic and international), and to conflict of laws. The latter were liberalised to allow economic actors the freedom to choose the court (state or arbitral) and the applicable law for their relationships. Over time, the conditions were gradually met for states to engage in international legal competition.[60] In other words, this com-

59 Cabrillac (2005b, pp. 533–545) emphasises that, presently, French codification appears to be imbued with the function of cohesion and resistance. On the one hand, while the geographical cohesion of French populations does not seem to be a major concern of codification [...] the authorization law of December 16, 1999, allowing the government to adopt nine codes by ordinance, expressly provides in its Article 2 that the government can extend the application of codified provisions to New Caledonia, overseas territories, as well as the territorial communities of Mayotte and Saint-Pierre-et-Miquelon with the necessary adaptations.
Likewise, 'the adoption of the Commercial Code has led to a significant extension of applicable rules in some territories, contributing to the standardization of law within the territory of the Republic' (*ibid.*, p. 542). On the other hand, the survival of the Civil Code becomes a fundamental issue in the face of the somewhat distant threat currently of the adoption of a European Civil Code. From this perspective, 'The challenge of codification is then to defend a threatened legal and cultural tradition' (*ibid.*, p. 543). For a highly critical approach to the economic, cultural, and political feasibility of a European codification of civil law, see Lequette, 2003, pp. 97–126.

60 In France, the phenomenon of normative competition has already been extensively analysed: see especially Watt, 2005, pp. 615–633. Regarding the concepts of competition used in the legal field, see, among others: Harnay, Bergé 2009, pp. 15–25; Harnay, Bergé, 2011, pp. 165–192. More broadly, du Bois Gaudusson, Ferrand, 2008; Sefton-Green, Usunier, 2013.

petition is achievable only through the existence of *regulatory arbitration* on the one hand, and *regulatory competition* on the other. Indeed, both courts and legislations are subject to the arbitration of private actors (*regulatory arbitration*) who can choose a court and a law because they are allowed to do so, to minimise the costs of their disputes, both procedurally and substantively. Subsequently, because they have something to gain or lose, states invest in a legislative policy to attract businesses and attract business disputes (*regulatory competition*).[61] The legal order thus becomes a *'merchant order'*.[62]

Responding to this competitive scheme, for years, France has been pursuing a policy of making both substantive[63] and judicial law[64] attractive. However, competitive motivations do not have unanimous support.[65] Some consider the idea of making the law more attractive as meaningless, a false idea:

> *a reform is not justified solely by the desire for modernity but more precisely because it meets needs. The objective is not to make inherently austere statutes attractive.* [...] *If legal reform is necessary, it is because it contributes to ensuring justice and balance of interests at stake.*[66]

Notwithstanding these criticisms, the government has recently displayed a strategy of international influence through law, particularly by strengthening its legal attractiveness.[67]

To establish itself in the international legal market, codification seemed an adequate lever according to the political authorities. Although

61 Armour, 2005, pp. 17–19.
62 Grimaldi, 2005, p. 24. See also Les marchés du droit, 2017.
63 For an example in corporate law, see: Cerqueira, pp. 7–38.
64 See Cerqueira, 2023, pp. 345–380.
65 Delebecque, 2019, pp. 185–191; Larroumet, 2019, pp. 365–370; Usunier, 2021, pp. 171–189; Cerqueira, 2021, pp. 129–151.
66 Delebecque, 2019, p. 191.
67 Influence par le droit. Stratégie de la France 2023–2028.

previously somewhat veiled,[68] codification has appeared to clearly integrate into France's strategy to compete with other legal orders or legal hubs in recent years.[69]

There are several reasons for this. First, a legal *prêt-à-porter* seems more relevant than ever in contemporary societies '*as the only method suited [as opposed to common law methods] to the data of modernity and the constraints of developing law that meets the requirements of precision and speed*'.[70] Furthermore, codification is a manifestation of the very idea of a developed country, whose law is necessarily codified. This idea led, for example, China to establish a civil code that came into effect in 2021. The logic is simple: it is essential to ensure that all economic actors have access to a set of rules related to a particular area and whose authority is beyond doubt. Faced with the proliferation of laws[71] covering increasingly extensive, complex, and specialised areas, codification seemed the best way to the authorities mitigate the negative effects,

68 Gelard, 1999, p. 5089: The French codification enjoys a great international prestige, observable not only in Europe but also far beyond, in Latin America, Africa, or Asia. Even some common law countries also resort to codification for the most modern branches of law. However, if the government program is completed, we will be the only country in the world to have a total codification of the entire legal system. This means that from now on, no legislator in any country will make any reform without referring to what the French have done. This is a source of comfort for me, knowing that the common law is making increasing advances in our European institutions or in international courts. Thus, through codification, French law continues to play an exemplary role.

69 The recent reforms of the Civil Code in the areas of contract law and security interests, as well as those upcoming in the field of civil liability or special contracts, are all motivated by the desire to make French law more attractive (see, *e.g.*, Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, *JORF*, 11 févr. 2016, texte 25).

70 Oppetit, 1998, p. 23.

71 Flis-Trèves, Mehl, Pisier, 1991, pp. 121–134; Éoche-Duva, Boccara 2023; Carbonnier, 1995, pp. 157–160; Éoche-Duval, 2022, p. 421; Secrétariat général du gouvernement, 2022; Conseil d'État, 2016; Conseil d'État, 2018; Rapport d'information n° 2268, 2014; Rapport d'information n° 743, 2023; Boulard and Lambert, 2013; Circulaire du 26 juillet 2017; Proposition de loi constitutionnelle, 2019; Outin-Adam and Reita-Tran, 2006, pp. 2919–2922; Hispalis, 2005, pp. 101–115; Piastra, 2006, pp. 1060–1061; Pontier, 2007, p. 769; Zarka, 2005, pp. 660–661.

particularly those related to accessibility to legal rules, intelligibility of the legislation, and legal certainty.[72] Finally, the attractiveness policy cannot ignore the modernisation of sources, of which codification is one technique. In this perspective, two processes coexist. The first aims to carry out a genuine reform of the existing law either by modernising existing codes, such as the recent reforms of the Civil Code in the fields of obligations and security interests, or by replacing old codes, such as the Civil Procedure Code in 1975. The second aims to codify, without reform, sectoral legislation that is too scattered. Widely used since 1989,[73] this process leads to either the recodification of certain subjects, such as commercial law (in 2000) or labour law (in 2008), or the adoption of a new code, often very comprehensive and cross-cutting. This was the case, for example, with the Consumer Code of 1993, which regulates issues related to civil law, commercial law, economic law, criminal law, administrative law, and procedure. This was also the case with the Intellectual Property Code of 1992, the Monetary and Financial Code of 2001, and the Transport Code of 2010, among others.

This high level of codification in French law[74] reveals the persistence of postulates from the first modern codifications: the monopoly of state legality, the rationality of the system, and the permanence of the code. Undeniably, these postulates still seem to be well-received in the market of money and legal services, despite the allure of soft law.[75] However, some argue that codification is incompatible with globalisation.[76] This incompatibility results from challenges to the sustainability of increasingly detailed and meticulous norms by a society resistant to state monopoly on norm production, as well as to the stability and rigidity that codification entails.[77] In addition, the weaknesses of the method, revealed by the illusions and negative effects of excessive codification, add to this. This is particularly the case with codification *à droit constant*. Take, for example,

72 Gelard, 1999, p. 5089.
73 Braibant, 1999, p. 3.
74 See section 3.1.2.
75 Doganis, 2023, p. 4.
76 Kessedjan, 2004, pp. 920–921.
77 *Ibid.*

the recodification of the Commercial Code in 2000.[78] Recodifying the subject matter meant more the consolidation of commercial law provisions into a Commercial Code than the creation of a code *for* commerce[79] or a code for economic activities.[80] It was thus not a codification-innovation but a compilation of laws that were previously in force made without considering jurisprudence.[81] While the government emphasised speed[82] and improving the existing law, especially in terms of form, to justify the choice of compilation, authors often disqualified these arguments as fallacious. Regarding speed, it was noted that it prevented the gradual maturation of proposals, which is necessary to achieve quality. Moreover, speed does not promote democratic discussions of texts.[83] As for the improvement of the law, the quality of codification depends on the quality of the texts to be codified. In this regard, texts of private law (consumer law, commerce, labour) are of a much lower quality than many texts of public law, which are better thought out and better drafted.[84] Furthermore, the compilation '*is never truly à droit constant, which undoubtedly harms the coherence of the methodological approach*'.[85] In this regard, the recodification of the labour law is an illustrative example.[86] The effects of text accumulation, lack of clarity and coherence, deficiencies, and incompleteness are thus the most criticised aspects by authors. Codification, therefore, does not mean simplification.[87] Despite the efforts to bring order to a legal order in disorder, the desire to display the rationality and permanence of the codes seems to be challenged.

78 *Ibid.*
79 de Casanova, 2001, p. 286 *et seq.*
80 *Ibid.*
81 Monéger, 2004, p. 182.
82 Circulaire du 30 mai 1996 relative à la codification des textes législatifs et règlementaires, art. 2.1.1 (*JORF* 5 juin 1996, 8263 *et seq.*): '*Codification à droit constant [is the] only one [that] allows for the development of codes without slowing them down or getting lost in the examination and debates of any substantive reform*'.
83 Cabrillac, 2009, p. 61.
84 Oppetit, 1998, p. 20–21.
85 *Ibid.*
86 Ferrier, 2008, pp. 2011–2014.
87 Zaradny, 2007, p. 9; Viguier, 2010, pp. 81–91.

When considering the number and importance of codes adopted in recent decades, these weaknesses reveal much more than the flaws of one code or another: they expose the weaknesses of the codification policy itself. They could, therefore, reveal a certain crisis within codification in France.

3. CRISES

Current inquiries into the renewal of legal sources[88] and the metamorphosis of the *Loi*,[89] as well as the tendency to seek normativity everywhere,[90] might not have occurred – at least not with the cohort of denunciations and fears accompanying them[91] – if codification were not in a crisis. According to one author, the overarching concept of crisis helps account for a multitude of phenomena negatively impacting the French legal order, such as

> *legislative inflation, the profusion of laws, fragmentation, periodization, destabilization of the law, dispersion, proliferation, disintegration of the law, globalization, 'denationalization', the judicialization of the law, the multiplication of instances for the production and gestation of law, regulations of all kinds, complexity, specialization, the technicalization of norms, the professionalization of law, disinformation of citizens, and the decodification of major codes.*[92]

To the above list, we would willingly add the trend toward legislative experimentation. However, chosen as the method to structure the French legal order in the aftermath of the Revolution and Liberation, codification was supposed to prevent most of these destabilising phenomena. Yet, many of them are closely related to codification to a greater

88 Hachez, *et al.*, 2012; Bonneau, Mazeaud, 2022; Barraud, 2018; Lasserre-Kiesow, 2006, pp. 2279–2287.
89 Tessyé, 2022.
90 Thibierge, 2014; Thibierge, 2009.
91 Beauthier, de Broux, 2012, p. 716.
92 Lasserre-Kiesow, 2006, pp. 2279–2287.

or lesser extent. For instance, consider the decodification of major codes, of course, and also of legislative inflation, complexity, specialisation, technicalisation of norms, and periodicisation, globalisation, and so on.[93] The crisis of the French legal order thus largely indicates a crisis of codification.

This crisis can be apprehended through two of its phenomena: legislative inflation (3.1) and, in a more unconventional manner, legislative experimentation (3.2).

3.1. LEGISLATIVE INFLATION

Although recodification is considered 'undoubtedly one of the most striking legislative phenomena of recent decades',[94] France experienced a significant period of decodification. This period was caused by legislative developments outside the code in several fields. French decodification (3.1.1) can thus be seen as an inflationary decodification. Nonetheless, the disorder caused by this movement led to a new policy of recodification. The prolific recodification that followed is not, strictly speaking, Cartesian (3.1.2).

3.1.1. INFLATIONARY DECODIFICATION

Following the Napoleonic work, the idea of codification experienced a *reflux*.[95] This was the era of decodification, a trend widespread and particularly pronounced in commercial matters.[96] In fact, the Commercial Code of 1807 became the 'most blatant victim of the decodification process'.[97] The process was characterised by the development of extensive

93 See section 2.2.

94 Cabrillac, 2009, p. 61.

95 Oppetit, 1998, p. 12 *et seq*.

96 Oppetit, 1982, p. 197 *et seq*. For an illustration of the trend in Latin America, where the influence of the French Commercial Code of 1807 was particularly significant, see: de Aguilar Vieira, Cerqueira, 2007, pp. 27–77.

97 Cabrillac, 2009, p. 56.

regulation outside of the code. Why? This code was soon described as paralysing and incomplete. It came into effect on 1 January 1808, aiming to replace the old royal legislation; the Commercial Code was supposed to 'correct the abuses introduced into commercial relations by a regime of excessive freedom' and 'conform to the progress already made in public economy'.[98] However, the 1807 codification was limited to simply updating the repealed legislation, with a surprising ignorance of the social and economic changes of the time. This was surprising because the code drafters were experienced merchants or bankers well aware of the social and economic changes in Great Britain, and they should have recognised the signs of the imminent industrial revolution in France.[99] Based primarily on Louis XIV's Ordinances of 1673 on trade and 1681 on the Navy, the content of the 1807 code was divorced from the economic reality of the time,[100] even though it was recognised that '*the time had not yet come when commerce, having moved beyond its old boundaries, would reveal all the needs of its legislation*'.[101] Thus, the Commercial Code was criticised for being a law that did not encourage merchant creativity[102] and established overly strict control over commercial actors,[103] portraying them as suspects. This is evident in the heavy penalties for bankruptcies, lengthy developments on commercial jurisdictions, the rigour that merchants were required employ in maintaining their commercial books, and the required authorisation for the formation of joint-stock companies.[104]

98 de Saint-Joseph, 1851, p. XII.
99 Richard, 2005, p. 102.
100 Licari, Bauerreis, 2004, p. 135.
101 Horson, 1829, p. 29.
102 Richard, 2005, p. 106.
103 Licari, Bauerreis, 2004, p. 134.
104 Richard, 2005, pp. 102–103; Monéger, 2004, p. 180.

Furthermore, in addition to its subjective approach,[105] it was criticised for its various deficiencies: nothing on banking, land insurance, credit, and checks. These gaps were immediately filled by numerous special statutes,[106] recourse to the Civil Code,[107] and commercial usages,[108] as well as doctrine. Jurisprudence played a rather limited role[109] because arbitration was often preferred in this matter.[110] The French Commercial Code quickly became useless for business people and the target of strong criticism from legal scholars.[111]

As a failed codification,[112] the Commercial Code did not meet the requirement of a great codification: to represent both a rupture with

105 Indeed, the Commercial Code became that of the merchant, endowed with a special jurisdiction, in total contradiction with the principles of the Revolution, especially the idea of a single law and a single court for all. The subjective approach was one of the legacies inherited from the slavish imitation of the "Savary Code"; the objective approach was once again favoured by the jurisprudence of the 19th century. (See J. Monéger, 2004, p. 180). The choice of an objective system also seems to have been a way to justify a subjective jurisdiction, the maintenance of which after the Revolution largely motivated the publication of the Commercial Code.

106 For example: the laws of 1838, 1867, and 1889 on bankruptcies and judicial liquidation; the laws of 1903 and 1908, which mitigated the severity of bankruptcy; the laws of 1856, 1863, and 1866 on joint-stock companies; the law of 1865 on cheques; the law of 1894 on promissory notes; the laws of 1898 and 1913 on pledges and business goodwill; the laws of 1844 and 1902 on patents; the law of 1858 on warehouses and warrants; the law of 1919 on the commercial register; and the law of 1925 on limited liability companies (SARL), among others. Many of these laws are the result of foreign influences, especially English (cheques, warrants, companies) and German (SARL, commercial register).

107 According to Richard (2005, p. 103), it is indeed the failure of the Commercial Code as a potential source that will, as a pendulum effect, highlight the other sources of commercial law at that time, especially the Civil Code, which imposed its models despite its inadequacy for commerce.

108 See *supra* note 47.

109 For example, the Court of Cassation, on 11 March 1914, in the case of *Caisse rurale de la Commune de Manigod*, established the economic purpose as the criterion for distinguishing between a company and an association.

110 Richard, 2005, p. 106.

111 Vincens, 1821.

112 Richard, 2005, p. 103.

the past and its continuation.[113] It did not take long for the vast majority of articles resulting from Napoleon's drafting to be modified, or even transformed, with entire books being reworked, starting with Book III on bankruptcies and insolvencies, which was replaced by a special law in 1838.[114] Thus, a long phase of decodification marked commercial matters for two centuries.[115]

However, it must be acknowledged that codifying commercial matters is not easy. The difficulty has been perfectly summarised by Bruno Oppetit:

> *The codification of commercial matters has always encountered many obstacles and questions in France, up to the present day, primarily due to the very particular conditions of legal development in this area. Indeed, the legislative or regulatory power has always had to negotiate here with professional, national, or international circles, whose considerable influence has been expressed either through organized representation of their interests, through the influence of consular or arbitration courts, or through the formation of customs and practices: now, this creative force of the law leads to both innovation and inertia, to the solicitation of the protective care of the State, as a dispenser of order and unification, as well as to deliberate opposition to the law when it deems the requirements of business life contrary to it; moreover, in contemporary times, the multiplication of legislative and regulatory interventions, the result of increasing statism and an omnipresent technocracy both in Paris and Brussels [...], has placed commercial law in a state of permanent reform, accentuating the mobility and diversification of its rules. These data, a mixture of corporatism,*

113 Malaurie, 2004, p. 6.

114 Within the new code, only the former arts. 1, 632, and 633 (currently arts. L 121-1, L 110-1, and L 110-2) remain. This permanence, as noted by Richard (2005, p. 101), '*carries significant weight, as these articles address the question of the quality of a merchant, a question that remains just as ambiguous today*'.

115 Indeed, this process began as early as 1830, with the succession of laws on commercial courts (1830), the conditions of sale of goods (1837–1841), and maritime transportation (1835–1841). According to some scholars (Didier, Didier, 2005, p. 87), the term 'decodification' is 'probably unfortunate because it reflects a sense of sadness in the face of a phenomenon that is, in reality, an expression of the vitality and expansion of this branch of our law'.

> *technocracy, and cosmopolitanism, appear* a priori *completely contrary to the values of legal stability, rationalization, and nationalism that underlie the very idea of codification: they dictate the understanding of the problem.*[116]

While decodification is particularly evident in every aspect of economic life, it has not spared civil matters either. As mentioned earlier, the Civil Code faced competition in the 19th and 20th centuries from numerous special laws in areas such as rural law, housing, urban planning, special contracts, and labour. Thus, several special laws coexist with the Civil Code despite their common subject matter. This includes the 1985 Statute on civil liability resulting from traffic accidents. The regime established by the 1985 Statute was not integrated into the Civil Code and is not expected to be according to the Senate's July 2020 bill for the reform of the civil liability law.[117] The same applies to the 1965 Statute on co-ownership or the 1975 Statute on subcontracting.[118] Even though significant reforms have been made within the Civil Code,[119] the general trend is to legislate outside the code.

This legislative pluralism not only causes difficulties in articulating sources but also affects the role of codes. In many areas, codes increasingly play a subsidiary role rather than being the main player, as with the Civil Code in relation to special contract law.[120]

The decodification movement has thus generated a great legislative and regulatory disorder, as it has led to a considerable increase in legislative and regulatory production.[121] In this regard, it has generated a codification crisis.

116 Oppetit, 1998, p. 25.

117 Regarding this project, see: Monteillet, Cerqueira, 2021.

118 The preliminary draft reform of special contract law from July 2022 aims to introduce this regime into the Civil Code while reforming it. For more information on this upcoming reform, see Monteillet and Cerqueira, 2023.

119 It should be noted that it was even enriched with a fourth Book during the reform of security law in 2006.

120 See, for example Aubert, 2004, p. 127; Lardeux, 2005, p. 3; Rémy-Corlay, 2005, p. 4.

121 Oppetit, 1998, pp. 12–13.

Given the temporal scale of the movement, some have ruled out the possibility 'of a temporary malfunction of the legal system' to admit the decline of the codification concept as 'a natural and, in any case, lasting transformation of the Western legal world'.[122] The French doctrine[123] has thus embraced the analysis of the phenomenon made by Italian authors, according to whom contemporary law consists of a myriad of special and categorical laws that claim to establish countless autonomous microsystems independent of each other, without the constraint of obeying a global rationality, and whose stability is fragile as it depends on the convergence of antagonistic interests of social or economic groups. As Natalino Irti asserts, such fragmentation of sources is fundamentally contrary to what codification inherently postulates.[124] The result is a residual function for codes in the contemporary legal order.[125]

In France, disorder was also denounced by the *Conseil d'État*.[126] The purely formal maintenance of codes emptied of their substance by the uncontrolled proliferation of texts outside the code could not continue, especially as France had to establish itself in the international market.[127] The recodification of the law became a post-war policy. However, the approach to overcome one crisis ended up leading to another.

3.1.2. PROLIFIC RECODIFICATION

The other face of legislative inflation is the proliferation of codes resulting from the recodification policy, one of the objectives of which is to simplify the law. Indeed, 'simplification's statutes' empower the government to codify aspects of the law,[128] while the Constitutional

122 *Ibid*.
123 *Ibid*.
124 Irti, 1986, pp. 22 et seq., as cited in Oppetit, 1998, p. 13.
125 Sacco, 1983, pp. 117 et seq., as cited in Oppetit, 1998, p. 13.
126 Rapport, 1991.
127 See section 2.2.
128 See, for example, Law 2007-1787 of 20 December 2007, regarding the simplification of the law, arts. 28 and 29; Law 2004-1343 of 9 December 2004, on the simplification of the law and its series of authorisations, art. 84. See Deumier, 2010, pp. 53–66.

Council recognises the requirement of legal certainty 'in the context of the "re-relance" of the codification's [process], in the normative form that was supposed to ensure its success, the ordinance'.[129] The term 'recodification' encompasses several codification methods. It may involve a complete or partial (even progressive) modification of an existing code or an administrative compilation of laws and regulations in a particular field.[130]

In France, the policy of codification *à droit constant* is responsible for the proliferation of codes. Led by the Higher Codification Commission, this policy – which nonetheless excludes the Civil Code[131] – has led to the codification of over 60% of legislative texts and nearly 40% of regulatory texts, despite repeated claims of comprehensiveness.[132] In total, there are currently 78 official codes,[133] with no less than 40 relating to private law, and most of them resulting from codification *à droit constant*.

Paradoxically, the multiplication of codes makes the law less accessible in many areas. Coupled with *à droit constant* codification, which does not allow for the definition of codification guidelines – a codification without a soul[134] – the plurality of codes often prompts French legal professionals to consult several codes to fully grasp the issue at hand. For example, despite the recodification of commercial law in 2000, a number of rules applied to commerce must be sought in the monetary and financial code, the intellectual property code, and the consumer code, not to mention the Civil Code. This is in addition to a prolific and often uncertain jurisprudence that complements the scattered provisions in multiple codes.[135] The result is unsatisfactory. While codifica-

129 Ibid., pp. 53–66.

130 Cabrillac, 2009, p. 60.

131 Commission supérieure de codification, 1994, p. 21.

132 See *supra*, note 58. See also Circulaire 30 mai 1996 du Premier ministre relative à la codification des textes législatifs et règlementaires, art. 2.1.1 (JORF5 juin 1996, p. 8263 et seq.); Gelard, 1999, p. 5089.

133 https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR (Accessed: 31 August 2023).

134 Deumier, 2010, pp. 53–66. For a similar position, see Terré, 2012, pp. 366–367.

135 Codification *à droit constant* is incomplete in this regard because the Higher Codification Commission is not authorised to codify jurisprudence.

tion is supposed to rationalise the sources of rules governing a subject matter and facilitate access, contemporary codification of French private law has achieved the opposite.

This crisis worsens when it comes to understanding the content of the codes. Indeed, administrative codification – from which the Civil Code is fortunately exempt, and to some extent, the code of civil procedure – produces codes with structures and contents that are difficult to read, despite intelligibility being an objective of constitutional value of the law. Sometimes, the very rationality of the code is in question. For example, the 2000 recodification of commercial law introduced some consumer and distribution law into Book III of the legislative part of the commercial code concerning certain forms of sales and exclusivity clauses.[136]

The lack of readability is even greater because many codes consist of a legislative part and a regulatory part depending on the legislative or regulatory origin of the codified provisions. Provisions are preceded by *'L.'* if they come from an old law, or *'R.'* or *'D.'* if they come from a decree. Articles identified with *R.* correspond to provisions subject to a decree that was submitted to the *Conseil d'État* for consultation during its drafting, while those identified with *D.* correspond to provisions subject to a simple decree. Some codes even have an *'A.'* section for ministerial orders. Additionally, the numbering of articles is not uniform. While it is continuous in the Civil Code, it is decimal in almost all codes resulting from administrative codification, and the drafting style is anything but clear and simple.

Above all, it is difficult to navigate within the codes. Provisions essential to understanding an issue are often scattered in different parts of the code, making their combination and interpretation akin to solving a Chinese puzzle. Furthermore, articles in the regulatory part, *R.* and *D.*, are often mixed. Versions frequently change as well, making it difficult to determine which one is applicable to a specific case. In this regard, the Labour Code is a caricature. In addition to the bewildering quantity of legislative and regulatory provisions, the code is difficult to read due to the dispersion and fragmentation of solutions. The result is a

136 Ripert, Roblot, 2001, p. 22.

real problem of accessibility and, therefore, knowledge of the applicable law. This is detrimental to employers and even more so to employees, who are supposed to be protected by this code but will have a hard time understanding the extent of such protection on their own.

In summary, one must be an expert to handle French private law codes. This falls far short of Napoleon's ambition to offer citizens an organised, systemic, and coherent set of few, general, clear, and simple rules, even though, according to the Vice-President of the Higher Codification Commission, Mr. Bernard Stirn, administrative codification has made French law 'more respectful of the hierarchy of norms, more coherent, and more orderly'.[137]

Despite these efforts and the optimism of decision-makers, the codification policy initiated in 1948 and relaunched in 1989 has not succeeded in curbing legislative inflation.[138] French codification, suffering from the *à droit constant* codification method, is thus challenged by the 'inebriety of laws'[139] deliberately indulged in by the French government. Although voices were raised in the late 2000s to signal that the objective of codifying the entire law was no longer relevant because, for complex matters, codification was on the verge of completion,[140] recodification persists. This intoxication is all the more persistent because of the difficulties posed by recodification, especially for areas that have gained legislative autonomy.[141] The situation is even less satisfactory as another

137 Stirn, 2023, p. 13.

138 According to one author, *à droit constant* codification promotes the inflation of the law instead of containing it and becomes a formidable accelerator of the problems plaguing the French legislative and regulatory corpus: inflation and even more so instability; a considerable increase in the volume of texts, even if it is mainly formal: for example, by splitting long articles into shorter ones, the legislative part of the Labor Code has gone from 1891 to 3652 articles; hyper-specialization and fragmentation of the law to the detriment of common law (Moysan, 2006, no. 8).

139 'Sobriety is the twin sister of modesty because it is simplicity, moderation, temperance, restraint, and even common sense [...]. Not a word too many, no pursuit of effect: the opposite of inebriety [...], of self-inebriety, of the inebriety of thought, of the inebriety of laws' (Malaurie, 2012, p. 599).

140 Deumier, 2010, pp. 53–66.

141 Terré, Outin-Adam, 1994, p. 99; Bénabent, 2004, p. 245 *et seq.*; Cabrillac, 2009, pp. 53–63.

crisis threatens French codification: a new trend towards experimental legislation.

3.2. LEGISLATIVE EXPERIMENTATION

Since 2003, the French Constitution, in its art. 37-1, provides that '*statutes and regulations may contain provisions enacted on an experimental basis for limited purposes and duration*'. This legal framework, which was lacking in legislative experimentation in France,[142] now grants the legislator the right to experiment. Legislative experimentation therefore requires that a fixed term be set forth in the text from the outset, that an evaluation of the effects be planned, and that the possible perpetuation of the measure be subject to the adoption of a subsequent law, making necessary adaptations based on observed effects.[143]

In the past, while the use of experimental laws was limited, in 2016, the government decided to create an entity within the Ministry of the Economy tasked with collecting – and even prompting – legislative requests from economic circles. This mission of this entity, known as 'France Expérimentation', is to seek out 'innovative and ambitious projects' requiring derogations from legislative or regulatory rules, and even European rules.[144] For the government, it is a struggle to adapt legal rules and administrative processes to the same pace as innovations by economic actors, thus hindering the deployment of new solutions. By promoting legislative experimentation[145] to boost France's economic and industrial development, the government is poised to develop legislation fundamentally aimed at addressing very specific and sector-specific economic interests.

142 Chevallier, 1996, pp. 167–203.
143 *Ibid*.
144 Expérimenter pour innover, 2023.
145 Daigre, 2023, p. 1401.

As mentioned earlier, while the use of experimental laws has been fairly limited in the past,[146] the inclusion of a right to experimentation in the Constitution risks exacerbating the legislative inflation that France has been suffering from, paradoxically, since both the government and the parliament committed to combat it in 1948.[147]

This risk leads to another: making codified provisions experimental and provisional, which, by nature, were designed to withstand the test of time due to their generality and stability. One recent application of this was the PACTE Statute (*Plan d'action pour la croissance et la transformation des entreprises*) of 22 May 2019, which introduced several '*trial*' norms regarding codified provisions of private law. For example, art. 99 of the PACTE Statute introduces an experiment in crowdfunding within a professional community for a duration of three years, temporarily deviating from several provisions of the Monetary and Financial code and the Consumer Code.[148] In the field of corporate law,[149] art. 184 modifies art. L. 225-27-1 of the Commercial Code to mandate two employee representatives on any board composed of eight members – instead of twelve as before. This provision then triggers a debate in three years about the requirement for three employee representatives on boards of companies with more than twelve members. Indeed, no later than three years after the law's publication, the government must submit to Parliament a report evaluating the economic and managerial effects of having employee representatives on the boards of the companies concerned, the feasibility of extending this provision to three representatives when these boards exceed twelve members, and the relevance of including in this panel an employee representative from subsidiaries located outside

146 For example, before expanding it and making it permanent, a Satt of 17 January 1975 (art. 2) decided to suspend for five years the article of the Penal Code that punished abortion when voluntary termination of pregnancy occurred within a certain period (before the end of the tenth week). For other examples, see Chevallier, 1996, pp. 167–203.

147 See *supra* note 58.

148 As the three-year period was set to end in May 2023, to our knowledge, no assessment has been made of this experiment by the government.

149 Couret, 2019, pp. 565–571.

the national territory when the company conducts a significant part of its activities internationally.[150]

Like the PACTE Statute, experimental law is a *'negotiated law'*, with solutions resulting from *'co-construction'* in which lobbyists – supported by scholarly think tanks – play a significant role.[151] This hallmark of postmodernity,[152] where the law loses its intrinsic legitimacy in favour of procedural legitimacy,[153] is coupled with doubts about the rule's legitimacy considering its effects, revealed by the temporary – experimental – nature of the norm.[154]

Whatever the cause – legislative dysfunction, integration of the law into public policies, or difficulty in legislating in sensitive or complex areas[155] – this new conception of the law departs from the tenets of modern law embodied in the idea of codification, in which the law is no longer a general and impersonal prescription driven by common interest but is

> *increasingly conditioned by the diversity of its recipients, who can no longer be apprehended as a homogeneous set of abstract citizens, and increasingly marked by its context, not only political and economic but above all social, environmental, and societal.*[156]

Let us emphasise this point with Jean Chevallier's analysis:

> *experimentation aims to replace the dominant legal rationality, which led to making the law a privileged instrument of 'rationalization' of social*

150 Art. 184, I-C.

151 Couret, 2019, pp. 565–567.

152 Chevallier, 2014, p. 142: The power of the law no longer comes from it being expressed as a mandatory order that everyone must obey; it now depends on the consensus surrounding it. This consensus requires that the recipients are involved in its development: prior consultation, participation in defining the rule becomes the guarantee of its validity: thus, the law becomes a negotiated law, the result of collective deliberation.

153 Chevallier, 1996, pp. 167–203; Couret, 2019, pp. 565–567.

154 Chevallier, 1996, p. 167 et seq.

155 On this matter, see Chevallier, 1996, pp. 167–203.

156 Daigre, 2023, p. 1401.

> *life, with another type of rationality, 'technico-economic,' to which the law itself will be subordinated. The law is no longer assured of legitimacy* ab initio*, based on its own characteristics, the values it embodies, its intrinsic normative power: its legitimacy depends on its ability to achieve certain objectives, on the effectiveness of the results obtained. A legitimacy based on the regularity of procedures implemented, on the conformity of conduct and behavior, is replaced by a legitimacy based on the effectiveness of actions undertaken, on the ability to achieve pre-established goals. The law thus becomes nothing more than a tool, an 'operational technique', or even 'a management technique', which has no inherent value but only functions in terms of the results it allows us to obtain: efficiency becomes the condition and guarantee of its legitimacy. Therefore, the law is invested and subverted by a technico-économique rationality that is extrinsic to it.*[157]

Codification cannot escape the ongoing conceptual shift. Indeed, legal experimentation affects both non-codified legislative and regulatory provisions and those that are codified. The development of legal experimentation in codified matters could signify the emergence of a new type of code, marked by the co-existence of general, impersonal, and enduring provisions with special, personalised, and temporary provisions. Beyond hybridisation within the currently effective codes, the expansion of legal experimentation could, in the future, lead to the hybridisation of codification itself: the codification process would incorporate, *ab initio*, the experimental approach alongside the classical approach, with all that it implies in terms of the development and meaning of legal norms. Admittedly, the possible perpetuation of temporary provisions is not ruled out, as the experimental law technique requires the adoption – or rejection – of a new definitive law after an evaluation process.[158] However, this does not eliminate the instability of the rule, as at the end of the set period, the temporary solution may either not be perpetuated,[159] be renewed for a new probationary period, or undergo

157 On this matter, see: Chevallier, 1996, pp. 167–203.

158 *Ibid*.

159 According to Chevallier (1996, pp. 167–203), this risk is minimal since it is difficult to challenge legislation, even if adopted experimentally, as the natural tendency is towards its renewal or permanence.

adaptations considered desirable based on observed effects. In other words, legal experimentation undermines, throughout its entire process, the legal stability expected from any codification work. In this regard, legal experimentation becomes an unusual factor in the crisis within French codification.

It is more important than ever to re-read Portalis in order to protect the city from excess, unnecessary complexity, and disguised privatisation of laws:

> *Laws are not pure acts of power; they are acts of wisdom, justice, and reason. The Lawmaker does not exert an authority so much as a secret function. He must not lose sight of the fact that laws are made for men, and not men for laws; that they must be adapted to the character, customs, and circumstances of the people for whom they are made; that one must be sparing of the new in matters of legislation, because, while one can, in a new institution, calculate the advantages that theory offers, one cannot know all the disadvantages which practice alone can reveal; that one must leave well enough alone, if betterment is uncertain; that remedying and abuse, one must imagine the dangers posed by the remedy itself; that it would be absurd to indulge notions of absolute perfection in matters susceptible only to relative goodness; that rather than changing laws, it is almost always more useful to present citizenry with new reasons to love them; that history offers us the promulgation of two or three good laws over the span of several centuries* [...]. [160]

These words should be engraved in the chambers of the National Assembly and the Senate as a daily reminder to legislators. They should be read aloud at the inauguration of the President of the Republic to persuade them to exercise their normative power with sobriety and wisdom.

In the meantime, we must return not only to legislative sobriety but also to the scholarly nature of any true codification work. Codification must become the work of scholars, not technocrats. In this perspective, which does not preclude advances in legislative drafting, we must follow the systematic method employed since 1945 for reforms to the French

160 Portalis, 1844, pp. 4–5.

Civil Code and Code of Civil Procedure and entrust scholars – law professors and practitioners – with the task of preparing codification projects. The quality of recent reforms in contract law, the general regime of obligations, and security law once again demonstrates the wise choice made by great codifiers since Justinian to entrust jurists with the task of codifying the law. This is also the choice for future reforms in the law of civil liability, private international law, and special contract law. However, this work is already advancing on the territory of my colleague and friend Lukas Rass-Masson.

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REFLECTIONS ON THE PRELIMINARY DRAFT OF THE SERBIAN CIVIL CODE FROM 2019*

ATTILA DUDÁS

ABSTRACT

In its recent history, Serbia, like its predecessors, the Kingdom of SHS/Yugoslavia and the socialist Yugoslav state, could not enact a new civil code, although numerous official and private initiatives to draft a civil code were undertaken, some even producing concrete drafts. Yet, enactment of a civil code, long after the 1844 Civil Code of the Principality of Serbia, could not be achieved because of political reasons or the division of legislative competence between the federation and federal units. On becoming a unitary state in 2006, these reasons ceased to exist. Thus, the very same year, a committee was formed by the Serbian Government tasked with preparing the draft of a prospective civil code. The committee progressively made available to the public the results of its work. The version of the draft, which can be considered final presently, was published in 2019, titled 'Preliminary Draft of a Civil Code of the Republic of Serbia'. It has a five-partite structure, wherein a detailed general part is followed by separate books dedicated to the law of obligations, in-rem rights, family law, and inheritance law. In this chapter,

* This research has been supported by the Ferenc Mádl Institute of Comparative Law and Central European Academy from Budapest, Hungary.

Dudás, A. (2024) 'Reflections on the Preliminary Draft of the Serbian Civil Code from 2019' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 181–207. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_8

the most important novelties proposed by the Preliminary Draft are analysed and, in some cases, critically reviewed. In the general part of the Preliminary Draft, the initiative to introduce the right to euthanasia is the most important talking point. Book II pertains to the law of obligations, convincingly relying on the Obligations Act of 1978. Book III is on in-rem rights, and Book IV deals with family law, influenced by the effective Family Law Act of 2005. Book V pertains to the branch of inheritance law, relying on the rules of the effective Inheritance Act of 1995. The most important novelties of the Preliminary Draft are subject of analysis in this paper.
Keywords: *codification of civil in Serbia, Preliminary Draft of Civil Code in Serbia, draft of a civil code.*

1. INTRODUCTION: A BRIEF OVERVIEW OF THE HISTORY OF CODIFICATION OF CIVIL LAW IN SERBIA

All Yugoslav states that ever existed in the 20th century had considered the idea of enacting a civil code and thereby unifying the civil law rules. Despite many attempts, differing in their momentum and pace, unifying the subject matter of civil law completely remained out of reach.[1] Although unification was more than desirable, civil law rules in the common South-Slavic countries differed a great deal in terms of their historical roots, style, and content, making this goal unachievable.

When the first Yugoslav state was formed after World War I, that is, the Kingdom of Serbs, Croats, and Slovenes (later named Kingdom of Yugoslavia), a prudent decision was made to retain in force the laws that were in effect in different parts of the new state. Thus, in the part of the Kingdom of SHS, which formerly belonged to the Kingdom of Serbia, the 1844 Civil Code remained in force; in the Montenegrin part, the 1888 General Property Code; and in present-day Vojvodina, the Hungarian statutes and a peculiar form of judge-made law remained in force.

1 See in more detail Istorija nastajanja građanskog zakonodastva u Srbiji, 2007, pp. 27–77; Orlić, 2016, pp. 317–340; Szalma, 2019, pp. 90–97; Dudás, 2013, pp. 9–17.

In the Croatian part, the ABGB remained in force, in a version that was prevailing before the 1914-1916 amendments (*Teilnovellen*), along with the autonomous Croatian law. In the Slovenian part of the Yugoslav state, the ABGB remained in force, but in a version that prevailed after the enactment of the Teilnovellen. Similarly, in the territory that formerly belonged to Bosnia and Hercegovina too, the ABGB remained in force concerning proprietary legal relations, while in matters of family and inheritance law, the religious rules were applied.[2] Therefore, as Miodrag Orlić pointedly remarked, 'in spite of the integrity of the territory of the state, in terms of applicable law six great territories existed'.[3]

This did not change fundamentally overnight after World War II either, regardless of the retrograde impact of a statute adopted in 1946, which is in short labelled in the literature only as the Invalidation Act. It abrogated all sources of law that were in force on 6 April 1941 (when the Kingdom of Yugoslavia de facto lost its sovereignty), while the rules of law promulgated by the Axis powers after this date were declared invalid. As Prof. Slobodan Perović, the president of the drafting committee sharply and precisely put it, 'this may have been the sole example when a state abrogated the entire legal system'.[4] However, such a bold and harsh step would have done more harm than good, if applied consequently, without exceptions. To prevent this, a sort of 'shock-absorber' was introduced in the Invalidation Act: in concrete cases, it enabled the courts to apply the rules of law contained in the sources of law that were in force until 6 April 1941, if the judge decided that they are still applicable and their application would not be contrary to the public order of the new state. This temporary solution to the vast legal lacunae created by the Invalidation Act was labelled simply as the application of 'old rules' (*stara pravna pravila*). Although it seems quite paradoxical, it was true: among other things, the 1844 Serbian Civil Code was no longer in force, but the content of its rules was still being applied. In general, this method of 'old rules' was applicable to all former sources of law, except the Hungarian judge-made law in Vojvodina, which was considered

2 Nikolić, 2022, p. 90.
3 Orlić, 2016, p. 317.
4 Perović, 2016, p. 300.

contrary to the public order of the new socialist state, whereby courts are empowered only to apply the law, not create it.[5] New statutes were constantly enacted; hence the systemic legal lacunae and the need for the application of 'old rules' gradually shrank. The need for unifying civil law in socialist Yugoslavia was clearly evident. The most reasonable way to achieve this goal seemed to be the enactment of a civil code, applicable on the whole territory of the Yugoslav state. By the end of the 60s in the past century, major efforts were undertaken to prepare a draft of statutes that could be easily integrated later into a single civil code.[6] However, the constitutional amendments from 1971 and the new federal constitution from 1974 made the enactment of a civil code, comprising all major branches of civil law, virtually impossible. The subject matter of the law of obligations and property law remained in federal competence, while the constituent federal units gained competence to regulate family law and inheritance law.[7] This division of competence remained. This is why, by the time of the dissolution of the last South-Slavic state, the State Union of Serbia and Montenegro, the definite closure of the idea of (con)federalism in the Yugoslav legal tradition, no common civil code or even a draft of it emerged. However, that by no means implies that no civil law legislation of decent quality exists. The most important of these, in the field of civil law, are the 1978 Obligations Act[8] and the 1980 Act on the Bases of Proprietary Legal Relations,[9] which were enacted in federal competence and are still applicable in Serbia. In matters of family and inheritance law, in line with the division of legislative competence as of 1971/1974, these two branches of civil law have been in the competence of the Republic of Serbia for some time already. The statutes in these branches of law currently effective are

5 See in detail Nikolić, 2020, pp. 187–204, 199.

6 Dudás, 2013, p. 13.

7 Ibid., p. 14.

8 Zakon o obligacionim odnosima, Službeni list SFRJ [Official Gazette of the Socialist Federal Republic of Yugoslavia], no. 29/78, 39/85, 45/89 – decision of the CC, Službeni list SRJ [Official Gazette of the Federal Republic of Yugoslavia], no. 31/93 and Službeni glasnik RS [Official Gazette of the Republic of Serbia], no. 18/2020.

9 Zakon o osnovama svojinskopravnih odnosa, Službeni list SFRJ, no. 6/80 and 36/90, Službeni list SRJ, no. 29/96, and Službeni glasnik RS, no. 115/2005.

the 2005 Family Law Act,[10] and the 1995 Act on Inheritance.[11] These are in the literature denoted as 'system-laws', since they represent partial codifications, comprising the majority of rules pertaining to a given branch of civil law.[12]

2. PREPARATORY WORKS ON THE PRELIMINARY DRAFT OF THE SERBIAN CIVIL CODE (2006–2019)

In 2006, the very same year when Serbia, after almost a century of federal experience, anew became a unitary state, the government officially appointed a committee entrusted with the task of preparing the draft of a prospective civil code for Serbia.[13]

In 2007, the committee published a general report containing a lengthy scholarly article on the history of codification of civil law in Serbia and a general overview of the structure of the future civil code, wherein it identified the major legal issues to be addressed during the drafting of the text. In 2009, the first version of the book pertaining to the branch of the law of obligations was published. The remaining books, each pertaining to one of the classical branches of civil law, were finalised consecutively in the subsequent years. They have been combined into a single text in 2015. This version from 2015 contains alternative legislative proposals in relation to numerous legal institutes of major importance. The 2015 Draft was made available to the public in order to achieve the broadest possible professional and scholarly debate on its content. Several major public debates were held on the Draft: one was organised at the Faculty of Law of the University of Belgrade, one each at the Appellate Courts Novi Sad, Niš, and Kragujevac, and one organised

10 Porodični zakon, Službeni glasnik RS, no. 18/05, 72/11 and 6/15.

11 Zakon o nasleđivanju, Službeni glasnik RS, no. 46/95, 101/003 – decision of the CC and 6/15.

12 Nikolić, 2022, p. 173.

13 Odluka o obrazovanju komisije za izradu građanskog zakonika [Decision on the Formation of a Drafting Committee of a Civil Code], Službeni glasnik RS, no. 104/2006 and 110/2006 – correction.

jointly by the Appellate Court and Supreme Court in Belgrade.[14] The finalised version of the Draft was submitted to the government in 2019.[15] However, since then, no public statements have been made that the draft will be enacted by the General Assembly in the near future.

3. A BRIEF OVERVIEW OF THE MOST IMPORTANT NOVELTIES OF THE 2019 PRELIMINARY DRAFT OF THE CIVIL CODE

The 2019 Draft of the Civil Code follows the Pandectists' division of civil law. Book I is titled General Part, Book II is dedicated to the law of obligations, Book III to property law, Book IV to family law, and Book V to inheritance law. Incorporation was the primary method applied by the drafting committee, implying that all books departed from and utilised the rules of the existing *'system'* laws.[16]

In this chapter, the aim is by no means to make a thorough analysis of the draft of a civil code that contains more than 2700 articles. It would be clearly unrealistic in a paper of this volume. The focus will be, thus, more on the presentation of the structure of the preliminary draft, present a general assessment of the books, and analyse only a few of the major novelties envisaged in the draft, in comparison with the existing legislation.

14 Perović, 2016, p. 307.

15 The text of the Preliminary Draft is available in Serbian at the following website: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html (Accessed: 4 March 2023).

16 Salma, 2016, p. 368.

3.1. BOOK I – GENERAL PART

Book I of the Draft is envisaged as a set of rules of general importance relevant in the application of rules of other books of the civil code.[17] The General Part is strikingly detailed, comprising 163 articles grouped into two parts. After the short first part comprising the introductory rules and general principles of civil law, the second part is titled 'Special Rules', divided into seven chapters: Subjects of Law, Subjective Civil Rights, Property, Juridical Acts, Representation, Objects, and Passage of Time. A significant number of rules have been transposed from the 1978 Obligations Act, which, although lacking a civil code and its general part, contains a considerable number of general rules and principles. The first chapter pertaining to the subjects of law contains detailed rules on natural persons, specifying their legal capacity, capacity to contract, and capacity to be held liable for damage. Most of these have been transposed from the 2005 Family Law Act. Similarly, general rules on key legal features and various capacities of legal persons are also found in this chapter. However, only the rules on associations and foundations are regulated in detail. Unlike the Hungarian Civil Code, for example, the subject-matter of legal status of business organisations is expected to remain regulated in the separate Companies Act.[18]

The part titled 'Subjective Civil Rights' contains a detailed catalogue of fundamental civil rights. The right to human dignity is considered a primary civil right. Its position as a supreme civil right is further strengthened by the rule of the Draft, specifying that all other civil rights stem from the fundamental right to human dignity.[19] The rule of the Draft that evoked the greatest interest of public opinion is the one envisaging the introduction of the right to a so-called merciful death (euthanasia). It defines it as a right of a natural person to a consensual,

17 On what is advised to be regulated in the General Part of the prospective civil code, and what should be regulated in other Books of the civil code, see Kuštrimović-Kovačević, 2009, pp. 1–24.

18 Presently, the statute pertaining to company law is the 2011 Companies Act. Zakon o privrednim društvima, Službeni glasnik RS, no. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021.

19 Preliminary Draft, art. 78, sec. 2.

voluntary, and dignified termination of his/her life, which can be performed only exceptionally, if the prescribed humane, psycho-social, and medical conditions are met.[20] The Preliminary Draft only intends to regulate euthanasia at a very general level. The conditions and the procedure for approving and performing euthanasia are expected to be regulated in detail by a special statute.[21] Finally, the Draft specifies that an abuse of the right to euthanasia, in order to obtain unjustified material or other benefits, represents a ground for criminal liability.[22] However, apparently, it was obvious to the drafting committee as well, that introducing euthanasia is legally extremely difficult and a socially sensitive issue. Therefore, the drafting committee inserted a comment after the proposed rules stating that owing to the complexity of performing the right to euthanasia, which has, in addition to legal and medical, psychological and social aspects as well, the drafting committee will subsequently make available to the public a definitive proposal based on the arguments of experts from various fields and professional activities, considering the proposal of the text of a special statute that shall have been prepared after the public consultations on the Preliminary Draft are closed. An eventual enactment of the Draft with the envisaged rules on euthanasia requires a corresponding change in the Criminal Code, states the drafting committee.[23] In addition, it would certainly require some constitutional amendments, as well.

3.2. BOOK II – LAW OF OBLIGATIONS

The first version of Book II, which pertains to the law of obligations, was published as early as 2009. The choice of beginning the actual work on the draft of a civil code with the law of obligations can hardly be described as surprising. The 1978 Obligations Act proved to be a lasting masterpiece of the Yugoslav legislation: it remained in force without

20 Preliminary Draft, art. 86, sec. 1.
21 Preliminary Draft, art. 86, sec. 2.
22 Preliminary Draft, art. 86, sec. 2.
23 Preliminary Draft, art. 86, in fine.

serious amendments since then in Serbia, survived all the changes in the political system and the transition from a sort of administratively planned economy to a market economy. The 1978 OA, however, did not regulate the subject-matter of the law of obligations entirely, leaving some space for the application of the 'old rules' even today. The 1978 OA in the most part followed the legislative solutions proposed by Professor Mihailo Konstantinović in 1969.[24] He named his legislative draft of the OA modestly as 'Sketch' for a code on obligations and contracts, but it was a full-fledged normative text, suitable to be enacted in the form of a statute. In drafting the 1978 OA, the drafters diverged from numerous solutions of the 'Sketch' on various points, most of which were assessed negatively later.

Most of the novelties envisaged by Book II of the Preliminary Draft of the Civil Code pertaining to the law of obligations, in comparison to the transposition of the text of the rules of the effective 1978 OA, represent a return to the solutions offered by Professor Konstantinović in the 1969 'Sketch'.

The structure of Book II follows the structure of the 1978 OA almost symmetrically. However, it should be considered that lacking a civil code and its general/introductory part, some of the rules of the 1978 OA, in many aspects, performed the function of the rules of a civil code, which are, in Pandectists' systematisation, usually structured into the General Part. Having a General Part in the Preliminary Draft, these rules are removed from Book II into the General Part. Mentioning only the most important, the principles of good faith, private autonomy (freedom of contract), equality of parties, prohibition of abuse of right, standards of due care, prohibition of causing damage, and prohibition of creating or abusing monopolistic position in the market from the 1978 OA are placed not in Book II, but in the General Part. As far as the general structure of Book II is concerned, no major changes are observed: Book II is divided into six parts. The first five are dedicated to the general rules of the law of obligations, while the sixth is dedicated to particular rules of a great number of nominate contracts. The first contains rules on different sources of obligations (general rules of contracts, causation of damage,

24 Konstantinović, 1996.

unjustified enrichment, benevolent intervention in another's affairs – negotiorum gestio and unilateral statements of will). The second comprises rules on the legal effects of obligations, the third on discharge of obligations, the fifth on specific types of obligations (monetary and non-monetary, obligations with multitude of objects and obligations with multitude of creditors or debtors). The fifth part contains the rules on the change of identities of the parties.

In the part pertaining to the general rules of contract law, the drafters aim to modify the list of notions that limit parties' autonomy. Presently, according to the OA, a contract must not infringe on mandatory rules, public order, or good morals.[25] This list of general barriers to parties' autonomy, in the General Part, is to be expanded with moral rules as such.[26] Similarly, the rule on the principle of freedom of contract, which is a derivative of the principle of parties' autonomy, the mentioned tri-partite set of concepts, is to be expanded by moral rules.[27] It is questionable whether there is a genuine need to explicitly name moral rules as a separate barrier to freedom of contract, distinct from the already existing ones, since public order (*ordre public*) and good morals (*gute Sitten*) already imply that parties must observe moral standards. The rules on contractual negotiations are also expected to be modified. Presently, a party is considered to conduct negotiations in bad faith if he/she either conducts negotiations without genuine intention to conclude the contract or withdraws from negotiations without due cause.[28] The OA does not specify how the parties should handle confidential information obtained from the other party during the negotiations. The Draft intends to rectify this shortcoming. It specifies that if one party has given confidential information to the other in the course of negotiations or allowed him/her to obtain them, the other party, unless otherwise agreed, may not make them available to third parties, nor use them for their own interests, regardless of whether the contract was subsequently concluded or not.[29] The nature and scope of the liability

25 OA, art. 10.
26 Preliminary Draft, art. 6.
27 Preliminary Draft, art. 164.
28 OA, art. 30, sec. 2.
29 Preliminary Draft, art. 172, sec. 1.

for infringement of this duty is also specified: the liability can comprise compensation for the damage caused and handing over to the injured party the benefits that the tortfeasor acquired from that violation.[30] In relation to precontracts, the Preliminary Draft intends to regulate the option contract explicitly,[31] which is for the time being considered a lawful, but still innominate contract. In the part pertaining to specific legal consequences of bilateral/onerous contracts as well a range of novelties is proposed. The most notable is the proposal to revert to the concept of *leasio,* which relies on a specific mathematic threshold for determining whether the inequivalence is legally relevant, a solution that shaped the tradition of Serbian/Yugoslav law before the enactment of the 1978 OA. The concept of *leasio ultra dimidium* was supported even in the 1969 'Sketch'.[32] The effective 1978 OA, however, rejected the concept of *leasio ultra dimidium* and opted for the concept *of laesio enormis*. In this understanding of *leasio*, the court is not bound by any specific mathematical threshold, but can avoid the contract if it finds the disproportion between the values of the mutual contractual obligations conspicuous.[33] The Preliminary Draft reverts to the concept of *leasio ultra dimidium* supported by Professor Konstantinović in 1969. It specifies that if there is a disparity between the obligations of the contracting parties at the time of the conclusion of the contract, that what one party has received or should receive from the other party does not represent even half of the value of what it has given to the other party, or has undertaken to give, then he/she can request to have the contract voided.[34] The rules on usurious contract are also expected to change. According to the effective 1978 OA, the aggrieved party may invoke the nullity of a usurious contract if the other party gains an obviously disproportionate benefit from the contract, abusing at least one of the circumstances specifically mentioned: state of necessity or difficult material condition of the other party, his/her lack of experience, recklessness, or dependence.[35]

30 Preliminary Draft, art. 172, sec. 2.
31 Preliminary Draft, art. 189.
32 'Sketch', art. 107, sec. 1.
33 OA, art. 139, sec. 1.
34 Preliminary Draft, art. 273, sec. 1.
35 OA, art. 141, sec. 1.

This list is a closed enumeration. The Preliminary Draft intends to change it into an open enumeration, meaning that the abuse of similar, but not explicitly mentioned circumstances may also be qualified as usury.[36] Finally, the Preliminary Draft intends to change the concept of repudiation of an onerous contract due to non-performance of the other party's obligation. The 1969 'Sketch' proposed the transposition of the concept of fundamental breach of the contract, as an event justifying the repudiation of the contract.[37] It has eventually been rejected in the 1978 OA, which states only that non-performance must not concern a negligible part of the debtor's obligation.[38] The Preliminary Draft in this regard reverts to the solution offered by the 1969 *Sketch*. It envisages that a contract may be repudiated if the debtor's failure to perform may be qualified as fundamental breach of contract.[39]

In the part on tort law, numerous major novelties are envisaged by the Draft. For instance, the fault in fault-based liability is defined in the OA as either intent or negligence,[40] which provides ground for different interpretations. The Draft intends to return to the solution offered by Professor Konstantinović in the 'Sketch',[41] according to which fault exists if the tortfeasor fails to act as he/she should have, considering the regular course of events and what could have been expected from a reasonable and diligent person under the given circumstances.[42] Regarding moral damage, a range of serious novelties is envisaged in the Draft. Presently, in the OA the so-called subjective understanding of moral damage is accepted, which in Yugoslav literature dates to the works of Prof. Obren Stanković from 60s of the last century.[43] According to this approach, infringement of personality rights is considered a compensable form of moral damage only if it manifests in bodily pain, mental suffering, or fear, whereby mental suffering is ground for pecuniary

36 Preliminary Draft, art. 274, sec. 1.
37 'Sketch', art. 94–96.
38 OA, art. 131.
39 Preliminary Draft, art. 257, sec. 1.
40 OA, art. 158.
41 'Sketch', art. 127.
42 Preliminary Draft, art. 290, sec. 1.
43 Karanikić Mirić, 2015b, p. 488.

compensation only if it stems from a closed list of possible reasons.[44] One of the major implications of this understanding is that, in general, legal persons are not entitled to claim pecuniary compensation for moral damage, since they are unable to feel bodily pain, mental suffering, or fear.[45] Legal persons may be entitled to compensation only in specific situations regulated by special statutes.[46] The Preliminary Draft proposes major novelties in this respect. First, the statutory definition of legally relevant forms of mental suffering justifies pecuniary compensation changes from a closed list to an open enumeration: instead of naming the legally relevant forms of mental suffering specifically, the Draft states that the injured party is entitled to compensation for bodily pain, fear, worry, sadness, and other forms of mental suffering.[47] Second, it explicitly declares the right of legal persons to monetary compensation for infringement of their reputation, honour, and other personality rights intrinsic to their nature.[48] Another, though indirect, consequence of the subjective understanding of moral damage is that the OA excludes the assignability and inheritability of the claim to compensation for moral damage, unless recognised in the written agreement of the parties or awarded by the court in a final, non-appealable judgement.[49] This solution seems consequent to the primary aim of the compensation, which is to provide just satisfaction to the injured party, but the practical implications are that it may produce quite unjust consequences.[50] The more severe the injuries, the more likely the injured party dies before the compensation is awarded by a non-appealable court judgement. To avoid this, the Preliminary Draft envisages a solution, according to which a claim to pecuniary compensation can be inherited if the injured party filed a lawsuit during his/her life.[51]

44 Karanikić Mirić, 2015b, pp. 488–489.
45 See Savčić, 2022, pp. 768–769.
46 Ibid., pp. 790–791.
47 Preliminary Draft, art. 345, sec. 1.
48 Preliminary Draft, art. 346.
49 OA, art. 204, sec. 1.
50 See in more detail Karanikić Mirić, 2015a, pp. 172–191.
51 Preliminary Draft, art. 350.

This is another example of the almost verbatim transposition of the solution offered by Professor Konstantinović as early as 1969.[52]

In the part pertaining to specific rules of different nominate contracts, the most important novelty is that the Preliminary Draft offers detailed rules on contract on donation[53] and contract on loan for use[54] (*commodatum*). If the Preliminary Draft is enacted in the form of a civil code, with the envisaged rules on donation and loan for use, the last bastions for applying the 'old rules' in the field of law of obligations would eventually be dismantled.[55] In addition, the Preliminary Draft offers detailed rules on reinsurance contract,[56] a regulation lacking in the 1978 OA at present. Detailed rules are also present in the Preliminary Draft on factoring as a new contract-type.[57] If the Preliminary Draft reaches the stage of enactment in a form of a civil code with this content, the special Act on Factoring will most likely be set aside, or integrated into the civil code, which would have been adopted in the meantime.[58]

3.3. BOOK III – PROPERTY LAW

Book III of the Preliminary Draft on property and other in-rem rights may be considered the odd one out, in comparison to the other books. While the common feature of all other books is that in the most part a single statute is used predominantly for shaping the rules of respective books, the same cannot be said of Book III. Naturally, the drafters departed from the effective Act on the Bases of Proprietary Legal Relations from 1980. However, this statute *'underregulated'* the subject matter of in-rem rights, since the subject-matter of in-rem rights was always considered to be of secondary relevance by the former socialist

52 'Sketch', art. 164, sec. 1.
53 Preliminary Draft, arts. 744–761.
54 Preliminary Draft, arts. 832–844.
55 Dudás, 2015, pp. 79-85.
56 Preliminary Draft, arts. 1389–1420.
57 Preliminary Draft, arts. 1589–1607.
58 Zakon o faktoringu, Službeni glasnik RS, no. 62/2013 and 30/2018.

regime.[59] This is why a great number of special statutes were adopted as of 2003 in order to fill the legal lacunae of the 1980 Act or to amend its obsolete legal solutions. To name the most notable ones, the Act on the Registration of Security Interest in Movables and Rights,[60] the Mortgage Act,[61] and the Act on Financial Leasing[62] fundamentally supplemented, or amended the rules of in-rem rights set out by the 1980 Act. The unsatisfactory state of the regulation of in-rem rights was well perceived by the legal doctrine. According to some estimates, the subject matter of in-rem rights in Serbian law is regulated in more than 70 statutes and regulations of different types.[63] In order to contribute to its resolution, an official draft of the Act on Property and Other In-rem Rights of the Republic of Serbia[64] was published in 2012, after almost a decade of dedicated work. A great number of distinguished scholars participated in its drafting, and its qualities were highly praised.[65] However, this draft was not officially declared as the main source in the drafting of Book III by the drafting committee.[66]

Book III on property law mostly codifies the rules from the 1980 Act on Bases on Proprietary Legal Relations and the mentioned special statutes. It is divided into six parts. The first contains rules on ownership: general rules, acquisition of ownership, termination of ownership, legal remedies for the protection of ownership, modalities of ownership, adjoining landowner rights, and right to pre-emption. The second part contains rules on personal and real estate servitudes. The third part is dedicated to the right to construct a building on a third

59 For the history of codification of the rules on rights in rem see Nikolić, 2008, pp. 77–106.

60 Zakon o založnom pravu na pokretnim stvarima i pravima upisanim u registar, Službeni glasnik RS, no. 57/2003, 61/2005, 64/2006, 99/2011, 31/2019.

61 Zakon o hipoteci, Službeni glasnik RS, no. 115/2005, 60/2015, 63/2015 and 83/2015.

62 Zakon o finansijskom lizingu, Službeni glasnik RS, no. 55/2003, 61/2005, 31/2011 and 99/2011.

63 Planojević, 2016, p. 431.

64 Nacrt Zakona o svojini i drugim stvarnim pravima Republike Srbije. https://arhiva.mpravde.gov.rs/cr/news/vesti/zakonik-o-svojini-i-drugim-stvarnim-pravima-radni-tekst.html (Accessed: 30 January 2023).

65 See Cvetić, 2012, pp. 145–155.

66 Cvetić, 2012, p. 154.

party's lot. The fourth part contains general rules on in-rem security interests: chattel mortgage and mortgage on real estate. Additionally, in the third subchapter, the Drafting Committee left a gap to regulate the other in-rem security interests. Apparently, the possessory pledge in movables is expected to remain regulated in Book II pertaining to the law of obligations as a nominate contract (contract on pledge). Part five comprises rules on possession and their legal effects, while the last, sixth part, deals with foreigners' rights to acquire ownership.

One of the major novelties of Book III is the proposal to introduce the right to construct a building on a third party's lot.[67] It is defined as a temporarily limited in-rem right of the owner of the building on a third party's lot to be recognised as the legal owner of the existing building or to build a new building on the lot and acquire ownership over such a building.[68] Book III contains rules on adjoining landowner rights and personal servitudes, to which the *'old rules regime'* is still being applied.[69] It explicitly regulates the duties of a third party who finds another person's movable asset. Presently, it is regulated only partially in an instruction of the federal government from 1949 and applies only to movables in state property.[70] The Draft contains detailed rules on condominiums, which are presently not regulated in the 1980 Act on In-rem Rights, but in a special statute from 2016.[71]

3.4. BOOK IV – FAMILY LAW

Book IV predominantly relies on the rules of the effective Family Law Act of 2005 and is divided into ten parts. The first is short, comprising a few general principles and definitions. The second part is devoted to

67 Preliminary Draft, art. 1925–1948. For a detailed analysis see Planojević, 2016, pp. 431–448.

68 Preliminary Draft, art. 1925, sec. 1.

69 See for example the decision of the Serbian Supreme court, Rev 3193/2018 (neighbours' rights) and the decision of the Appelate Court in Novi Sad, Gž 4704/2013 (usufruct as personal easement).

70 See in more detail Pavićević, 2016, pp. 547–564.

71 See in more detail Cvetić, 2017, pp. 1343–1362.

conclusion, legal effects, and dissolution of marriage. The third part covers legal issues pertaining to different aspects of the relationship between children and parents. The fourth part pertains to adoption; the fifth to foster care of children; the sixth to guardianship over children; the seventh to duty of providing maintenance between spouses and partners, parents and children, and close relatives; the eighth to proprietary legal relations between spouses, partners, children and parents, and close relatives; the ninth to combating domestic violence; and the tenth to different procedural rules applicable in litigation and administrative procedure. Among the numerous novelties proposed in the Preliminary Draft, three need to be specially mentioned.

Major dilemmas emerged during the work on the Draft on how same-sex partnerships are to be regulated.[72] Presently, same-sex partners are not allowed to conclude a marriage, nor does a legal institute for registered partnership exist in Serbia. Further, the effective FA recognises only the lasting community of a man and a woman as a de-facto partnership,[73] the legal consequences of which are mostly equalised with those of marriage. After several versions of the respective rule, the final version of the Draft intends to extend the concept of de-facto partnership to same-sex partnerships as well. It specifies that a de-facto partnership (cohabitation) is a lasting community of two persons of different or the same sex, between whom there is no marital impediment of consanguinity and none of them is married or cohabits with another person.[74] Since the Draft equalises the legal position of partners in cohabitation with the position of spouses in their internal relations, regardless of their gender,[75] the non-registered, de-facto partnership of two persons of the same sex would have the same legal effect as the lasting cohabitation of man and woman, hence that of marriage, if the Draft were enacted with the present content. This solution of the Draft is justified in the literature on the requirement to comply with the European Convention on Human Rights, Recommendations

72 Cvejić-Jančić, 2019, pp. 164–167.
73 FA, art. 4, sec. 1.
74 Preliminary Draft, art. 2119, sec. 1.
75 Preliminary Draft, art. 2119, sec. 2.

of the Council of Europe, case laws of the European Court of Human Rights (ECtHR), and the rules of the Serbian Act on the Prohibition of Discrimination of 2009.[76] However, due regard must be given to the fact the government has already prepared a legislative proposal of an act on lasting cohabitation of same-sex partners,[77] which was subject to a wide public debate. If the proposal is going to be enacted eventually, the mentioned rules of the Preliminary draft will surely undergo fundamental modifications.

Supporting the general endeavour to increase natality, the Draft envisages rules pertaining to surrogate motherhood (giving birth to a child on behalf of a third person), as one of the means of biomedically assisted reproduction. Surrogate motherhood opens a range of fundamental legal issues, such as, for instance, who shall be considered the mother of the child, conditions of validity of the contract on surrogate motherhood, or the effects of withdrawal of consent of the surrogate mother, which the Serbian literature called attention to not only during the drafting of the Preliminary Draft,[78] but also long before the enactment of the 2005 Family Act.[79] The Draft offers solutions to most of these critical legal issues. First, it states that the woman who according to the contract on surrogate motherhood intends to take care of the child (intended mother), regardless of whether her reproductive cells were used to impregnate another woman (surrogate mother), shall be registered in the civil register as the child's mother.[80] The father of the child is considered to be the husband or the partner of the intended mother (intended father).[81] The surrogate mother cannot be a woman who is a blood relative of the intended parents, nor a woman whose germ cells have been used for impregnation. In addition, the Draft specifies that a surrogate mother cannot be a woman who has not already given birth

76 Cvejić-Jančić, 2019, p. 167.

77 https://www.paragraf.rs/dnevne-vesti/080321/080321-vest18.html (Accessed: 12 February 2023).

78 Cvejić-Jančić, 2015, pp. 122–135.

79 See for instance Stanić, 2001, pp. 491–507.

80 Preliminary Draft, art. 2176, sec. 1.

81 Preliminary Draft, art. 2176, sec. 2.

to a child.[82] Logically, the Preliminary Draft excludes the legal effect of the general legal presumptions on the fatherhood and motherhood of the surrogate mother and her husband/partner (the *pater est quem nuptia demonstrant* and *mater semper certa est* presumptions).[83] Furthermore, the Draft excludes the possibility of challenging the legal status of intended parents as legal parents of the child, even when the germ cells of only one of them have been used for impregnation.[84] The contract on surrogate motherhood is valid only if the intended parents are spouses or partners who could not conceive a child naturally or by means of biomedically assisted reproduction, or they are advised not to conceive a child owing to the risk of the child being born with a serious hereditary illness.[85] The contract can be devised as onerous. However, the parties may specify reimbursement of only reasonable costs of the surrogate mother and only a reasonable remuneration.[86] The contract must be confirmed by a judge who is obliged to draw the parties' attention to the major legal effects of the contract, ascertain whether the required medical conditions are met, and the agreed reimbursement of costs and remuneration is moderate. If not, the judge declines confirmation of the contract.[87] A rule of major importance is when the surrogate mother refuses to deliver the child to the intended parents after giving birth to it. In such a situation, the Draft envisages the right of the intended parents to request the court to order the surrogate mother to deliver the child to them. This right is limited to three months after the child's birth.[88]

The second major novelty is regarding the introduction of a so-called children's alimony fund or children's support fund, which exists in numerous European countries.[89] Quite often the alimony debtors do not fulfil their obligations, or they fulfil them irregularly, due to which

82 Preliminary Draft, art. 2179.
83 Preliminary Draft, art. 2176, sec. 3.
84 Preliminary Draft, art. 2176, sec. 4.
85 Preliminary Draft, art. 2177, sec. 1.
86 Preliminary Draft, art. 2183.
87 Preliminary Draft, art. 2178.
88 Preliminary Draft, art. 2182.
89 See in more detail Novaković, 2016, pp. 103–122.

the sustenance of the alimony creditors may be endangered. To address this serious issue in relation to child alimony, the Draft envisages the introduction of a children's alimony fund.[90] The initial assets of the fund are to be provided primarily from the state budget.[91] The beneficiary of the alimony from the assets of the fund is a minor, Serbian national with permanent residence in the territory of Serbia, to whom the debtor has failed to pay alimony for at least three months without interruptions or six months with interruptions.[92] Having paid the overdue alimony instalments to the creditor, the alimony fund gains a recourse right against the debtor.[93]

3.5. BOOK V – INHERITANCE LAW

Book V on the law on inheritance mostly transposes the rules of the 1995 Act on Inheritance.[94] It is divided into five parts. The first contains general rules and definitions, the second rules on intestate succession, the third on testate succession, the fourth on different contract-types having legal relevance to inheritance, while the fifth deals with the acquisition of the estate by the heirs.

From the major novelties of Book V, one should definitely mention the introduction of the contract of succession, the third legal ground of inheritance, after intestate and testate inheritance.[95] The Preliminary Draft specifies that by a contract of succession, one party, the testator, obliges to bequeath his/her estate or part thereof to the other party. A contract of succession may be concluded only between spouses,[96] but the contract can also be concluded in favour of children of either

90 Preliminary Draft, art. 2306–2315.
91 Preliminary Draft, art. 2306.
92 Preliminary Draft, arts. 2307 and 2308.
93 Preliminary Draft, art. 2310.
94 Krstić, 2020, p. 165.
95 Preliminary Draft, art. 2505. For reasons for introducing the inheritance contract into Serbian law, see Vidić, 2018, pp. 389–414; Stojanović, 2003, pp. 163–179; Đurđić-Milošević, 2017, pp. 625–637.
96 Preliminary Draft, art. 2684, sec. 1.

party, their common children, their adoptees, and other descendants.[97] The contract of succession may, therefore, be concluded only between spouses and as a contract creating only unilateral obligations. This has been criticised in the doctrine, claiming that there are no justified reasons why partners and future spouses could not conclude such a contract and why it could not be devised as a contract creating mutual obligations, as well, that is, in which both parties undertake to bequeath their estate or part thereof to the other party.[98] In parallel to the introduction of the contract of succession, available only to spouses, the Draft envisages an explicit prohibition of concluding a contract on maintenance between spouses,[99] which is another novelty in comparison to the effective Act on Inheritance. Such an approach may have merits, since there is already a statutory obligation to provide maintenance between the spouses, based on their marriage. The contract on life-long maintenance between spouses, being an onerous contract, is a legal instrument by which the rules on mandatory share in estate may be circumvented.[100] However, other opinions are also expressed in the doctrine, which support that the possibility of concluding a contract on succession between spouses should not affect the possibility of concluding a life-long maintenance contract between them.[101] Another critical remark formulated in relation to the rules on contract of succession is that it does not regulate the content of the contract.[102] The Draft contains only rules on the subject-matter of the contract (it may relate to the whole estate of the devisor or part thereof[103]) and its form (the contract must be concluded in written form, confirmed by a judge, who is obliged to draw the parties' attention to the legal effect of the contract[104]). The Draft explicitly states that the contract is considered valid even if

97 Preliminary Draft, art. 2684, sec. 2.
98 Vidić, 2018, p. 413.
99 Preliminary Draft, art. 2702, sec. 4. See in more detail Dudás, Kovačević, 2022, pp. 19–30.
100 See Đurđić-Milošević, 2017, p. 633.
101 Krstić, 2020, p. 170.
102 Vidić, 2018, p. 413.
103 Preliminary Draft, art. 2687.
104 Preliminary Draft, art. 2686.

one or more of the descendants of the parties did not give their consent to the contract, who would be called to inheritance upon the parties' death.[105] This is a major difference in comparison to the contract on assignment and distribution of estate during the life of the devisor, the validity of which is conditioned on the consent of the devisors' descendants who would be called to inherit him/her.[106]

The third major novelty in the field of the law on inheritance that needs mention in this brief overview is that the Preliminary Draft in the light of the development of biomedical sciences, extends the notion of the unborn child (*nasciturus*). The rule of the effective 1995 Inheritance Act still supports the classic concept of *nasciturus*, by prescribing that a child may inherit, if it was already conceived at the time of devisor's death, but comes to the world after his/her demise, under the condition that it is liveborn.[107] The Preliminary Draft intends to change this concept: a child is considered capable to inherit, even if it is not yet born, nor conceived at the time of devisor's death, under the condition that it is liveborn.[108] Although this novelty may be supported in general, critical remarks are also expressed saying that the Draft does not specify any time-limit in which the child should be born at the latest, which generates a great degree of legal uncertainty.[109] In addition, this rule may contradict the special regulations pertaining to bio-medically assisted reproduction, which indirectly forbids the use of germ cells posthumously for the purpose of giving birth to a child.[110]

4. CONCLUDING REMARKS

The endeavour to enact a civil code, although in differing pace and impact, was a hallmark across the 20th century in the Kingdom of Serbia and all Yugoslav states that had ever existed. Owing to specific historical

105 Preliminary Draft, art. 2685.
106 Preliminary Draft, art. 2691.
107 Act on Inheritance, art. 3, sec. 2.
108 Preliminary Draft, art. 2506, sec. 2.
109 Stojanović, 2012, pp. 192–193.
110 Krstić, 2020, pp. 167–168.

circumstances, a novel civil code that would replace the 1844 Code was never enacted. The realisation of this endeavour, thus, gained realistic prospects only after 2006, when Serbia finally became a unitary state anew. The very same year a committee was appointed to prepare the draft of a future civil code of Serbia. The appointing of the committee and the official initiative to commence the drafting of a civil code was received positively by scholars and practitioners alike. The results of its work have been published gradually by 2019 when the final version of the Preliminary Draft of a Civil Code for the Republic of Serbia was made available to public. The frame of this paper by no means makes it feasible to provide an overview of all of the major novelties of the Preliminary Draft. Only the ones considered the most important have been presented in short.

The Preliminary Draft follows the five-partite division of branches of civil law according to the Pandectists' school of thought. The drafting committee eventually opted to have a general part in the Preliminary Draft, defining a large number of theoretical concepts with meticulous precision. The novelty that evoked the greatest public attention and opinion is the proposal to introduce euthanasia, as the embodiment of the supreme human right, the right to human dignity. The General Part is followed by Book II dedicated to the law of obligations, which was the first draft of a legislative text offered to the public by the committee as early as 2009. The choice to prepare Book II on obligations first was unsurprising. The legislative model, which the committee departed from, the 1978 Obligations Act, demonstrated its qualities in its more than 40 years of application, even in the turbulent changing social environment. The relatively small number of legal issues that were not regulated in the 1978 OA, or were not regulated properly, could easily be remedied by reverting to the solutions offered by Professor Konstantinović in the 1969 'Sketch', which the drafting committee mostly followed. In comparison to the 1978 OA, major novelties are proposed in the Preliminary Draft in relation to contractual negotiations, precontracts, leasio, usury, repudiation of contract due to non-performance, concept of fault, concept of moral damage, right of legal persons to pecuniary compensation for moral damage, inheritability of a claim to compensation for moral damage, etc.

Book III on in-rem rights was among the last ones to be finalised. The aim of the drafting committee to unify the rules on in-rem rights into a single legislative text can be supported, since presently these are dispersed in a considerable number of statutes and regulations. However, a critical remark has been formulated in the doctrine that the committee should have considered the Draft of the Act on Property and Other In-rem Rights of 2012, which was highly praised not only at national level, but also by foreign scholars.

Book IV on family law integrates the rules on the effective Family Law Act of 2005. However, numerous novelties are envisaged by the Preliminary Draft of which two are noteworthy. The first is the introduction of surrogate motherhood into the Serbian law. In this pursuit, the Draft contains detailed rules on the conditions of validity of a contract on surrogate motherhood, conditions imposed on the surrogate mother and intended parents, the consequences of the refusal of the surrogate mother to deliver the child after its birth to the intended parents, etc. The second major novelty is connected to the legal regulation of same-sex partnerships. At present, same-sex partners cannot conclude a marriage, nor can their relationship be recognised as de-facto cohabitation, having mostly the same legal effects as marriage. The Preliminary Draft intends to extend the concept of de-facto cohabitation to embrace lasting cohabitation between same-sex partners as well. However, a recent legislative proposal intends to introduce registered partnership for same-sex partners. If this proposal is going to be enacted in a form of statute, the mentioned rules of the Preliminary Draft are expected to be modified.

Finally, Book V contains rules on inheritance law, which in the most part represents the transposition of the effective Inheritance Act of 1995. However, numerous novelties are proposed in the Preliminary Draft. Two have been discussed in depth in this chapter: the introduction of a contract on succession into the Serbian law and the extension of the notion of nasciturus, which is claimed to be necessitated by the growing availability and importance of modern biomedically assisted means of human reproduction.

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THE CURRENT STATE OF THE SLOVAK PRIVATE LAW RECODIFICATION*

MILAN HLUŠÁK

ABSTRACT

The Civil Code, which is currently in force in the Slovak Republic, was adopted in 1964, that is, in a different social system. This code was intended to regulate only typical situations of socialist life. The result was an unduly simplified and overly generalised legal regulation that served as an instrument for managing society rather than for realising private interests. Although the changes made to the legislation after the socialist regime ended in 1989 removed many of the shortcomings, new ones were introduced, resulting in an insufficient, disparate, unsystematic, inconsistent, and fragmented regulation that does not fulfil its unifying and systemising role. The Code still in force therefore does not offer satisfactory solutions to the problems of current complex life because it is over-simplified, inconsistent, and incoherent. Despite these glaring negatives, the Slovak Republic has not managed to adopt a new Civil Code even after decades of recodification works. In this chapter, an attempt is made to identify the reasons for this undesirable state of

* This paper was written within the framework of the project APVV-20-0171 Concurrence of delicts and quasi-delicts in non-contractual relations and their overlap with contract and property law.

Hlušák, M. (2024) 'The current state of the Slovak private law recodification' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 209–227. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_9

affairs. Among them are, first, the weak interest of politicians, social and political unawareness of the benefits of a new code, the method of recodification work, the fatigue involved in the recodification process, and its extensiveness. The objectives of recodification are also discussed – particularly, the strengthening of the private autonomy of individuals while respecting the protection of the weaker party, modernisation and streamlining of private law, its integration and centralisation, as well as the transparency and clarification of the civil law system. In the conclusion, a brief picture of the intended structure of the new Code (according to its draft) is presented, describing the most significant changes.
Keywords: *Slovakia, recodification of private law, Civil Code.*

1. PROGRESS OF RECODIFICATION WORKS AND CURRENT STATUS

At the outset, it is necessary to state that the Slovak Civil Code from 1964, which was adopted to regulate only the typical situations of socialist life, is still in force in Slovakia. The process of recodification of Slovak private law, which has been going on for roughly 30 years, has not yet reached a successful end, and most likely may not in the foreseeable future. During this time, two so-called Legislative Intentions (i.e. memoranda containing the basic principles of future legislation) approved by the Government of the Slovak Republic have been drafted, as well as several versions of paragraph wording; many personalities took turns in heading this process.[1]

During the long period when recodification was underway, the accents and emphases have also gradually changed. In the initial period, the question that was primarily addressed was whether to keep the regulations of civil and commercial law separate. Such a separation would cause problems especially in the law of obligations. The Commercial

1 The Legislative Intention approved by the Slovak Government in 2009, as well as the several versions of the paragraph wording and the history overview, is published on the website of the Ministry of Justice of the Slovak Republic. Available at: https://www.justice.gov.sk/aktualne-temy/rekodifikacia-sukromneho-prava (Accessed: 15 September 2024).

Code regulates not only specific types of contracts for commercial relations but also general issues of the law of obligations, which would unnecessarily cause a not-always justified double-track approach to the regulation of the Slovak law of obligations. This issue was ultimately resolved in favour of uniformity of regulation. In the current situation, therefore, the Commercial Code, as a separate code, which regulates not only the status of merchants, but also the commercial obligations, will be abolished and replaced by the Law on Commercial Companies and Cooperatives, which will contain only specifics applicable to commercial companies and cooperatives. The entire obligation law will then be regulated uniformly in the new Civil Code.[2]

Sometime later, the issue of regulation of intellectual property rights was addressed, which was supposed to be included in the new Civil Code according to the first Legislative Intention; subsequently, this intention was abandoned: the last Legislative Intention of 2009 leaves the regulation of intellectual property rights outside the Civil Code.

Recently, the issue of regulation of consumer relations was addressed, considering a new, separate Consumer Code to place this regulation. However, this intention was also abandoned, and now the regulation of consumer relations is to be included in the Civil Code. The reason for this is primarily because a substantial part of civil law transactions is carried out today within the framework of consumer relations; to exclude such a vast part from the basic, ground code of civil law would be a certain degradation of it. Moreover, the approach taken so far – where a large part of consumer relations was regulated in special laws – may be characterised by a weaker degree of coordination between the specific regulation and the regulation included in the Civil Code. Therefore, including a substantial part of the regulation into the Civil Code, one piece of legislation, appears a better alternative. The issues of consumer administrative law will remain specially and separately regulated.

In recent times – also in view of the fruitlessness of the recodification works so far – a gradual recodification in the form of partial amendments to the current Civil Code was considered. An amendment was therefore drafted based on the law of obligations and some questions

2 For details on why this approach is appropriate, see Lazar, 1995.

of the general part (which were assessed as politically and socially the most passable). The amendment of other parts of the code was to follow gradually, in a phased manner, as and when necessary social and political consensus was obtained on them. After this approach was criticised – which, however, was not entirely baseless, the rationale being *'if it doesn't rain, at least let it drip'* – it was abandoned, and currently the recodification process is underway with the idea of a completely new code. Of course, having a new Civil Code is a much better alternative. Gradual recodification would cause risk of inconsistency in the new parts with those not yet recodified. On the contrary, as the current situation proves, waiting for the new Civil Code can once again postpone the necessary changes and benefits to society indefinitely.

2. REASONS FOR THE CURRENT DEADLOCK

The reasons for the new Civil Code not being adopted to date are complex. First, the relatively *weak interest of politicians* is a factor. Changing civil law regulations has never been a real priority for them, although it has been included in the government's programme statement (manifesto) many times. As it is usually said, recodification does not win elections. Objectively, however, it must be said that in individual periods of social need, demand was focused on other priorities, be it deep economic reforms in the period after 1998, the economic and financial crisis after 2007, the fight against corruption after 2018, or the pandemic, the energy crisis, and the war in Ukraine. These problems pushed recodification – which would undoubtedly mean a big, major change for society and at the same time a considerable, despite only temporary, burden for both legal practitioners and the courts – into the background.

Second, a certain *social as well as political unawareness* seems to have contributed to the failure so far. Neither society nor political actors sufficiently realised the need for a new civil law or the benefits that would accrue from it. It must be admitted that a society living for decades in a relatively non-standard and simplex regulation of private life has already got used to the current regulation and can no longer conceive of a different one for itself, for example, in the area of inheritance law

or marital property relations. There is no in-depth discussion in society about what regulation of private life should look like, even in areas that are most closely linked to private life. Sporadically, voices are heard talking about the need to introduce regulations that make life easier for the LGBTI+ community or to establish, for example, private or family foundations as a mechanism of inheritance law, or to regulate the participation of persons who are not fully capable of deciding on their own affairs in the management of their affairs. However, these are only partial issues, without any attempt made to intervene more broadly in the current regulation. Therefore, one cannot expect the process of recodification to be accelerated because of social demand.

Furthermore, the method of recodification and its dependence on changes in political conditions can be another cause of failure to implement a new Civil Code so far. Those entrusted with preparing the new code are exposed to uncertainty about to whether continuity will be maintained whenever the Minister of Justice is changed, because responsibility of the Civil Code lies with the minister. It should be added that breaking continuity is not particularly difficult. This is because the results of recodification works are not always discussed in sufficient detail among the professional public and evaluated from the point of view of legal practice. Although in the initial period of the recodification process the professional public paid considerable attention to the proposed changes in the civil law, this attention gradually turned into disinterest. This creates an impression (often justified) that recodification is still a work in progress, the concepts are open, and that there is still both, room and a need, for reopening questions that have already been closed. Therefore, even from the point of view of the Ministry of Justice, changing the leadership of the recodification works and starting the process *ab ovo*, from the scratch, is not a problem.

Fatigue from the recodification process can be another cause for the current state of affairs. The process that has been going on for about 30 years and has not produced the desired results is perceived by many stakeholders as a story whose end is not in sight and is questionable. Scepticism looms large about the successful conclusion of the process among the professional public and those in legal practice; above all, a strong sense of fatigue can be observed among the academic community.

This is logically underpinned by a lack of interest in participating in the recodification process further and a reluctance to respond to any partial results. At the same time, fatigue and disinterest indicate that the fundamental issues of recodification are not sufficiently discussed, which in turn suggests that the conclusions adopted in the recodification process are not the result of a broad consensus. This closes the circle of disinterest: long-term failure of the recodification process leads to greater disinterest, which in turn leads to further prolongation of the whole process. At the same time, this leads to the logical questions of whether recodification is necessary at all if we have been able to somehow function with the existing regulation for decades, and whether the new code will end up being a useless luxury, a burdensome fad that will complicate everything, overload judges and practitioners who will have to learn civil law anew; and after all, if we have managed to live without some legal institutes for almost 60 years, then maybe we do not need them at all.

Another reason for the prolongation of the recodification process is that many of the problems that have arisen over a long period have not been dealt with gradually as they arose, but have been postponed to a later date, assuming that they will be dealt with in the framework of recodification. Politicians have thus avoided dealing with complex issues by postponing them indefinitely, while recodification has given them an elegant way out, a neat reason not to address them immediately. Thus matters began to grow, and now, they will have to be dealt with all at once, instead of gradually. Matters to be addressed are therefore *quite extensive*; the changes will not only be evolutionary, but in many ways downright revolutionary, raising fears in a large section of the legal community that too many changes will be required. It is understandably natural that practitioners do not like change. It is necessary to adapt to changes, understand them, and free our thinking from the burden of conventions or paradigms that have been built up in our civil law since 1950. We are inherently reluctant to accept new and complex changes. Therefore, change will not be painless. At the same time, the reluctance will be not only to individual changes but also to recodification per se.

As mentioned above, several complex reasons have led to the current situation and to the lack of tangible results. It is therefore essential to deal with them by restarting the recodification process is in such a way that these causes are adequately addressed and eliminated.

3. REASONS FOR RECODIFICATION

Despite the failure of recodification efforts so far, the adoption of the new Civil Code is becoming even more necessary, mainly because the Civil Code of 1964, which is still in force today, was adopted in a different social system, under a socialist regime. Although numerous amendments have succeeded in eliminating some of its ills, the Code as a whole is still indebted to the regime in which it was created.

First, the current Civil Code was built around *typical situations of socialist life*. The consequence is an overly simplistic legislation that has left out many of the classical legal institutes. The desire to avoid a casuistic approach has led to the legislation being too generalised, to the extent that what remains of it does not adequately cover present-day needs and does not provide answers to current problems. Life today is far different from what it was more than 50 years ago. A major amendment to the Civil Code in 1991 did change a lot about this, but not enough. We would do well to remember that its source of inspiration was the so-called middle Civil Code of 1950. Professor Karel Eliáš – who is behind the new Czech Civil Code – rightly points out the paradox that the ideological source of the amendment in 1991, which was supposed to help the protection of private property and pave the way for the market economy and new social conditions, is a law that was supposed to be an instrument for building a socialist way of life and a planned economy modelled on Soviet law.[3]

The inadequacy of the legislation and its inability to respond to the needs of the current complex world can be seen, for example, in the insufficient regulation of inheritance law, which was prepared primarily for situations where, in principle – for example, owing to the absence of any family problems – there is no need for a testator to regulate how his estate

3 Eliáš, 1998.

is to be dealt with after his death, because no problematic behaviour on the part of the heirs is foreseen. Such a regulation, largely considering only unproblematic cases, is no longer sufficient today, because it makes it impossible for the testator to make decisions about his estate, even though atypical circumstances of the case would require it, for example, if the descendant is addicted to drugs or any other substance, if she or he is unable to manage her or his affairs because of a disability or other handicap, and so on. Current legislation based, for example, on the inadmissibility of imposing conditions or orders in a will cannot provide answers to today's problems. However, the problem is not limited to inheritance law. The fact that the Civil Code regulated only typical situations of socialist life, and at the same time that the code was considered primarily mandatory, led to the opinion, often accepted even today, that what the Civil Code does not recognise is not permitted. This has a negative effect especially in judicial practice, which, even 30 years after the regime change, cannot always overcome this approach.

Furthermore, the Civil Code, at its inception, represented *a tool for managing society* rather than *a tool for realising private interests*. Thus, the goal was not only to regulate typical situations, but also to prevent atypical relationships from occurring. This was manifested in an unnaturally narrowed legal space for individual autonomy and free decision-making about one's own affairs, as well as in an overly simplistic view of law as a system of limits, constraints, and restrictions on the realisation of an individual's broad freedom. Above all, one can mention the rigid view on the invalidity of legal (juridical) acts, which takes a primarily formalistic view of compliance with the letter of the law, without looking for an answer to the crucial question of what reasonable and significant reason in a given case justifies denying legal protection to an individual's decision. The aforementioned limitation of private autonomy is still manifest in the preference for absolute invalidity over other mechanisms (e.g., relative invalidity, or revocability of a legal act). It may also be pointed out that the limitations of the regulation of inheritance law unreasonably and disproportionately prevent a testator from deciding how his estate is to be dealt with after his death.

Further, *the paternalistic approach*, on which today's Civil Code was built, could (perhaps) have been manageable in the times of socialism,

but today, the individual can no longer rely on the protection of the state, both because of the capacity of the state and because of the current complexity of life situations and the diversity of a person's private needs and interests. For example, the protection of persons with medical or other disabilities, given the complexity, pitfalls, and risks of today's world, can no longer be fully provided by the state. The concerns of parents and other close people about the fate of such descendants or other relatives cannot be resolved by simplistic and inflexible guardianship or inheritance law arrangements.

Furthermore, the current Civil Code was also a manifestation of efforts to *decentralise civil law.* The Civil Code was narrowed down to regulations necessary to ensure only the basic needs of citizens. To a large extent, this situation continues even today, as the regulation of many purely civil relations is contained in special laws. This is most evident in the dual regulation of obligations in the Civil and Commercial Codes or in the separate regulation of family law in the Family Act. However, many other examples of unnecessary fragmentation of the legal regulation also exist: for example, a separate regulation of the lease and sublease of non-residential premises or short-term lease, separate from the Civil Code, or the fragmentation of the regulation of consumer private relations. The consequence of such fragmentation is that the Civil Code has, to a large extent, lost its status as a unifying regulation of civil law. This entails several shortcomings and disadvantages. First, special laws are not always sufficiently adapted to the regulation of the Civil Code, which is also a consequence of the fact that they fall within the remit of different ministries. Likewise, the same terminology is not always preserved, or the same idea is expressed differently, which raises questions on whether the idea is the same. At the same time, the fragmentation of legislation and the lack of connection between special and general legislation allows the legislator to make more benevolent changes to special legislation, which do not consider the unity and coherence of the civil law system. The consequence of all these shortcomings is that the application of the law becomes increasingly difficult and court decisions become less predictable.

Last, but not the least, the reason for the recodification is also the *inconsistent and incoherent* state of the Civil Code currently, which makes even the regulation inconsistent and incoherent. The code is largely

unsystematic as well, which means that the room for reforming the original structure is limited. Entire books and sets of provisions have been deleted without replacement. For example, sections 55 to 99 and 152 to 414 are completely missing. Moreover, originally, the Civil Code did not contain any comprehensive regulation of obligations; it regulated them only in a fragmented manner in several places. On the contrary, the existing provisions were extended by dozens of others, for example, § 151a to 151me were inserted after § 151 (with the result that there are 26 paragraphs with the number 151). The Code is therefore difficult to navigate, making the connections between the various provisions obscure.

Even the major amendment of the code in 1991 was unable to eliminate or remedy these shortcomings. It should be emphasised that the amendment of 1991 was from the beginning seen as insufficient, as if hastily sewn with a hot needle; it was adopted largely because, on the one hand, its adoption was a prerequisite for the adoption of the new Commercial Code, which was key for the new economic system based on a market economy, and on the other hand, it was assumed that a completely new Civil Code would be adopted in the foreseeable future. Already in 1996, the chairman of the first recodification commission, Professor Karol Plank, pointed out strongly that the Civil Code as amended in 1991 is only a temporary solution, a 'way out of an emergency' that 'bears the stamp of the speed of its preparation'.[4] The amendment from 1991 was thus considered only an interim, temporary solution, which is also confirmed by its explanatory memorandum (report), citing that the amendment was adopted for the necessary period until the recodification and was mainly for the period of transition to the market mechanism. This was in 1991. In an era that is separated from the present day not only by thirty long years – a whole generation – but also by a huge social, economic, cultural, and technological shift. During this time, we achieved the market economy, became independent, and joined the European Union. Yet the legislative standstill persists. The socialist Civil Code has endured most part of its life in non-socialist times. Expectations for the early adoption of the new code have therefore not been fulfilled, and our

4 Plank, 1996.

society has had to struggle with an insufficient, temporary regulation for more than 30 years.

However, the unsystematic nature of the structure, or its lack of conceptuality, is not only a consequence of the initial form of the Civil Code, but also of its subsequent amendments. Changes to the code, especially after 1991, were often carried out *ad casum*, without considering their impact on the overall coherence and cohesion of the code. For example, the regulation of consumer relations was included in the general part within the regulation of legal acts, although it would be more appropriate to include it in the part dealing with obligations. In addition, some revisions also introduced chaos and confusion into the terminology because their sources of inspiration have not been confronted with the existing terminology. Problems are also often caused by the literal transposition of European Union law, which has often been carried out without sufficient examination of whether the literal translation corresponds to the terminology of the Civil Code, or whether the idea addressed by the European Union law is not already resolved in a general way by the Civil Code. Unnecessary questions and doubts then arise: the amendments adopt provisions from several sources without evaluating whether the adopted provisions resolve the same issue and doubts arise as to when one or the other provision should be applied. The unsystematic nature of some parts of the regulation is also because the major amendment in 1991 un-conceptually extended the regulation previously applicable only in the relationship between natural persons and socialist organisations to relations between only natural persons, which often resulted in the introduction of harsh regulations into relations between natural persons.

The result of all these shortcomings and disadvantages is a code that lacks a sufficiently clear internal organisation of the content and logical continuity of individual parts, as well as coherence and consistency of the regulation, which makes it impossible or difficult to derive rules and principles applicable to the entire regulation of civil law and to build a consistent and coherent system of civil law.[5]

5 For details on reasons and objectives of recodification, see Dulak, 2009.

4. OBJECTIVES OF RECODIFICATION

The objectives of recodification largely follow from the reasons given above. They can be divided into material and formal objectives. The main substantial, *material objectives* of the recodification are to strengthen the private autonomy of individuals, while respecting protection of the weaker party, and to modernise and streamline private law.

The first material objective of the recodification is *to strengthen the private autonomy of individuals*. As has already been pointed out, the current Civil Code, as well as the practice that developed in its background, followed a paternalistic approach to the individual, enhanced by the fact that civil law was not understood as a tool for realising private interests but as a tool for managing society. The aim is to reverse such an approach and strengthen private autonomy in several ways. Primarily, we may mention here the turning, the reversal, of the paradigm in assessing the validity of a legal (juridical) act. The validity of the legal act must prevail over its invalidity. Another area where private autonomy needs to be strengthened is in the protection of adults. Presently, a person who is unable to manage her or his own affairs tends to have his or her legal capacity restricted, although there could be milder, less intrusive interferences with her or his autonomy. However, it is necessary to strengthen the protection of private autonomy in other areas as well. For all of them we can mention, for example, the need to prefer limitation over preclusion or limit the ability of courts to prioritise, for example, expediency or other similar aspects over the interest of the individual. On the contrary, the interest in protecting private, individual autonomy is not limitless. The new legislation must limit it in several ways, and one of them is *the protection of the weaker party*.

The second material objective is *modernisation and streamlining of private law*, or restoration of some abolished legal institutes. As mentioned, the current Civil Code was conceived to regulate typical situations of socialist life. Many classic institutes or issues were not covered and dealt with by the Civil Cod although these omitted classical institutes could provide solutions for many complex questions of contemporary life. Their absence is therefore felt in practice as a deficiency. This includes,

in particular, the rigid regulation of inheritance law, which makes it impossible for a testator to decide on the fate of his estate. Another area that requires modernisation is the protection of adults with physical or other disabilities. In the same way, today's austere regulation of personal rights no longer meets the current needs. In this context, one may mention in particular interferences with personal rights carried out on the Internet or in the online environment. Among other things, the regulation of liability for damage requires modernisation, a result of technological progress. Further, the regulation of legal entities requires modernisation, as the current one – especially in relation to legal entities other than commercial companies and cooperatives – does not always flexibly help the development of legal relations, mainly because of its austerity and ambiguity, as well as the limited possibilities of using the relevant forms of legal entities. In this regard, we may mention, for example, the current inadmissibility of the so-called family or private foundations. At the same time, it should be emphasised that, in many areas it will not be a question of real modernisation, but rather of a return to classic institutions, which – although they were omitted when the Civil Code was adopted – still meet the needs of the modern world and whose absence adversely affects legal practice.

One of the main formal objectives of the recodification is to *integrate and centralise civil law* as much as possible, particularly to eliminate duplication of regulation and move regulation from special laws to the Civil Code wherever it makes sense. The other, equally important, formal objective is to make the civil law system *clearer and more transparent.* This will require making the structure of the Civil Code more transparent and logical, linking the regulations that remain in special laws with the regulation of the Civil Code, clarifying the relations between them, and introducing a uniform method of regulation and sanction mechanisms. Another important formal objective is to achieve terminological purity, matter-of-fact expression (i.e., avoiding non-normative content), and clarity and comprehensibility of the text (each section should have its own title, a section should have a maximum of 3 paragraphs, and each paragraph a maximum of 2 sentences).

The new Civil Code must therefore bring not only a cosmetic modification or correction, but also fundamental changes that will inevitably lead

to a change in our perception of law and our view of it. Present-day regulation of civil law was adopted in an effort to simplify. This has also been reflected in our thinking, when we try to find quick and easy solutions that are suitable for as many situations as possible, regardless of whether the solution is really the one that a particular life situation deserves. Overall, the incompleteness and inadequacy of today's regulation encourages it. The current Civil Code is therefore not only the foundation and root cause of this simplification, but also a tool for deepening it.

The above objectives cannot be achieved by partial amendments alone, all the more so since what is to be amended cannot even be considered as a regulation that should regulate relations in the 21st century. A house with a bad foundation cannot be repaired indefinitely. Sometimes a big patch is not enough to cover a big hole: the clothes need to be replaced. A new Civil Code that is comprehensive, consistent, and as clear as possible – giving answers to many times more questions than the current one, making the work of judges and practitioners easier by its methodology, system, and language, and enabling individuals to make decisions about their own affairs, not only in areas where this is not possible today, but also without unnecessary and excessive interference by the state – could also be a great boost to improving legal relations. The added value of the new code would thus also improve and culturalise social relations as such.

Of course, what has been said does not mean that the new regulation should completely sweep the old one off the table. Where there is room, the new regulation must build on the existing one, improve it, not negating it just for the sake of negation. However, the Slovak civil law – although partially modernised in 1991 – is still only a law built on the foundations of Soviet law. Therefore, fundamental changes cannot be avoided, even where they may not seem necessary today. If this is required by a new, modern concept of civil law, a uniform methodology of approach and regulation, or the need for clear terminology, even a regulation that seems unproblematic will have to give way.

5. STRUCTURE OF THE CODE

The Code is expected to consist of six books: General Part, On Persons, On Family, On Real Rights (right *in rem*), On Obligations, and On Inheritance and Legacies.

The most significant changes in *the general part of the Civil Code* will concern the issue of legal (juridical) acts. As mentioned above, in case of any deficiencies in the legal act, today's regulation prefers its invalidity over its validity. The new code should change this premise, this starting point, and allow private decisions to be accepted as far as possible. This will entail moving some of the grounds for absolute nullity of a legal act into the group of grounds for revocability (voidability).[6] These changes will also affect the rules of interpretation of a legal act, since today's regulation rigidly supports strictly linguistic interpretation, which leads judicial practice to the conclusion that linguistic interpretation takes precedence even over the apparent will of the parties to the contract. The consequences of the conditions included into a legal act will also be clarified, as today's law is too brief. The section on statute of limitations will also be significantly revised – in contrast to the current state, it is now envisaged that only claims, i.e., the right to demand from another to act or omit something, will be subject to statute of limitations. On the contrary, other rights, in particular the so-called creative rights (*Gestaltungsrechte*), such as withdrawal from or termination of a contract, will not be subject to statute of limitations at all (but will be subject to other limiting mechanisms). At the same time, the new regulation of the statute of limitations will also remove the current double-track since the Commercial Code regulated the statute of limitations of commercial obligations separately and differently from the Civil Code. A major task of the general part will also be to lay down rules that will support the honesty of the parties and, on the contrary, that will prove to be a disadvantage to one who behaves dishonestly in mutual relations.

The *book on persons* is envisaged to establish the general regulation for all legal entities, with the exception of the peculiarities of

6 See Hlušák, 2021.

commercial companies and cooperatives, which will be left to the special regulation contained in the new Companies and Cooperatives Act. A significant innovation will be the introduction of decision-making support arrangements with the aim of helping those who cannot make the necessary decisions on their own due to their disabilities, thereby avoiding judicial restriction of their legal capacity. Introduction of the so-called private, or family, foundations is also envisaged. Plans are also afoot to change the regulation of personal rights, especially from the point of view of protection on the Internet, or in a digital environment.[7]

The *book about family* will be a novelty for our Civil Law, as family law is currently regulated in a separate, special law (Family Act of 2005). The recodification envisages its abolition and the incorporation of the matter of family law into the Civil Code. The current family law is relatively new: it was adopted in 2005. Therefore, few fundamental changes are expected. Only issues of marital property relations will probably undergo substantial modifications, as the current regulation does not suit today's life. Therefore, a certain relaxation of the rules for matrimonial property regimes is expected, but with an increase in the protection of each of the spouses and guaranteeing the protection of creditors. Given the reluctance of the majority of the political spectrum, the possible introduction of regulation of registered partnerships or recognition of LGBTI+ relationships, which is still completely absent in any form in the Slovak legal order, is highly questionable.

The *book on real rights* foresees a move to the so-called superficial principle (*superficies solo cedit*), that is, the building is not part of the plot, since this principle does not currently apply. This change is justified not only by the positive consequences of such a change in the neighbouring Czech Republic, but also by convergence with neighbouring states where this principle is applied.[8]

The Book on Obligations will, in particular, bring the long-awaited and much-needed unification of the general regulation with the regulation of commercial obligations, which is now contained in a special,

7 See Cirák, 2013.

8 See Jakubáč, 2023.

separate Commercial Code. This will remove the persistent and troublesome dualism. At the same time, it is expected that the regulation of consumer obligations will be substantially clarified. On the contrary, the regulation of labour relations will probably remain contained in a separate Labour Code, only with a subsidiary applicability of the Civil Code.[9]

The *book on inheritance and legacies* envisages the restoration (reintroduction) of institutions that were abandoned by communist law and have not been part of Slovak private law for 60 years or more, such as *legatum*, conditions, *fideicommissum*, *modus*. As has already been mentioned several times, the current inheritance law is absolutely inadequate, as it does not give the testator enough space to determine the fate of his property after his death according to his own will. It is the book on inheritance and legacies that will probably contain the most changes compared to the current state.[10]

6. CONCLUSION

We have reached the end of our reflections. As has been described, the situation in Slovakia is not flattering. The Civil Code of 1964, which was adopted in the times of socialism, has been in force for a very long time. Slovak private law is thus stumbling along. It is therefore unable to provide solutions and possibilities where practice needs them or where they could be a positive step forward. The Civil Code of 1964 thus hinders the development of social relations and makes legal turnaround more difficult. It must be frankly and humbly admitted that this situation is largely the fault of the academic community itself, which has failed to unite in the process of drafting the new regulation of the private law and failed to make the benefits of the new code convincingly clear to politicians and to the professional and general public. As an academic community, we must acknowledge this fault and restart the recodification process. It is high time that we not only try to complete

9 See Barancová, 1998, or Hlušák, 2023.

10 See Jakubeková, 2008.

the long-standing, and perhaps for all stakeholders tedious, process of recodification, but also to bring it to a real and successful conclusion. The Slovak Republic – as Professor Ján Lazar aptly pointed out – will thus fill a significant gap in the private law order.[11]

11 Lazar, 2020.

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REFORM OF PRIVATE LAW IN THE CZECH REPUBLIC[1]

MILAN HULMÁK

ABSTRACT

This chapter presents the reform process of private law in the Czech Republic, specifically focusing on the significant and successful wave of recodification achieved in 2012. Previous attempts at modernising Czech civil law, as well as the major elements of the reform, and their effects on various branches of law, such as commercial, consumer, labour, and family law, are documented. Furthermore, the main sources of inspiration, and some legal transplants utilised during the reform are presented apart from the major challenges faced in their implementation (including erroneous translation, and misunderstanding the conceptual models of foreign rules, the adaptation of which was desired). The transformations of case law under the new rules are also touched upon. Finally, later amendments and corrections enacted to complement the 2012 reform are presented.

Keywords: *Czech Republic, civil law reform of 2012, Civil Code, legal transplants, case law.*

1 This paper was written within the framework of the project APVV-20-0171 Concurrence of delicts and quasi-delicts in non-contractual relations and their overlap with contract and property law

Hulmák, M. (2024) 'Reform of Private Law in the Czech Republic' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 229–258. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_10

1. INTRODUCTION

The reform of private law was undertaken in the Czech Republic in 2012. This chapter focuses on the content of the new Civil Code in the Czech Republic and its impact on private law. The chapter begins with a description of the reform of civil law in the Czech Republic (section 2). Understanding the scope and impact of the reform requires at least a brief mention of the problems to which the private law reform responded. From this perspective, it is interesting to note how private law reform has already affected previous regulation (section 3). The new civil law is largely influenced by foreign sources. Section 4 mentions the several challenges resulting from this. As almost ten years have passed since the new Civil Code came into effect, it is possible to attempt an analysis of the approach adopted by courts to the new Civil Code (section 5). Finally, the chapter would be incomplete without at least a brief discussion of the amendments to the Civil Code (section 6).

2. CIVIL LAW REFORM IN THE CZECH REPUBLIC

The long process of implementing private law reform, which started in 1990 in Czech Republic was completed only by 2012. The first draft of the current new Civil Code[2] could not be adopted due to the elections in 2010. However, after certain revisions, the second attempt to adopt this draft in 2012 was successful.[3] Act no. 89/2012 Coll., the Civil Code (hereinafter *'CzeCC'*), Act no. 90/2012 Coll., on Business Companies and Cooperatives, and Act no. 91/2012 Coll., on Private International Law were adopted. The adoption of these regulations has resulted in the repeal of hundreds of other regulations. The Civil Code alone repealed 258 of them. Hundreds more had to be amended. Several new fundamental regulations had to be adopted too.

2 Chamber of Deputies Journal no. 835 (5th electoral term).

3 For more about the recodification efforts, see Melzer, Tégl et al., 2013, p. 21.

The enforcement of these acts was postponed to 1 January 2014. This postponement of the Civil Code and thus of the private law reforms had two effects. The first was that it prepared society for the fact that private law would change significantly as of 1 January 2014. The second impact was the continued effort to delay or even cancel the reforms altogether.

The preparation for the reform required adopting further regulations that would follow up on the reform. However, these were not prepared in advance. For example, one may mention Act no. 256/2013 Coll., the Land Registry Act, and Act no. 304/2013 Coll., the Legal Persons Registry Act. Furthermore, regulations implementing the Civil Code have been adopted, for example, Regulation no. 351/2013 Coll., which determines the amount of default interest and costs associated with a claim, or Regulation no. 366/2013 Coll., on the regulation of certain matters relating to flat ownership. Subsequent amendments have also been made to procedural law (No. 292/2013 Coll. and no. 293/2013 Coll.) or tax regulations (e.g., no. 344/2013 Coll.). In some cases, draft bills prepared for previous codes were used (such as Act no. 67/2013 Coll., on certain issues related to using apartments and non-residential premises in residential houses). Although there was almost a two-year-long *vacatio legis*, the time for preparation was relatively short in some cases, especially in the case of implementing regulations since their adoption happened at the very last minute in 2013.

In the meantime, extensive training of judges, prosecutors, and other judicial personnel was organised within the Judicial Academy of the Czech Republic.[4] Other professionals were trained by the Czech Bar Association or private agencies. The postponed effectiveness gave room for the creation of the first commentaries, or at least some of their volumes.[5] Several matters have been discussed in-depth in other scholarly publications.

Postponed enforcement allowed for continuing efforts to suspend the reform. Proposals to postpone the enforcement were already being

4 Project Education of judges and prosecutors in the field of recodification of private law (CZ.1.04/4.1.00/80.00002) (1.6.2012 – 31.5.2015).

5 E. g., Melzer, Tégl, 2013; Spáčil, 2013.

made before the adoption. For example, during the Senate discussion, an effort was made to postpone the date to 1 January 2016. Similar attempts were made after the adoption too by various interest groups, for example, tenants, farmers, judges, or the Czech Bar Association. The key arguments were an alleged underestimation of the preparation process for the new Civil Code, absence of expert literature, and the need for revision of the adopted Civil Code.[6] This was to a certain extent facilitated by the then-ongoing political instability in the Czech Republic. In 2013 (28 August 2013), the Chamber of Deputies was dissolved, and a few months later, snap elections took place (in October 2013). Owing to this, some implementing regulations were adopted in the form of statutory measures of the Senate, such as the tax regulations. The last proposal to postpone enforcement was submitted in October 2013.[7] As it failed to push for expedited consideration, it was subsequently withdrawn.

2.1. THE NEW CIVIL CODE

The new Civil Code contains 3081 provisions divided into five parts (books) – I. General, II. The Family Law, III. Absolute Property Rights, IV. Relative Property Rights, and V. Common and Transitional Provisions.

Book I., the General Part (§ 1–654), is divided into titles that regulate the scope of the regulation and its basic principles, persons, representation, objects and their division, and legal facts.

Book II., The Family Law (§ 655–975), is divided into the following titles: Marriage, Family Relationship and Relation by Affinity, and Guardianship and Other Forms of Care for a Child.

Book III., Absolute Property Rights (§ 976–1720), contains the following titles: General Provisions, Rights *in rem*, and the Law of Inheritance.

Book IV., Relative Property Rights (§ 1721–3014), includes the following titles: General Provisions on Obligations, Obligations Resulting

6 Resolution of the 6th Assembly of the Czech Bar Association of 11 October 2013 [Online]. Available at: https://www.cak.cz/assets/zaverecna-usneseni-snemu-cak.pdf (Accessed: 6 August 2024).

7 Chamber of Deputies Journal no. 5 (6th electoral term).

from Juridical Acts, Obligations Resulting from Delicts, and Obligations Resulting from Other Legal Reasons

Book V., Common, Transitional, and Final Provisions (§ 3015–3081), contains two titles: Common Provisions and Transitional and Final Provisions.

The systematic structure of the Civil Code is similar to traditional civil law codifications, such as the BGB. There is a notable emphasis on person and personal relations, which is the reason for the extensive regulation of persons in the General Part and the systematic placement of the regulation of family law right in Book II.[8] The structure did not cause much controversy. The only question raised was whether the General Part is even necessary, since some of the other civil codes, for example, the Austrian one and the Dutch one, do not have any.[9] Some authors questioned its exigency, seeing a tendency towards simplification in its inclusion.[10]

2.2. POSITION OF COMMERCIAL LAW

The original concept of the new Civil Code was based on the belief that the existence of a separate Commercial Code has a number of advantages, particularly, the separation of regulations concerning only entrepreneurs, for example, the definition of a business, entrepreneur, procuration (Prokura), or business corporations. The dualism of private law was therefore to be preserved. The regulation in the previous Commercial Code, no. 513/1991 Coll. (hereinafter *'CzeComC'*), was only to be reduced. More specifically, the aim was to remove unjustified duplicities within the field of obligations. Nevertheless, certain specifics would have to be retained in the new Commercial Act. In the area of obligation law, this included, for example, the possibility of limiting damages, excluding the possibility to withdraw from a contract on grounds of distress or grossly unfair terms. It was assumed that

8 Eliáš, 2000, p. 327.
9 Ibid.
10 Švestka, Dvořák, Tichý, 2006, p. 80.

the new Commercial Act would regulate dispositions with a business, commercial agency, or a silent partnership.[11] However, this concept was not entirely enforced. These issues are now regulated in the Civil Code. The notion of a trade, that is, a commercial obligation as a special legal relation between entrepreneurs, has been abandoned.[12] A special law, Act no. 90/2012 Coll., on Business Companies and Cooperatives, regulates only these types of legal entities.

2.3. POSITION OF CONSUMER LAW

In the case of consumer law too, the original concept was not sustained, although in a different way than in the case of commercial law. The initial draft of guidelines of the Civil Code offered two possible solutions: to either reserve the entire regulation of consumer law to a special act or to incorporate the traditional private law directives in the new Civil Code.[13] The first alternative was chosen for the consequently adopted guidelines of the CzeCC. Consumer law, including the implementation of Directives 85/577/EEC, 97/7/EC, and 93/13/EHS, was supposed to be enacted in a separate statutory regulation, as was done in Austria and other countries. The Civil Code should have contained only general provisions on the protection of the weaker party.[14] The instability of legislation in this area, the need for frequent amendments, and the close connection to public law were the main reasons for this choice. It should not be overlooked that, at that time, discussions were being held on a comprehensive revision of consumer law in the EU, which, in a limited form, eventually led to the adoption of Directive 2011/83/EU on consumer rights.

11 Guidelines of the Civil Code, 2001, p. 11; Eliáš, 2000, p. 327; Eliáš, Havel, 2002, p. 249.

12 For more detail see: Pelikánová, 2013, p. 39.

13 Guidelines of the Civil Code, 2001, p. 70.

14 Guidelines of the Civil Code, point 1.2.3.1 (endorsed by Government Resolution no. 345 of 18 April 2001) [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/vecny_zamer_OZ_2000.pdf (Accessed: 12 September 2024).

This concept faced criticism in the expert literature.[15] In particular, it was argued that the protection of the weaker party is an integral part of a modern civil code, which needs to be incorporated into its system and cannot be retrieved from it into special acts, as confirmed, for example, by the Draft Common Frame of Reference (DCFR).[16] In addition to the expert arguments, political considerations leaning towards facilitating adoption in the Chamber of Deputies also had an impact. As a result, in 2008, the regulation of consumer contracts was incorporated into the Civil Code.

The Civil Code therefore contains a general regulation of consumer contracts (§ 1810 CzecCC), including the regulation of sale of goods to consumers (§ 2158 CzeCC) and the regulation of timesharing (§ 1852 CzeCC). However, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights was implemented quickly and with simplifications during the discussion in the Chamber of Deputies. The regulations of unfair commercial practices[17] or consumer credit[18] remained outside the Civil Code.

2.4. POSITION OF LABOUR LAW

The approach to labour law in Czech private law was, and still is, marked by the historical burden of a completely separate Labour Code from the year 1965.[19] Even the mere idea that labour law could be a special regulation of general private law was extremely difficult to envisage, let alone force.[20] In fact, this was achieved only through the intervention

15 For example, Švestka, Dvořák, Tichý, 2007, pp. 29, 59.

16 Lavický, 2007, p. 848.

17 Act no. 634/1992 Coll., on Consumer Protection.

18 Act no. 257/2016 Coll., on Consumer Credit.

19 Act no. 65/1965 Coll., Labour Code.

20 The new Labour Code, Act no. 262/2006 Coll., was based on the unique principle of delegation. According to § 4, the Civil Code applied to employment relationships under this Act only if this Act expressly so provided.

of the Constitutional Court.[21] From the very beginning, there was, some weariness regarding the incorporation of labour law into the Civil Code. Integration was perceived as inappropriate for political, practical, and technical reasons. The interplay of private and public law aspects in the modern regulation of labour relations and the need for a special law, albeit with a subsidiary application of the Civil Code, were emphasised,[22] and this is exactly what happened. Act no. 262/2006 Coll., the Labour Code, was retained as a special law. The Civil Code, in regulation of employment contract, refers to the regulation in a special act. Thus, in practice, it contains one single provision, which has led to some absurdities, such as the employee's position in compensation for personal injury being worse than under the general private law.[23]

2.5. POSITION OF FAMILY LAW

Following the example of the traditional German or Austrian codes, family law was to be an integral part of the new Civil Code. This corresponded, *inter alia*, to the emphasis on the human person and the importance of non-pecuniary relations. The regulation of family law in a special law was perceived as a manifestation of totalitarian legal

21 Constitutional Court, no. 116/2006 Coll. The Constitutional Court concluded that the principle of delegation regulated in Section 4 of the Labour Code is contrary to the requirements of the rule of law. It breaks the basic functional links to general private law and at the same time introduces a considerable degree of uncertainty into employment relations, since explicit references cannot cover all necessary situations that may arise in employment relations.

22 Guidelines of the Civil Code, 2001, pp. 14, 25.

23 In the specific case, The Constitutional Court found a contradiction with the requirements of equality (the claim under the Labour Code was 25% of the claim under the Civil Code), whereas correction was achieved by constitutionally conforming interpretation of the regulation in the Labour Code (Constitutional Court, ref. no. II ÚS 2925/20). The legislator had already addressed this issue through the amendment of the Labour Code in Act no. 205/2015 Coll., albeit not providing a comprehensive solution.

tendencies.[24] At that time, family law was regulated in a separate statute[25] and not in the Civil Code. The incorporation of family law into the Code was perceived mostly conciliatorily, with both positive and negative consequences mentioned.[26] Among the arguments against the inclusion, we can mention the connection of the matter with public law, necessity of state interference, and the practicality of regulating all issues in one law, which would be precluded by integrating family law into the Civil Code.[27]

2.6. POSITION OF INTERNATIONAL PRIVATE LAW

Right at the outset, the question of whether the Civil Code should also encompass the regulation of private international law was brought up. The draft of the guidelines of the Civil Code reckoned with the inclusion of Book V, which would be devoted to conflict-of-law provisions.[28] Prof. Eliáš defended this concept primarily on the basis of a systematic viewpoint and a practical approach.[29] Notwithstanding that, this idea failed to be pushed. For example, Prof. Kučera objected that regulation in a separate act is more modern and more practical due its linkage with the regulation of international procedural law.[30] Mentioned examples that served as inspiration were the regulations in separate acts from Austria (1978), Switzerland (1987), and Italy (1995). Taking a cue from these examples, Act no. 91/2012 Coll., on Private International Law, was adapted simultaneously with the Civil Code as an independent statute.

24 The Guidelines of the Civil Code, point 2.3.1 (endorsed by Government Resolution no. 345 of 18 April 2001) [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/vecny_zamer_OZ_2000.pdf (Accessed: 12 September 2024).

25 Act no. 94/1963 Coll., on Family.

26 Švestka, Dvořák, Tichý, 2007, pp. 110, 114.

27 Ibid., p. 98.

28 The Guidelines of the Civil Code, 2001, p. 23.

29 Eliáš, 2000, p. 327.

30 The Guidelines of the Civil Code, 2001, p. 127.

2.7 OTHER QUESTIONS

The original concept of the Civil Code was based on the idea of not including the regulation of intellectual property, industrial rights, and securities owing to the dynamic nature of the Code. The all-embracing concept of the Civil Code, or codification megalomania, was being rejected. A certain compromise was sought instead.[31] As a result, the Civil Code contains the general regulation of securities (§ 514 CzeCC). Intellectual property remained regulated outside the Code, within special laws; however, the Code regulates licence contract (§ 2358 CzeCC) and the creation of a incorporeal work (§ 2631 CzeCC).

3. REASONS FOR PRIVATE LAW REFORM AND ITS IMPACT ON THE FORMER LAW

There were many reasons for the reform of private law. The prevailing one was the impossibility of building a modern system of private law on the remainders of the Civil Code dated 1964 (hereinafter *'CzeCC 1964'*) and the Commercial Code dated 1991 without replacing them. Unlike mere amendments, reform clearly indicates a discontinuity of the general approach towards private law.

The CzeCC 1964 emphasised proprietary relationships; thus, for example, the Code had only a limited regulation of statutory positions of natural persons and limited regulation of immaterial damages. Private law suffered from the absence of general rules on legal persons. The CzeCC 1964 contained only seven provisions on this issue. The rules in CzeCC 1964 were considered mostly mandatory, for example, the flat tenancy of spouses or default interests. The breach of any statutory rule led predominantly to absolute invalidity of the contract. Moreover, there was need for a uniform private law. The CzeCC 1964 and the CzeComC contained unjustifiable differences in the regulation of obligations, for example, different regulations of surety, *pactum de contrahendo*, set-off, and performance. Moreover, even after 20 years discussions were still

31 Eliáš, 2000, p. 327.

ongoing about the scope of their application, for example, on unjust enrichment, insurance contracts.[32]

The situation was slowly changing in legal practice, thanks to the influence of Constitutional Court case law, more progressive rules implemented in the CzeComC, and drawing inspiration from the Allgemeines bürgerliches Gesetzbuch (ABGB). Nevertheless, some issues were destined to remain unresolved without legislative action (e.g., absence of a regulation, mandatory character of rules, low damages in case of personal injury, etc.).

The discussions surrounding the new civil law began to intensify in the year 2000.[33] During the preparation process, addressing the problematic aspects of the former, then-effective, regulation was unavoidable. It is therefore hardly surprising that the preparation of the new Civil Code had an impact on the old regulation, leading to both modifications of earlier legislation and shifts in the approach of case law.

3.1. LEGISLATION

In 2011, an amendment to the old Civil Code was adopted, namely, Act no. 132/2011 Coll., effective as of 25 May 2011. Its aim was to partially liberalise the regulation of the lease of an apartment. Changes in the overall conception of private law relations and an exhaustive rectification could be expected only with the completion of the reform, which was supposed to create an overall framework and a normative basis for the entire private law in terms of content (by preferring a uniform value system), systematic arrangement, choice of terminology, and arrangement and form of individual normative constructions. Nevertheless, even before the adoption of the new Civil Code, as a partial step in that direction, an amendment that ensured partial compensation for the unequal position of landlord and tenant was adopted.[34] Therefore, in accordance with the

32 See Chamber of Deputies Journal no. 362 (6th electoral term), pp. 562 et seq.

33 The reform was formally launched in 2000. In that year, JUDr. Otakar Motejl, who was minister of justice at that time, charged Prof. Karel Eliáš and Doc. Michaela Zuklínová with the preparation of the new Civil Code.

34 Chamber of Deputies Journal no. 188 (6th electoral term).

forthcoming recodification (even in terms of wording), for example, the regulation of housing compensation was removed, regulation of unilateral rent increases was added, and the scope of the transfer of lease in case of death of the tenant became more restricted.

3.2. CASE LAW

Regarding case law, two areas can be mentioned where settlement pursuant to the old legislation has changed, *inter alia*, thanks to the influence of the new Civil Code. One of them is the protection of bona fide acquirer in the case of acquisition from a non-owner, the other is the problem of a double lease of the same object.

Going by the case law, the higher courts had long been refusing to recognise the protection of good faith in acquisitions from a non-owner, except for cases explicitly listed in the law. The law expressly allowed the acquisition of title from a non-owner only in the case of transfer from an unlawful heir, in the case of purchase of movable property between entrepreneurs, or by prescription.[35] Attempts to extend the protection of good faith to other cases, for example, in the case of transfer from a person registered in the land registry, were unsuccessful for a long time.[36] Such protection was only enforced under the previous regulation thanks to repeated interventions by the Constitutional Court.[37] The latter justified its approach, *inter alia*, by an explicit regulation in the new Civil Code. According to him, the legislator was aware of the inadequacy and injustice (unconstitutionality) of the previous regulation. The form of the new legal regulation reflects the fundamental criticism made by the Constitutional Court, thus supporting its legitimacy and correctness.[38]

In the context of the regulation contained in the CzeCC 1964, in the version in force until 31 December 2013, the court practice had long

35 See § 485 CzeCC 1964, § 446 CzeComC.

36 E.g. Supreme Court, ref. no. 31 Cdo 1168/2013; Supreme Court, ref. no. 29 Cdo 2066/2013-179.

37 Constitutional Court, ref. no. III. ÚS 705/16.

38 Constitutional Court, ref. no. I. ÚS 2219/12, points 10 and 48.

been settled in the opinion that a prerequisite for the valid conclusion of a lease agreement is the fact that the object is legally free, that is, the leased object is not subject to the right of use of another person.[39] Otherwise, the second lease agreement was absolutely invalid for the initial impossibility of performance pursuant to § 37 (2) of the CzeCC of 1964.[40] This approach faced criticism in the scholarly literature.[41] The new Civil Code takes a different stance rejecting this approach. Rejecting this idea in relation to the old legislation was established only through a ruling of the Constitutional Court, specifically ref. no. II ÚS 4235/18 of 13 September 2019. The latter refers to a different solution in the new Civil Code (§ 1760 and 1763). Consequently, under its influence, the Supreme Court changed its approach as well.[42]

4. LEGAL TRANSPLANTS IN THE CIVIL CODE

The main goal of civil law reform was to overcome the remnants of socialist law and return to traditional regulation.[43] It is therefore obvious that the preparation of the new private law was often based on finding templates for the new regulation. However, the models to draw inspiration from were many.

The original assignment included the instruction to draw inspiration primarily from the governmental draft of the Civil Code from 1937. The draft aimed to reform and unify civil law in the former Czechoslovakia. The content of this draft was predominantly founded on the provisions of the ABGB. It was never enacted.[44] Another significant inspirational source was the regulation within the CzeComC, which significantly influenced the present-day regulation of the law of obligations.

39 Supreme Court, ref. no. 26 Cdo 916/2001.

40 Supreme Court, ref. no. 3 Cdon 120/96, ref. no. 26 Cdo 1767/2009, ref. no. 26 Cdo 2033/2004 and ref. no. 26 Cdo 4217/2010.

41 For example: Fiala, et al., 2009, p. 202; Švestka, et al., 2009, p. 1877.

42 Supreme Court, ref. no. 31 Cdo 3679/2020.

43 Chamber of Deputies Journal no. 362 (6th electoral term), p. 569.

44 For more details, see Kober, 2021.

However, many other inspirational sources were also involved. Since solutions typical for a given legal culture were sought, it is evident that the inspiration primarily came from the codes of neighbouring countries, such as the BGB (e.g, in the matter of torts, dissent, auction, legal status of animals), the ABGB (e. g., law of succession), or the Polish Civil Code (e.g., land registry, material publicity).

The explanatory report accompanying the Civil Code also refers to the ZGB (gaps in law in § 10 CzeCC, application of general rules on obligations to other private rights and duties in § 11 CzeCC), Codice Civile (assignment of contract, family enterprise) or the Quebec Civil Code [trusts, adhesion contracts (§ 1798 CzeCC), subcontractor's responsibility for a work (§ 2630 Czech)]. Some changes are derived from the Dutch Civil Code (such as the healthcare contract).

When drafting the new Civil Code, legislators sought inspiration from various similar projects throughout the European Union. No comprehensive solution was transformed as a whole. UNIDROIT Principles 2010 were reflected, for example, in case of surprising clauses in standard terms (§ 1753 CzeCC) or resolving a battle of forms (§ 1751 CzeCC). The Draft Common Frame of Reference (DCFR) was considered, for example, in case letters of confirmation (§ 1757 CzeCC) or the rebuttable presumption of a public offer [§ 1732 (2) CzeCC]. The newly introduced rules on pre-contractual liability (§ 1728 CzeCC) were inspired by the European Contract Code.

One should also not forget international treaties. For example, rules regarding mentally disabled people were largely influenced by the UN Convention on the Rights of Persons with Disabilities and resulting obligations on the part of the Czech Republic were implemented in the Czech legislation. Further, certain treaties of the International Labor Organization (no. 138/1973) were implemented apart from aspects taken from the Convention on the Rights of the Child.

We might interpret this as a resignation to perform a truly innovative activity, a reluctance to seek new solutions. Despite this, from a practical point of view, the adoption of established functioning models has proved successful. Such an approach enables overcoming a long period of uncertainty regarding new regulation by referring to existing case law and literature related to the model regulation. In this respect,

inspiration from Germany or Austria is more practical, as opposed to that from Quebec.

Nonetheless, using foreign models also comes with inherent drawbacks. First is the language barrier, which can often lead to inaccurate translations and misunderstanding the foreign institutes. Another problem may be the limited possibility to grasp the development of the law over time, whether in statutes or in case law.

4.1. BAD TRANSLATION

The Czech legislator drew inspiration from the Italian Codice Civile when regulating the assignment of contracts in § 1897 of the CzeCC.[45] § 1898 and § 1899 CzeCC are therefore concerned with regulating the liberation of the assignor.

The wording was adopted from art. 1408 of the Italian Codice Civile. This provision states that the assignor is liberated from his duties once the assignment becomes effective against the assigned party. However, if the assigned party has declared their refusal to release the assignor, it can enforce performance against the assignor if the assignee fails to fulfil the assumed obligation. In such a case, the assigned party must notify the assignor within 15 days from the date of the default; any failure to do so makes the assigned party liable for eventual damages caused by such default.[46]

The Czech legislator split this regulation into two provisions and altered the diction in a manner that creates the impression that the assigned party could refuse the liberation of the assignor within 15 days of becoming aware of the assignee's default. § 1899 (1) mentions the possibility of making a declaration refusing the liberation, and § 1899 (2) sets a time limit for making *a declaration*. Scholarly literature attempts to rectify this mistake through interpretation, aiming to align the regulation with the Italian model. This includes, among other things, interpreting § 1899 (2) of the CzeCC as the time limit for a call

45 Chamber of Deputies Journal no. 362 (6th electoral term), p. 1007.
46 Mališová, Zimnioková, 2021, p. 780.

for performance, rather than a time limit for declaring the refusal of liberation.[47]

4.2. MISUNDERSTANDING THE MODEL REGULATION

Misunderstanding the model regulation could be demonstrated on the regulation of so-called family enterprise, laid down in § 700 of the CzeCC. Under Czech law, a family enterprise is characterised as a special form of business (§ 502 CzeCC), thereby making it an object of relations and a collective 'thing' (*universitas rerum*).[48] However, the Italian regulation in art. 230bis of the Codice Civile, which served as a template for the Czech regulation,[49] understands the concept of a family enterprise in a much broader sense. It perceives it more as a type of business activity rather than a business itself.[50] Here, too, there are evident attempts to wider use of the institute and to emphasise the family community, not the business as such.[51]

4.3. DISREGARD FOR CHANGES

In certain instances, drawing inspiration from foreign and historical models resulted in overlooking the development in the area in the country of origin of the pertinent rule. We may mention three different examples from the new Civil Code.

47 Petrov, Výtisk, Beran, 2023, § 1899 points 4 and 5; Mališová, Zimnioková, 2021, p. 780.

48 Králíčková, Hrušáková, Westphalová, 2020, p. 114; Petrov, Výtisk, and Beran, 2023, point 2.

49 Chamber of Deputies Journal no. 362 (6th electoral term), p. 719.

50 Melzer, Tégl, 2016, p. 220.

51 Králíčková, Hrušáková, Westphalová, 2020, p. 114; Melzer, Tégl, 2016, p. 226.

4.3.1. Takeover of property

The Czech legislator decided to regulate the takeover of property in § 1893 CzeCC. The source of inspiration here was the Governmental Draft of the Civil Code of 1937 and the regulation of takeover of assets, business, or enterprise in § 1256 et seq. (i.e., § 1409 ABGB - *Veräußerung des ganzen Vermögens einer Person*).

As a result, the Czech regulation, specifically in § 1893 (2) CzeCC, includes a rule of reversal of burden of proof in cases of transfers to close persons; moreover, the liability of a close person for debts is not limited by the value of the property taken over. While the reversal of the burden of proof remained in § 1409 (2) ABGB, the absence of limits has been repealed in the ABGB since 1982.[52] In Germany, the whole institute of takeover of property in § 419 BGB was repealed in 1999[53] as creditor protection was already sufficiently ensured through regulations governing ineffectiveness. The introduction of the institute into the Czech legal system has been criticised partly for this reason.[54]

4.3.2. Succession in personal injury claims

In response to previous regulation,[55] the Czech legislator sought to ensure that personal injury claims would not extinguish upon the death of the injured party. The § 1475 (2) CzeCC states, following the example of the German and Austrian approach, that claims extinguished by the death of the creditor are not part of the estate unless they have been recognised or filed with a public authority.[56] However, the pertinent German provision (§ 847 (1) BGB) was repealed in 1990.[57] In Austria, the

52 § 187 of the Third Amendment of the ABGB was repealed by Act no. 370/1982 BGBl. [Insolvenzrechtsänderungsgesetz, 1982] due to its apparent inadequacy.

53 Art. 33 (16) Einführungsgesetz zur Insolvenzordnung (BGBl. I 1994 S. 2911) in force since 1.1.1999.

54 Čech, Flídr, 2014, p. 24.

55 § 579 odst. 2 CzeCC 1964.

56 Supreme Court, ref. no. 25 Cdo 3556/2016.

57 Gesetz zur Änderung des Bürgerlichen Gesetzbuchs und anderer Gesetze (BGBl. I 1990 S. 478).

same interpretation previously held by former Czechoslovak and Austrian courts was abandoned in 1996.[58] Personal injury claims do not extinguish upon the death of the creditor and pass to the heirs.[59]

4.3.3. Exclusion of private annuities from execution

Pursuant to § 2705 CzeCC, if annuity is provided gratuitously, the payor has the right to reserve in the annuity contract that the beneficiary's creditors may not subject the beneficiary's benefits to execution or insolvency proceedings. Said provision is a novelty inspired by § 519 of the Swiss OR and art. 2377 CCQ. [60] However, Switzerland abandoned this rule in 1997.[61]

5. THE NEW CIVIL CODE IN THE CASE LAW

Private law reform was opposed by many while being adopted, with the judiciary being the most vocal. In the early years, one could find strong condemnation of the new civil law in specific decisions.[62] However, now, after ten years, clearly the courts have learned to work with the new civil code. At present, we do not witness any longing for the old regulation in the judiciary anymore. The new private law is commonly applied and does not pose any major problems.

When analysing the case law under the new regulation, we can identify various interesting approaches to the new Civil Code. In fact, they all point to a single fact. When it comes to the new Civil Code, while the wording and intentions of the legislator are one thing, the practical implementation of the Code is a different ball game altogether. It may differ in numerous cases.

58 OGH, ref. no. 6 Ob 2068/96.
59 Doležal, 2016, p. 74.
60 Chamber of Deputies Journal no. 362 (6th electoral term), p. 1080.
61 BG of 16. 12. 1994, in force since 1.1.1997 (AS 1995 1227; BBl 1991 III 1).
62 District Court in Prague 8, ref. no. 25 C 110/2012 (...whereas as of 1.1.2014 unfortunately the unsuccessful Civil Code no. 89/2012 Coll. came into force ....).

5.1. THE SAME WORDING, DIFFERENT CONCLUSIONS

We first focus on the approaches where case law arrived at different solutions despite the regulation remaining the same under the new Civil Code. Since the Supreme Court considers these decisions to be new, as they concern different legislation, changes in the case law are made without these cases being submitted to the plenary session for decision.

An example that can be cited here is the regulation of contractual penalty, which builds on the regulation contained in the Commercial Code. The rules governing court moderation of contractual penalty in § 2051 CzeCC are essentially the same as those in § 301 CzeComC. Previously, courts deciding on moderation of contractual penalty assessed the amount only in light of circumstances apparent at the time of contract conclusion. [63] Such an approach has been abandoned. Nowadays, the court deciding on moderation does not examine the reasonableness of the clause stipulating the contractual penalty, but focuses on the total amount of the claimed contractual penalty. The court considers the manner and circumstances under which the breach of contractual obligation secured by the contractual penalty occurred and the extent to which it affected the interests of the creditor covered by the contractual penalty.[64] This change is also connected to the fact that moderation is now permitted even after set-off.[65] The Supreme Court newly allows such review,[66] whereas it had been previously denied. [67]

Another example might be the nature of public auctions under Act. no. 26/2000 Coll.[68] The courts previously refused, owing to the wording of this special regulation, to consider public auction a type of contract formation.[69] The new CzeCC did not amend this special regulation.

63 E.g., Supreme Court, ref. no. 23 Cdo 4784/2008.
64 Supreme Court, ref. no. 31 Cdo 2273/2022.
65 Kolmačka, 2019, section 57.
66 Supreme Court, ref. no. 31 Cdo 927/2016.
67 Supreme Court, ref. no. 32 Odo 1007/2006.
68 Hulmák, 2022, p. 115.
69 Supreme Court, ref. no. 22 Cdo 2960/2009; ref. no. 29 Cdo 66/2015; Constitutional Court, ref. no. I. ÚS 3969/12.

§ 1771 CzeCC only explicitly lists auction as a form of contract conclusion now, but the stated was true even under the previous regulation too. Nevertheless, the Supreme Court decided that public auctions under the special regulation are actually similar to the contracts now.[70] Recently, a new law addressing this matter in a more conceptual way was passed.[71]

5.2. DIFFERENT WORDING, SAME CONCLUSIONS

In certain instances, the legislator has chosen a different wording for the law to arrive at a different solution. Regardless of the modified wording, the courts continue to apply the conclusions they have reached in relation to the previous regulation.

An example is the revocation of a gift for ingratitude. The Supreme Court has long held that the revocation of a gift under the previous regulation[72] has *ex nunc* effects.[73] The new regulation, however, provides for the possibility of withdrawing from the contract, that is, in principle with *ex tunc* effects.[74] Nonetheless, the Supreme Court continues to rule that the effects are *ex nunc,*[75] although it must be admitted that this opinion can be found in the literature as well. [76]

Another example is the issue of subjecting the right to terminate a contract by notice to the limitation.[77] The Supreme Court has previously inferred that the right to terminate contract by notice is not subjected to the limitation.[78] The new regulation of limitation offers different solutions, including the limitation of competences (*Gestaltungsrechte*).[79]

70 Supreme Court, ref. no. 27 Cdo 1045/2019.
71 Act no. 250/2023 Coll., on Public Auctions.
72 § 630 CzeCC 1964.
73 Supreme Court, ref. no. 33 Cdo 160/2022.
74 § 2005 CzeCC.
75 Supreme Court, ref. no. 5 Tdo 1307/2021.
76 Petrov Výtisk, Beran, 2022, § 2072, point 23.
77 Hadamčík, 2020, p. 590.
78 Supreme Court, ref. no. 26 Cdo 78/2010.
79 E.g., Lavický, 2022, § 611, point 16.

However, the Supreme Court continues to hold that the right to give a notice is not subject to the limitation.[80]

5.3. DIVERSION FROM THE WORDING OF THE LAW

A separate group of cases consists of situations where the courts have directly refused solutions contained in the new Civil Code. Within the transitional provisions, § 3030 CzeCC prescribes the extension of application of Title I (i.e., the first fourteen provisions of the Civil Code) to rights and obligations that are otherwise assessed under the previous legislation. The Supreme Court limits the impact of this requirement by stressing that this rule cannot be interpreted as conferring true retroactive effect of Title I on previously established legal relations (i.e., before 31 December 2013). Title I must be applied in a way that it respects the previous legislation interpreted in compliance with the established case law.[81]

Another example may be the legislator's instruction in § 742(2) CzeCC to consider investments from the spouses' sole property to joint property of spouses and vice versa when dividing the joint property of spouses. According to this provision, the increase or decrease in the value of the acquired property after the investment was made must be considered. Here, the legislator responded to the case law on the previous legislation and expressly emphasised the requirement to consider the increase in value as well.[82] However, the Supreme Court has held that the increase in the value of the property is to be considered only if the spouses have agreed so.[83] The court argued with a need for teleological reduction, since during marriage, spouses generally lend finances to each other without interest. Nevertheless such approach adopted by the Supreme Court was recently rejected by the Constitutional Court.[84]

80 Supreme Court, ref. no. 33 Cdo 3037/2019.
81 Supreme Court, ref. no. 21 Cdo 3612/2014.
82 Chamber of Deputies Journal no. 362 (6th electoral term), p. 732.
83 Supreme Court, ref. no. 22 Cdo 1172/2022.
84 Constitutional Court, ref. no. Pl. ÚS 23/24.

5.4. INNOVATIVE APPROACHES

Pursuant to § 24 CzeCC, every individual is responsible for their own actions if they are capable of assessing and controlling them. Based on this principle, the Supreme Court has concluded that persons whose legal capacity is restricted cannot be held liable for the breach of their contractual obligation, nor can obligation be terminated by notice on these grounds.[85] As a result, such individuals are not even obligated to pay contractual penalties. This decision seems strange since the liability for breach of contractual obligation is objective under the new Civil Code (e.g., § 1924, 1968, 2913 CzeCC).

6. AMENDMENTS AND OTHER DEVELOPMENT

Private law, like other legal norms, must be constantly adapted to the needs and development of society. Certain rules, namely, law of inheritance or family law, are more rigid. Others are more susceptible to change, for example, consumer law, due to the introduction of digital technologies.

The development of private law never ends with the adoption of any civil law code. Discussions regarding possible legislative changes persist. Each codification is followed by the effort to decodify. Aforestated holds true for the CzeCC too. The first amendment to the CzeCC was adopted approximately three years after its entry into force.[86] The code has since then been amended nine times over a period of almost ten years. Other proposed amendments did not pass. Currently, seven amendments to the CzeCC are under consideration in Parliament.

85 Supreme Court, ref. no. 26 Cdo 2365/2022.
86 Act no. 460/2016 Coll.

6.1. ADOPTED AMENDMENTS

Of the adopted amendments to the CzeCC, the following two must be mentioned as they are substantial in modern Czech private law. First, modifications have been made to the regulation of children's liability in order to protect them from incurring debts.[87] Second, a significant amendment has been made to regulation of consumer protection.[88]

In the regulation on legal capacity, the new Civil Code retained, with a few additions, the previous rules. The fundamental principle was the gradual acquisition of legal capacity by the child, depending on their intellectual and volitional maturity appropriate to their age.[89] A similar rule applied to tort capacity, with the level being fully dependent on the child's personality.[90] However, special protective provisions were lacking. In some cases, the Constitutional Court had to intervene. Children were burdened with inherited debts, debts incurred by their parents on their behalf, fines for fare beating,[91] unpaid waste collection fees,[92] or hospital bills.[93] The legislator has decided, following the example of the German regulation,[94] to limit the liability of minors while strengthening the liability of parents. The discharge of a pecuniary debt arising from a juridical act of a minor who has not acquired full legal capacity may be enforced only against property acquired by the minor before acquiring full legal capacity and property acquired by a juridical act relating exclusively to property acquired before acquiring full legal capacity; this does not apply to a pecuniary debt incurred in gainful activity. The parent who acted on behalf of the child or contested (to) the juridical act guarantees the fulfilment of a pecuniary debt, which

87 Act no. 192/2021 Coll.

88 Act no. 374/2022 Coll.

89 § 31 CzeCC.

90 § 2920 CzeCC.

91 Constitutional Court, ref. no. I. ÚS 1775/14 and ref. no. IV. ÚS 1669/14.

92 Constitutional Court, ref. no. Pl. ÚS 9/15. In this ruling, the Constitutional Court repealed the regulation, under which waste collection fees were paid by minors.

93 Constitutional Court, ref. no. II. ÚS 728/15. The Constitutional Court has ruled that it is the legal guardians, not the minors, who are obliged to pay the regulatory fees for health care.

94 § 1629a BGB.

was incurred by the child due to their juridical act performed before the acquisition of full legal capacity. The guarantor (the parent) cannot legally force the debtor (the child) to settle this debt.[95] This is followed by other statutory restrictions. For instance, the contractual penalty agreed by a person under the age of fifteen is deemed non-existent.[96] Further, procedural law has also been strengthened.[97]

The problems related to consumer protection regulation have already been discussed above. Many of the shortcomings resulting from the implementation of the consumer protection directives were only remedied by Act no. 374/2022 Coll.[98] This act also implemented the directive on digital content,[99] the omnibus directive,[100] and the directive on consumer sale of goods.[101]

6.2. AMENDMENTS NOT ACCEPTED

After the adoption of the CzeCC, a technical amendment was drafted. The purpose of this draft was to exonerate the CzeCC from evident legislative errors.[102] Typically, these were confusions in the names of

95 § 899a CzeCC.

96 § 2048 (2) CzeCC.

97 Šínová, 2022, p. 277.

98 E.g., Incorrect implementation of the Annex to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, especially in terms of wording.

99 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

100 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council, regarding the better enforcement and modernisation of Union consumer protection rules.

101 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

102 Some of them in Eliáš, 2014, p. 27.

contracting parties, such as donor instead of donee,[103] principal instead of agent,[104] and pledgor instead of pledgee.[105] Another example is the conflicting double regulation of the consequences of merger of the creditor and the debtor in the case of creditor solidarity.[106] Subsequently, however, only some key, and often rather substantive, issues have been regulated in Act no. 460/2016 Coll.,[107] which were referred to as minor technical amendments.

One of the ideas that resonated strongly in Czech legal discourse after the adoption of the CzeCC was the creation of a consumer code. The less-than-perfect implementation of the consumer protection directives in the CzeCC contributed to some extent. It was also necessary to implement the new directives. Moreover at that time, a special law was already dedicated to this matter, though predominantly focusing on the public law aspects of consumer protection.[108] In addition, a certain tradition existed in this regard,[109] albeit with negative consequences. Guidelines of this code were drawn up. Even a major international conference on this topic was held in Brno.[110] Nevertheless, this concept was later abandoned.

6.3. AMENDMENTS IN CONSIDERATION

Currently, there are two significant amendments in the legislative process, both concerning family law. First is a proposal in the Chamber of Deputies to legalise same-sex marriage, not only an already existing registered partnership, but also a fully-fledged marriage.[111] Second, is a

103 § 2072 (2) CzeCC.
104 § 2438 CzeCC.
105 § 1341 CzeCC.
106 § 1878 (2) and § 1948 CzeCC.
107 For a critical view of this amendment, see Eliáš, 2014, p. 24.
108 Act no. 634/1992 Coll., on Consumer Protection.
109 The CzeCC 1964 was originally adopted primarily as a regulation of services provided to citizens.
110 Principles of European Private Law in Application Practice – Code of Conduct for Consumers: Yes or No? Brno, 31 May and 1 June 2018.
111 Chamber of Deputies Journal no. 241 (9th electoral term).

proposal aimed at streamlining divorce proceedings in cases where the divorce is uncontested. The notary will settle these divorces. Furthermore, prohibition of corporal punishment for children is also explicitly declared.[112]

6.4. CHANGES IN REGULATION OF CO-OWNERSHIP

Special attention should be paid to the regulation of co-owners' pre-emptive right. This example serves as a good illustration of how, in some cases, there is encroachment on fundamental codes. Until 1992, the CzeCC 1964 stipulated the need for the consent of other co-owners when transferring ownership shares.[113] In 1992, this rather stringent requirement was alleviated into a very broad-based pre-emptive right.[114] This regulation was criticised.[115] Therefore, in the new Civil Code, effective as of 1 January 2014, the legislator reserved this right to only a narrow set of cases.[116] However, with the argument that such a regulation enables move-ins of outsiders into co-owned apartments without the consent of other resident co-owners, the previous regulation was fully reinstated in 2018.[117] Simultaneously, the practical issues that such a step (backward) would bring (e.g., in the disposition of garage spaces) were pointed out. The legislator therefore repealed the general co-owners' pre-emptive right again, effective as of 1 July 2020.[118]

112 The amendment to the Civil Code on uncontested divorces is heading for the consultation process [Online]. Available at: https://advokatnidenik.cz/2023/09/08/novela-oz-tykajici-se-nespornych-rozvodu-miri-do-pripominkoveho-rizeni/ (Accessed: 12 September 2024).

113 § 140 CzeCC 1964 in its original version (the exception was a transfer to a descendant or other co-owner; the exception was gradually expanded).

114 § 140 CzeCC as amended by Act. no. 509/1991 Coll. (the exception was a transfer to close relatives).

115 E.g., Švestka, Jehlička, 1994, p. 160 et seq.; Eliáš, 2005, p. 153; more conciliatory Spáčil, 2009, p. 396.

116 § 1124 and § 1125 CzeCC.

117 § 1124 CzecCC as amended by Act no. 460/2016 Coll.

118 § 1124 CzecCC as amended by Act no. 163/2020 Coll.

7. CONCLUSION

The recodification of private law in the Czech Republic in 2012 was not just an option, but a necessity. It was the only way to return the private law regulation to some standard form common in the neighbouring countries. The provisional solution of the early 1990s, built on the relics of the previous regulation, was no longer sustainable.

In retrospect, the adoption of the new Civil Code must be regarded as a great success. It is, of course, relative to what was already existing. Although it was not easy and various catastrophic scenarios were formulated, it is clear today that after 2012, private law in the Czech Republic is experiencing an unprecedented boom. This can be measured by the new opportunities and solutions in practice, the amount of literature, and knowledge of private law.

The new Civil Code is certainly not ideal, nor is it perfect. A number of mistakes have occurred in its preparation. No agreement is observed on the settlement of its application problems. These are left to be resolved in practice. Many problems emerged only after its adoption. In many cases, the subtle nuances of the various formulations used are only now discovered. The improper implementation of the various EU directives makes for a separate chapter. On the contrary, it is obvious that in the constant search for ideal wording, understanding of everything, and consensus in professional circles, there would have been no reform of private law in the Czech Republic even today.

The last chapter (6) reveals that although codification of private law has been implemented, this is no obstacle to continuing the search for new ideas or adapting old ones. Law reform must never end. However, nothing dramatic is now on the horizon.

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CODIFICATION OF CIVIL LAW IN CROATIA: CHALLENGES OF MULTIPLE CRISES FOR THE REFORM OF CROATIAN CIVIL LAW

TATJANA JOSIPOVIĆ

ABSTRACT

Croatian civil law underwent numerous significant transformations during the late 20th and early 21st centuries after the country gained its independence from the former Yugoslavia and then gained accession to the European Union (EU). The Croatian legal system is complex, with numerous acts governing civil law. It lacks a unified Civil Code. Therefore, during the EU accession process, numerous sources of law had to be coordinated in order to achieve the transposition of EU norms, and where necessary, harmonisation of the domestic legal system to EU standards. These legislative needs were later complemented by the necessity for the mitigation of various crises by modifications in the civil law after the Great Recession of 2008, the COVID-19 pandemic, as well as natural disasters that struck the country. The chapter traces the progress of the development of Croation civil law during this significant period.

Keywords: *Croatia, civil law, law of obligations, European Union accession, crisis management.*

Josipović, T. (2024) 'Codification of Civil Law in Croatia: Challenges of multiple crises for the reform of Croatian civil law' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 259–290. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_11

1. INTRODUCTION

After gaining its independence in 1991, and particularly during the process of accession, as well as after the accession to the European Union (EU) in 2013, the Republic of Croatia has carried out numerous and complex political, economic, and legal reforms in the course of transitioning to a new social, legal, and economic order. The transition was marked by the establishment of the independent Croatian State and many new government institutions, by winning in the Homeland War and maintaining peace. At the same time, a political transition also happened, from an authoritative to a democratic system and from a planned economy to a market economy. The monetary transition from Croatia's national currency to Euro,[1] the legal transition from a socialist to a market-oriented legal system, and the transition from the national legal system to a legal system harmonised with the EU law were also accomplished. In the course of such a multi-level transition, the Republic of Croatia faced many political, economic, legal, and social challenges particularly when switching to the market economy, joining the EU institutions, undergoing its economic recovery and accepting the Union's market freedoms, protecting its fundamental rights, reforming public administration and the judiciary, carrying out legal reforms, and developing the rule of law.

The civil law reform started immediately upon Croatia's independence. Initially, the major challenge was the transition from the socialist self-management system based on social ownership, collectivist regulation of ownership, planned economy, and the dominance of public law

1 The Republic of Croatia has been a member of the Euro and Schengen area since 1 January 2023. Its reform for the Euro changeover was one of the most successful economic and monetary reforms carried out after its accession to the EU. According to the Eurobarometer Survey of January 2023 (16 January–19 January 2023), 54% of respondents said that having the Euro was a good thing for Croatia, while 61% of them were also of the opinion that the changeover process went very, or rather, smoothly and efficiently. While 57% of respondents thought that the introduction of the Euro would have positive consequences, 62% of respondents feared that the introduction of the European currency would increase inflation in Croatia. See the Flash Eurobarometer 518 – Croatia after the euro changeover, 2023.

over individualistic and liberal regulation based on private ownership, private autonomy, and freedom of contracting. The aim was to return to the circle of continental and Middle European legal orders to which the Croatian civil law had belonged prior to the introduction of the socialist legal system. The guiding principle for the reform was to ensure free acting of individuals within the boundaries set up by the contemporary continental European orders. The country's civil law system had to regain its central position in the Croatian legal order.[2] This required a completely different organisation of the relationship between private and public law bodies when dealing with private law relations in accordance with private law norms. The dominance of public law and priorities in terms of protection of collective interests when organising civil law relations was no longer what the country required. It was necessary to implement privatisation of civil law relations by abolishing social ownership, returning nationalised property, and transforming socially owned enterprises into private companies. Such an approach, on the one hand, called for very complex transition regimes by which, along with maximum recognition of the rights acquired under the former socialist regulations, the transition to a new civil law system had to be made.[3] On the other hand, the whole process required a completely new regulation of the legal position of individuals, their rights and interests in civil law relations, and a central position in the new civil law system. The first civil law regulations adopted immediately upon Croatia's independence were mostly aimed at maximum protection of the subjective economic rights and interests of private individuals in civil law relations and at the recognition, with almost no exceptions, of private autonomy when regulating any civil law relations on the market. The starting point

2 In this regard, see Gavella, 1994, pp. 9, 168.

3 For example, a special challenge was the transformation of the right to immovables from social (e.g., the right to use) to private (e.g., the right to use, but also the right of disposition) ownership. These rights were *ex lege* transformed to private ownership in favour of persons who previously had been holders of the right to use socially owned immovables. Another challenge was the transformation of previous tenancy right to socially owned flats after the abolishment of social ownership. The tenancy right was also *ex lege* transformed into the right to protected leases. For more see Josipović, 2010, pp. 189, 190; Josipović, 2022, pp. 273–279.

was the fact that society had developed an awareness and responsibility to ensure that subjective civil law rights were not to be abused and that they had to be exercised scrupulously and responsibly, by always respecting the rights and interests of other people. In the beginning, the reform was primarily directed to increased protection of the rights and interests of creditors when settling their claims, to a re-establishment of traditional instruments of securing claims and extending possible options,[4] to some new rules to hasten and simplify the compulsory settlement of claims[5] and similar activities. The social component, that is, the concept of the social commitment of individuals when exercising their rights in civil law relations was neglected or suppressed in favour of an extensive and, as effective as possible, protection of the subjective rights and interests of individuals. However, after the first wave of reforms, aimed at maximal divergence from the previous collectivistic public law elements predominant in the civil law of the socialist period, it became obvious that the social component of civil law relations had to be considered in a very specific way. Indeed, it was important to keep an optimal balance between protection of individual rights and freedoms and the collective interests of the entire society. Civil law had to contribute to the development of the welfare state as well. These requirements had already become obvious during the process of harmonisation of the

4 For example, under the Act on Ownership and Other Real Property Rights (in force since 1 January 1997), the right of lien was in Croatia for the first time regulated in detail on the model of Austrian law (arts. 297–353). However, by the enforcement law reform of 1996, the catalogue of real property title insurance was significantly extended to speed up settlements of the secured claims. New voluntary judicial or notarial security rights were introduced (judicial or notarial mortgage/non possessory pledge, floating charge, judicial and notarial security of claims by transfer of ownership/fiduciary transfer of ownership). Notarial or judicial security rights made it possible for creditors to settle their claims quickly and directly, immediately upon the maturity of the secured claim, in some cases even out of court. In later amendments, the provisions of the Enforcement Act on security rights were gradually modified to provide for greater protection of debtors. For more, see Gavella, 2007, pp. 124–169, 371–378, 496–551.

5 For example, abstract instruments of security of claims were introduced (promissory notes, blank debentures) and summary enforcement proceedings on the basis of authentic instruments to ensure quick and simple compulsory settlement of claims. For more, see Dika, 2007, pp. 253–280.

country's civil law with the law of the EU during the accession negotiations. The harmonisation of individual civil law areas (e.g., the law of contract) called for the recognition of some new values that had not been sufficiently considered during the initial reform process (e.g., the protection of the consumer as the weaker party to a contract, remedies for better enforcement of consumers' rights, protection of vulnerable end users of energy, protection of passengers with reduced mobility or with disabilities, protection of employees from the risks of liquidity crises, insolvency of employers, and the like). Indeed, multiple crises, intensified at the beginning of the 21st century, occurred one after another in Croatia and significantly impacted the *'socialisation'* of civil law. Their negative impact on the economic and social positions of individuals and their impairment of fundamental rights and living and working conditions called for a different equilibrium in the protection of subjective rights and interests in many private law relations, and sometimes also for priority to be given to the protection of endangered individuals over the protection of private economic interests of individuals. All this has led to a situation where, today, individual segments of civil law are very different from their initial regulation following Croatia's independence. Civil law in the Republic of Croatia is much more *'socialised'* and its public law component is thus more expressed than it was at the beginning of the reform.

This chapter presents the main idea and process of codification of civil law in the Republic of Croatia after the country's independence and its transition to a market economy, the most important changes in individual civil law areas determining the development of Croatian civil law, and the effects of the civil law reform and problems emerging in civil law because of the specific legislative approach to the entire reform. Particular attention is paid to the changes in Croatian civil law due to the multiple crises faced by the country over the past twenty years. Owing to the serious impacts of these crises on the position of individuals, some civil law segments were often amended, mostly by *ad hoc* legislation with not much coherence or systematisation. The main aim of the chapter is to find an optimal solution for further development of Croatian civil law. Can it continue to function efficiently after so many *ad hoc* statutory interventions have significantly changed the

country's civil law relations? If the answer is negative, what must be done to consolidate Croatia's civil law order?

2. CIVIL LAW REFORM AFTER CROATIA'S INDEPENDENCE AND THE ACCESSION TO THE EU

2.1. THE IDEA AND THE PROCESS OF CODIFICATION

The main aim of civil law reform in the Republic of Croatia has been to establish a new civil law system based on private ownership, market freedoms, harmonisation of the civil law system with *acquis communautaire,* EU market freedoms, free movement of persons, and all other values on which the European Union is based. Croatian civil law reform has been marked by several crucial factors.

It was carried out with maximum appreciation of the legal tradition and the earlier developments of civil law. It was largely founded on the Austrian Civil Code tradition, deeply rooted in some regions of Croatia since 1814. The main task was to ensure continuity of Croatian civil law.[6] The connection with the Austrian Civil Code, although not directly applied,[7] has never been interrupted. Even during the socialist period, the Austrian Civil Code had a significant impact on the regulation of individual civil law areas where the private law component continued to be dominant (e.g., property law, law of inheritance).[8] In addition, the Austrian Civil Code was always applied in a subsidiary manner to particular civil law relations that were never provided for in the valid Croatian socialist law (e.g., contract of donation, personal servitudes).[9]

6 See Gavella, 1994, p. 177.

7 In socialist Yugoslavia, as early as in 1946, a separate act on the termination of validity of regulations passed prior to 6 April 1941 was adopted; it also included the validity of the Austrian Civil Code. An act of the same content was adopted by the Republic of Croatia after its independence in 1991.

8 On the role of the Austrian Civil Code for the development of Croatian civil law see Gavella, 1994, pp. 174–178; Gavella et al. 2010, pp. 179, 180, 180–197.

9 For more, see Josipović, 2011, pp. 164–169.

Many other segments of the civil law system (civil proceedings, *ex parte* proceedings, enforcement proceedings, land register) were all governed on the model of Austrian law. However, reform based on the tradition of the Austrian Civil Code did not result in its reintroduction in the Republic of Croatia although numerous legal concepts of the Austrian civil law that already existed in Croatian law were retained (e.g., the principle of causal tradition for the acquisition of real rights, land register, and so on). Some other civil law concepts, which had previously been neglected, were also provided for on the model of Austrian law.

Another element of the reform was modernisation of particular civil law areas. It complemented the concept that a reform had to ensure continuity in the development of these areas. When carrying out the reform, special attention was paid to the changes and development of individual civil law areas that occurred after the Croatian civil law had been included in the socialist legal circle.[10] The same approach was not used only in civil law areas where a decision was taken to return to the Austrian civil law tradition. Modernisation was also carried out in areas that had already started developing during the socialist period in a direction that did not require to be abandoned or where no 'revolutionary' changes were necessary for adjustment to the new, legal, social, and economic orders. Indeed, it was necessary to modernise these areas to adjust them to modern tendencies in the regulation of particular civil law relations to protect fundamental rights and freedoms. These tendencies were particularly obvious in the areas such as family law, succession law, and even the law of obligations (contract law and tort law). Following Croatia's independence, the trend of increasing protection of individuals in various family law relations and eliminating various types of discrimination in family

10 Thus, for example, during the land register reform, the Austrian model of land register that had been introduced in Croatian territories as early as in 1855 was retained. The same principles of the land register law and the same organisation of the land register books were also retained. However, in the reform, all modern rules of the Austrian land register law were preserved. As a result, the digitalisation of the land register under the valid Croatian Land Register Act was in its entirety carried out on the model of the Austrian model of digitalisation of the land register.

law and succession law relations continued.[11] In the law of obligations, on the one hand, the same monistic concept of regulating obligations was retained, based on the same principles. On the other hand, modernisation of individual provisions of the law of contract law and the law of tort was carried out to upgrade personality rights.[12]

Another important element of the reform was taking over various legal transplants in the country's civil law system. Different legal transplants, important for the modernisation of the Croatian civil law, were taken over from different legal orders, mostly continental European and German orders. Many legal transplants were taken over, with some adaptations, from Austrian law,[13] as well as German and Swiss bodies of law.[14] These were mostly legal transplants, which, in their countries of origin, were proven successful legal instruments for governing particular civil law relations and, which, according to the Croatian legislator, would function very well in the reformed Croatian civil law system. However, sometimes, for their successful implementation, the necessary legal and organisational infrastructure was missing in Croatian

11 For example, during the reform of succession law by the Succession Act (valid since 3 October 2003) regarding the right to succession, children born in and out of wedlock, and marital and extra-marital partners were completely equalised in terms of their right to inheritance. Later, same-sex partners were recognised for the same inheritance rights as marital and extra-marital partners. On the contrary, the freedom of testate succession was extended by narrowing the circle of legitimate heirs. For more, see Gliha, Josipović, 2014, pp. 194, 195, 197–199, 211–213.

12 For example, during the reform of the law of torts, by the Obligation Act (valid since 1 January 2006), the so-called objective concept of non-material damage based on the violation of the rights of personality was introduced instead of the previous subjective concept under which pain or fear had been considered as non-material damage. Under the new concept, the liability for non-material damage already exists when someone's right to personality has been violated (the right to life, privacy, dignity, corporal and spiritual health, the right to a name, and the like), even if the person has not suffered any fear or pain. For more see Baretić, 2014, pp. 167, 168.

13 For example, condominium and the right to build in the Ownership Act (valid since 1 January 1997) are provided for based on the model of the Austrian law.

14 For example, the rules on the acquisition of ownership of movables from non-owners, on real encumbrances, and on legal regulation of companies are governed based on the model of German law.

law hence, new legislative interventions in Croatian civil law regulations became necessary.[15]

However, it was not possible to base the reform only on legal transplants. One of its very important elements was an autonomous development in some civil law areas. Very specific civil law relations were involved for whose regulation no suitable model could be found in modern foreign legal orders. A coherent civil law reforms required a reversion to some traditional private law institutes and civil law principles (a single type of private ownership, private companies, use of flats on the basis of lease contracts, the principal of the legal unity of immovables, and the like). This required a specific regulation of the transition from the social-ownership-concept of various legal institutes to traditional private law models. Special rules were necessary to regulate the transformation of social to private ownership, transformation of social to private companies, reversion to private ownership of the nationalised immovables and enterprises, transformation of socialist rights on the use of socially owned flats into the right to lease, a re-establishment of the legal unity of immovables as the basis for efficient functioning of the land register and legal transactions of immovables. That aspect of the civil law reform was the most challenging one because it required a new balancing between individual rights, significant financial resources and the new instruments for the enforcement of individual rights. The most complex challenge was to harmonise the rights acquired in the course of the socialist era with the rights recognised to those who had been deprived of their ownership and of their companies during socialism and to carry out their indemnification without violating the rights acquired

15 For example, problems have arisen in practice with the registration of ownership in the land register under general rules on land register proceedings provided for in the Land Register Act (valid since 1 January 1997). Therefore, special summary proceedings were introduced to register immovables in cases where the parties do not have all documents needed for registration of ownership. At the beginning, such proceedings were considered as an exception to be applied only when the proceedings of the compliance with the land register had not been made *ex officio*. However, the area of application of summary proceedings was extended by the introduction of new cases when it was possible, in such proceedings, to carry out the registration. In the new Land Register Act (valid since 6 July 2019), registration in summary proceedings is no longer considered an exception.

in the meantime. This required a new balance of protection between the mutually confronted, acquired rights and the new subjective rights which the new civil law order recognised to individuals, some of which should have been treated as fundamental rights under the international conventions in the meantime signed by the Republic of Croatia. Despite the fact that 30 years have elapsed since the initial reforms directed at the abolition of social ownership and socially owned companies, in some civil law areas, the Republic of Croatia is still in search of an optimal balance of the protection of all persons to whose rights the transition from the socialist to the new civil law system refers. In the meantime, it has become clear that an optimal balance between the mutually confronted individual rights cannot only be achieved by transferring the burden of the transition from one protected group to the other. What is needed is an active role of the State, and in particular its financial contribution, so that any of the confronted groups are compensated for the damage caused by the loss or reduction of the rights due to the transition to a new civil law system.[16]

The requests for a fast transition to a new legal, social, and economic system determined the nomotechnical approach to civil law reform. It was carried out successively. Priority was given to civil law areas that were decisive for the transition to the new economic and legal system and that had previously been organised inappropriately for the new

16 For example, a major challenge in the civil law reform was the regulation of the relations between flat owners whose flats were returned to them in the process of denationalisation and former holders of tenancy rights (while the same flats were under social ownership). Following denationalisation, former holders of tenancy rights acquired the status of protected lessees and they were able to continue dwelling in the same flats by paying nominal amounts as fees. Protecting flat owners and their fundamental right of ownership, i.e., how to establish optimal balance between the right to ownership and the right to a home became a disputable issue. The main problem was the fact that the State has always tried to keep the balance by special regulation of mutual rights and obligations between owners and protected lessees. However, it became apparent that the problem could not be solved without a corresponding financial intervention of the State, or without the financial assistance or indemnification of one of the interested parties. Any other solution would have been too big a burden for one of the parties. The European Court of Human Rights, as well as the Croatian Constitutional Court, ruled on such issues in several cases. For more see Josipović, 2022, pp. 277–279.

legal and economic relations after the transition to a market economy. The first civil law areas that were reformed were company law, labour law, bankruptcy law, property and land registration law, and tenancy law – the civil law areas that, under socialist law, had been regulated on collectivistic principles and could no longer function as such in the market economy. Subsequently, reforms of other civil law areas were also carried out, especially those that, at least at the beginning of the process, were suitable for the regulation of particular civil law relations such as family law, succession law, and the law of obligations. Regardless of the fact that these were the regulations from the socialist period, they considered some fundamental principles important for the new legal order. Their modernisation took place later, after the regulations had already been adopted to lay down the basic legal framework for the development of private ownership, market economy, and competition.

A gradual civil law reform resulted in a situation where the Croatian legislator opted for a segmented approach, and the reform was carried out by adopting numerous separate acts without unifying them into a civil or commercial code. In some specific civil law areas, new laws were passed while in others, the valid Acts were only amended to conform to the new legal order. The long-lasting target of reform was from the very beginning the adoption of a code to ensure systematism, integrity, and stability, and play a central role in the Croatian legal system.[17] However, so far no civil code has been adopted. Moreover, theoretical discussions on the need to have a civil code have also not be held.[18] It is to be expected that the same concept of the development of civil law will be retained in the future in the form of separate acts for individual civil law areas. Such an approach is to some extent justified by the fact that separate acts can be much faster to implement and easier

17 See Gavella, 1994, pp. 269–276.

18 At the beginning of the civil law reform, individual segments of civil law, usually included in civil codes (e.g. real property law, succession law) were technically provided for in separate Acts so as to be later incorporated into the future Civil Code. However, such practice was later abandoned, so that every individual civil law Act gained its specific structure and concepts. The incorporation of separate Acts into the Civil Code would require significant technical interventions and even some interventions into the content of individual norms.

to adjust to the changes of social, legal, and economic relations caused by circumstances of national or international nature. However, in the course of civil law reform, it became clear that the non-existence of a civil code providing for, among other things, the fundamental and general principles and the core of civil law, was a problem in practice. In fact, because there is no general part of civil law as the basis for the regulation of individual civil law areas, some separate acts overlap when particular aspects of general civil law are dealt with, and this results in inconsistency within the civil law system.[19]

Finally, one of the most important factors for the reform and development of civil law in Croatia was the harmonisation of civil law with the law of the European Union. It was carried out in parallel with the civil law reform because of the transfer to a market economy and private ownership. This is precisely why systematic preparations for a civil code have not yet started. Very short time limits for the alignment of Croatian law with the EU law called for an accelerated legislative procedure. The harmonisation of the country's civil law with the law of the Union was carried out in three ways. First, the laws that generally and integrally provided for the civil law area were aligned with the EU law.[20] In addition, separate systemic laws were adopted into which EU directives were transposed providing for a particular legal area.[21] Some EU directives were transposed into separate acts adopted only

19 The role of the general part of civil law was given to the general part of the Obligations Act (in force since 1 January 2006). However, some rules typical for the general part of civil law are differently provided for in other Acts as well (e.g., in the Family Act), such as the rules on civil incapacity and its impact on the validity of a contract. The consequence of such a technical approach is that of different interpretations of the Obligations Act and the Family Act regarding civil incapacity. The relationship between these Acts regarding the rules on the relationship between a general and a separate Act, the previous and current Act, is also interpreted differently. In the end, such situations always lead to legal uncertainty when entering into contracts and determining their effects.

20 See the Obligations Act, the Company Act, the Private International Law Act, the Insurance Act.

21 For example, see the Consumer Protection Act, where the majority of consumer directives are transposed.

for transposing a particular directive to the Croatian legal system.[22] The approach to harmonisation was different. In most cases, the Croatian legislator opted for the same material and personal area of application as determined in the EU law. Only exceptionally did the legislator opt for the so-called extended (gold-plated) harmonisation, that is, for the extension of the scope of application of the EU law to other persons and other legal relations as well.[23]

2.2. EFFECTS OF CIVIL LAW REFORM

Civil law reform in the Republic of Croatia has been a continuous process, largely determined, except by many internal factors, by the development of the EU law and various other circumstances impacting the legislative activity of the European legislator. However, after thirty years of intensive development of civil law, many positive effects of the civil law reform on the entire Croatian legal system are noticeable. All segments of Croatian civil law have been adapted to the individual concept of providing for civil law relations based on a market economy and private property, but at the same time respecting the social component of ownership and of other subjective civil law rights. Civil law in Croatia has been significantly updated and adapted to modern business trends and communication on the digital market. It is extremely important that the new values are increasingly protected in civil law[24] and that the position of the weaker contractual party is always considered, as well as human rights in private law relations are protected.

22 See the Act on Consumer Housing Credits which transposes Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

23 For example, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods is transposed in the Obligations Act to apply to all C2B, B2B, C2C contracts against payment.

24 For example, contractual relations have become more transparent. On the one hand, this is the result of the transposition of Directive 93/13/EEC on unfair terms in consumer contracts in the Consumer Protection Act. On the other hand, the criteria for transparency laid down in this Directive have also been the model for the regulation of transparency of general business conditions in B2B contractual relations (art. 296 of the Obligations Act).

The horizontal effects of the fundamental rights are increasingly expressed in various civil law relations. Many new legal concepts and institutions,[25] new segments/areas of law,[26] new remedies for protection of individual rights,[27] as well as many new instruments for cross-border enforcement of individual rights have been developed. These positive effects are the result not only of the autonomous development following the transition to market economy but also of the harmonisation with the EU law because of its very important corrective effects on the realisation of increased social justice and more effective enforcement of individual rights in civil law relations.

2.3. PROBLEMS CONNECTED WITH CIVIL LAW REFORM

A very demanding and intensive civil law reform, with so many goals to be achieved, has also led to specific problems in the functioning of the Croatian legal system. A gradual and successive approach to the reform resulted in fragmentation, segmentation, and complexity of the civil law system, which often appeared unsystematic and incomplete. In practice, problems emerged in the determination of the relationship between general rules and special rules, which often differ in terms of their specificity.[28] Frequent legislative changes have been a serious problem caused by intensive development of the EU law, particularly with the development of the digital market. Very short deadlines were often prescribed for the transposition of EU directives, and this is why a sufficiently systematic approach to the alignment of national legislation is not always possible. Clearly, the transitional regimes organised

25 For example, new contracts of importance for the digital market are governed on the model of the EU law (e.g. contracts for the supply of digital content and digital services).

26 For example, EU law impacted the development of the law on the protection of personal data.

27 EU law impacted the development of the concept of collective protection in civil law relations.

28 Very often, there are several levels of separate regulations. In every particular case, it is necessary to apply various interpretations to determine which regulation, and in what way, has priority in the application over some other regulation.

for the transition from the old to the new regulation were too complex. Efficient transition to the new regulation often becomes difficult because of the demanding process of determining acquired rights.[29] For all these reasons, problems persist in the re-establishment of traditional law principles based on the market economy. Problems are also seen in case law, particularly in the application of national regulations aligned with the EU law. No systematic monitoring of the EU law exists in the courts, and theoretical analyses of EU law are also missing. When applying the law of the Union, its principles are often interpreted differently, and the method of interpretation of national legislation, in conformity with the EU law, is still not sufficiently developed.[30]

However, the biggest problem connected with civil law reform is the undeveloped legal and economic infrastructure for the application of the new legal instruments and the legal transplants from the EU. Therefore, long and expensive enforcements of individual rights before the courts of competent jurisdiction have become a frequent problem. The EU Justice Scoreboard 2023 shows that in the last few years in Croatia, the average judicial review for the protection of consumer rights has become significantly longer:

29 In that regard, the biggest problem is the transformation of social ownership of immovables. In socialism, several different regimes of social ownership existed, with different rights of use in favour of different persons. The transformation of social ownership was also carried out on different legal bases. Therefore, it is still unknown who has become a private owner of a particular immovable following the transformation of social ownership.

30 There is a special problem in the preparation and drafting of a regulation, and also in case law, when the primary EU law is interpreted in the context of civil law relations. See, for example, the ECJ's judgment of 14 February 2019, C-630/17, Milivojević, ECLI:EU:C:2019:123.

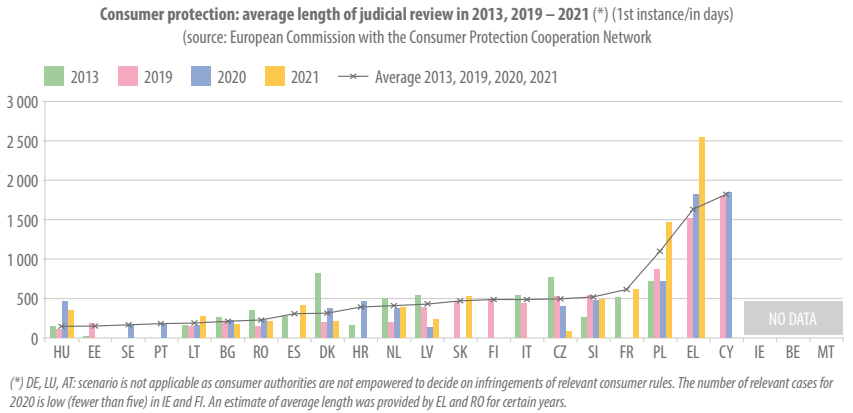

Figure 1. Average length of judicial review[31]

Another serious problem is the lack of knowledge and awareness of individual rights conferred by the EU law. This has been confirmed by the most recent European statistics. According to the Consumer Conditions Scoreboard – 2023 Edition,[32] consumers in the Republic of Croatia are almost at the bottom of the scale when it comes to knowledge and awareness of individual rights conferred by the EU law, which is considerably below the European average.

31 The 2023 EU Justice Scoreboard, 2023, p. 18.
32 Consumer Conditions Scoreboard – 2023 Edition, 2023.

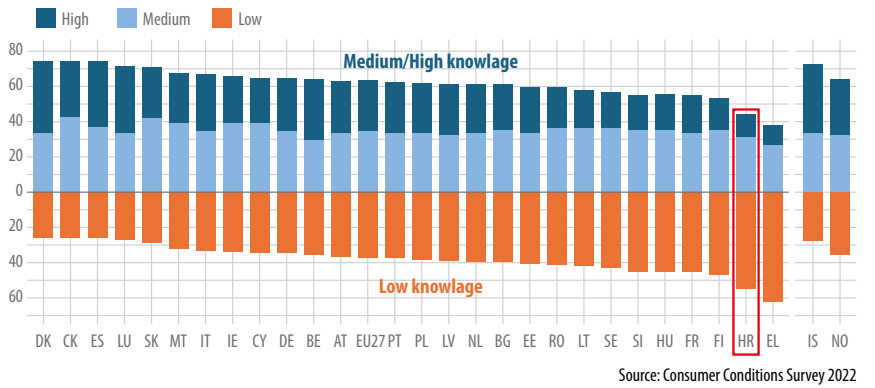

Figure 2. Consumer Conditions Scoreboard/2023 edition: Overall knowledge of consumers' rights.[33]

Country Summary: Croatia

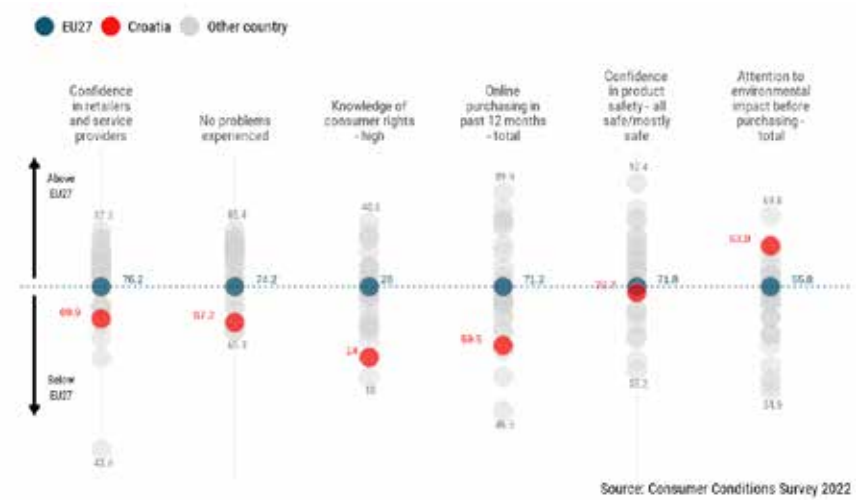

Figure 3. Consumer Conditions Scoreboard/2023 edition: Country summary – Croatia[34]

33 *Idem*, p. 27.
34 *Idem*, p. 40.

3. CIVIL LAW IN MULTIPLE CRISES

3.1. CIVIL LAW MEASURES TO MITIGATE THE EFFECTS OF MULTIPLE CRISES

Civil law development in the Republic of Croatia since the beginning of the 21st century has been mostly marked by numerous crises – the financial crisis (2008), the COVID-19 crisis (2020), the housing crisis caused by destructive earthquakes (2020), and the energy crisis. During all these crises, Croatian civil law has followed the current trends in the regulation of civil law relations, including those arising from the EU law, particularly from the European legislation dealing with the development of the digital market and the green transition, which also significantly impacted the traditional principles in individual civil law areas. Nevertheless, civil law development since the beginning of this century has been marked by the crises that have drastically changed the country's social, economic, and legal relations. Their negative impact on the economic and social status of individuals called for a corresponding response of the Croatian legislator to ensure the functioning of the social State. In the area of civil law, a large number of *ad hoc* laws have been adopted by which, to alleviate any negative impacts of the crises on the position of individuals, interventions have been made in the fundamental civil law principles. In case law, interpretations of civil law norms have changed. Some legal remedies for protection of subjective rights have been given a special role in case law aimed at protecting endangered groups in any extraordinary circumstances caused by the crises.

In addition, the multiple crises mentioned resulted in a different approach to the protection of particular values in civil law. Different priorities in the protection of individual subjective rights in civil law relations were established. Preferential treatment was given to the enforcement of new social values in civil law and to the protection of fundamental rights. Social justice became much more expressed in comparison with the first civil law developments following Croatia's

independence. Increased attention was paid to protection of (a) the weaker party in contracts, (b) low-income and over-indebted consumers, (c) vulnerable customers when delivering public services, and (d) fundamental rights in civil law relations to ensure access to housing, access to justice, and universal services, as well as to the measures directed at prevention of insolvency and over-indebtedness. The goal of all these civil law measures has been to mitigate any negative and unfavourable effects of the multiple crises on the status of citizens and companies. Such measures have been taken in many civil law areas, particularly in contract law (especially in consumer contract law), real property law, as well as in enforcement and bankruptcy law. Most measures are of legislative nature, some of them of administrative nature, and some a result of judicial activism. However, they all had a significant impact on the previous regulation of particular civil law areas.

The financial crisis had the strongest impact on the changes in contract law, especially in the area of consumer credits, particularly foreign currency credits. The scope of the financial crisis was so massive and serious that by applying traditional contract law instruments (e.g., the rule *clausula rebus sic stantibus, laesio enormis*, impossibility of fulfilment), it was impossible to solve all the problems arising from a drastic imbalance in the rights and obligations of the parties to the contract in credit relations caused by sudden, extreme, and unexpected changes in foreign exchange rates in denominated consumer credits. An *ad hoc* legislative intervention in the regulation of consumer credits was necessary. The Croatian legislator took a whole series of measures to protect consumers who had entered into credit contracts. The aim was to protect consumers from unexpected, frequent, and extreme changes in exchange rates, particularly in the case of consumer credits denominated in CHF with variable interest rates. During a relatively short period of time (2013-2015), a large number of new rules for consumer credits were drawn up for consumer credits, such as statutory freezing of the maximum interest rate and of the maximum annual percentage rate of charge, freezing interest rate for loans in CHF and the exchange rate for CHF, and finally, legal obligation for creditors (credit institutions) to offer conversion of credits denominated in CHF into

credits denominated in EUR.[35,36] These were always cogent and mandatory rules directly applied to consumer credit contracts, and they *ex lege* changed the contract terms agreed upon earlier. Since they were mandatory rules, contractual parties were not allowed to agree on the exclusion of their effects. Their application was followed by a specific regulation of transgression measures and high fines for creditors if they violated their statutory obligations towards consumers. In addition, all the mandatory rules were retroactively applied to any already-concluded consumer credits and some to credit contracts denominated in CHF as well.

As already mentioned, the financial crisis also impacted case law, particularly in strengthening the enforcement of consumer rights. By judicial interpretations of individual civil law provisions, previous civil law concepts were significantly changed. The new approach was particularly obvious in the context of collective and individual protection of consumers against unfair contract terms (terms on variable interest rate, exchange rate terms), which resulted in a significant increase in consumers' credit obligations in foreign currency loans. On the one hand, case law made a decisive contribution to the interpretation of the effects of collective protection against the realisation of individual restitution claims based on unfair and null-and-void contract terms. During the first (and, so far, the only) proceedings for collective protection of consumers against unfair contract terms in consumer contracts denominated in CHF,[37] it became clear that in the applicable laws, numerous aspects and effects of collective protection were not regulated. The subsidiary application of individual provisions of general contract law could not provide for satisfactory consumer protection. In this regard, a particular problem was the accomplishment of restitution

35 This is why the Consumer Credit Act (2009) was first amended in December 2013 (OG, 143/13) and again in January and December of 2015 (OG, 9/15 i OG, 102/15). For more, see Josipović, 2019, pp. 163–168.

36 In the end, for 93.9% of credits denominated in CHF, the offers for conversion into credits denominated in Euro were accepted. See the data cited in Josipović, 2019, p. 167.

37 At the end of 2014, 16% of all credits to consumers were denominated in CHF. Of this percentage, 95.5% were residential loans. For more see Josipović, 2019, p. 162.

of the overpaid amounts under the contract provisions, which, in the proceedings for collective protection, were determined as unfair, null, and void. The application of general provisions on the calculation of limitation periods[38] could not provide effective protection because when the limitation period had set in, after the termination of collective proceedings, most consumers were no longer able to realise their restitution claims. Judicial activism then significantly contributed to effective protection of consumers who had already entered into credits denominated in CHF, even without any appropriate amendments to the existing regulations.[39] In case law, the problem was solved by special interpretations regarding the calculation of limitation periods by the Supreme Court of the Republic of Croatia. In 2018, the Supreme Court's first interpretation had been that collective redress interrupts the limitation period for individual restitution claims and that upon the termination of collective proceedings, the limitation period starts running anew, although the Obligations Act did not expressly lay down any such rule.[40] In 2020, the Supreme Court totally changed its previous interpretation regarding the calculation of the limitation period for restitution claims based on null and void contracts, that is, for the return of the overpaid amounts on the basis of unfair contract provisions. According to the new interpretation, the limitation period for such individual restitution claims does not start to run from unfounded payments but only after the court has declared nullity, or after nullity has been declared in some other way.[41] This new approach to interpretations of limitation periods has opened up new possibilities for the restitution of overpaid credit

38 Under the Obligations Act, the period of limitation starts to run on the first day following the day when the creditor was entitled to the fulfilment of the claim (art. 215/1). When unjustified enrichment is involved, the limitation period starts to run from the unfounded payment. The limitation period is interrupted by a court action or any other creditor's action before the court for the settlement, insurance, or determination of the claim (art. 241 of the Obligations Act).

39 See Josipović, 2020, pp. 4–33.

40 See the decision of the Supreme Court of the Republic of Croatia Rev-2245/17, 20/03/2018, available at www.iusinfo.hr (Accessed: 5 October 2023).

41 Legal interpretation of the Civil Division of the Supreme Court of the Republic of Croatia, Su-IV-47/2020-2, 30 January 2020 available at VSRH_GO_2020_Su-IV-47-2020-2_2020-1-30_sjed01.pdf (Accessed: 2 October 2023).

instalments based on unfair contract terms (even when, according to previous interpretations, the limitation period has already expired) for many consumers struck by the financial crisis owing to their entering into credit contracts denominated in CHF. All the interpretations by the Supreme Court applied retroactively to already-concluded credit contracts such that even those that were time-barred became active again. At the same time, other positions of the Supreme Court began to be applied retroactively to consumer contracts, if the Court's interpretations were important for effective enforcement of consumer rights to protect them against the financial crisis. For example, the Supreme Court held that the courts of enforcement in enforcement proceedings conducted on the basis of enforcement documents not having passed through any judicial control are *ex officio* bound to control whether a consumer contract contains any unfair (null and void) provisions.[42] Any further implementation of enforcement against the consumer depended on the results of such control.

The financial crisis, and later the COVID-19 crisis, have shown that at the time of a crisis it is not possible to keep an appropriate balance between the rights and obligations of debtors and creditors by traditional civil law principles of the duty to meet the obligations and remedies for debt enforcement (particularly when debtors are natural persons). Therefore, the consequences of the financial crisis had a significant impact on the forced settlement of claims arising from various civil law relations where debtors were natural persons. By the enforcement law reforms, the focus of protection was gradually transferred from the creditor to the debtor in order to maintain a new balance in debtor-creditor relations because of the social and economic problems that citizens were exposed to due to the crisis. The main trend characterising the development of the law of enforcement in the Republic of Croatia since its independence has been continuous intensification

42 The Supreme Court of the Republic of Croatia, no. Su IV-87/2022, Zagreb, 11 March 2022, From the records of the meeting of presidents of Civil Divisions of County Courts and the Civil Division of the Supreme Court of the Republic of Croatia held on 11 March 2022 in Zagreb, available at http://www.vsrh.hr/custompages/static/HRV/files/PravnaShvacanja-Zakljucci/GO-zakljucci/Su%20IV-87-2022.pdf (Accessed: 2 October 2023).

of the protection of debtors in enforcement proceedings. The rules on exemption from execution, or limitation of enforcement, were changed by every new Enforcement Act or its amendments,[43] that is, the limitations of enforcement to provide for the increased protection of debtors were increasingly extended.[44] In addition, the enforcement rules on immovables were often changed by laying down increased restrictions on enforcements. Enforcement against immovables were excluded if the claims did not exceed certain amounts, whereby a trend of increasing the amounts for which the enforcement was excluded was also observed.[45] Such changes were accompanied by specific regulation of the debtor's legal position in cases of a compulsory sales of residential immovables. The debtor and his/her family were recognised specific rights, which led to some restrictions on the new owners' use of

43 The first Enforcement Act was passed in 1996. In 2010, another Enforcement Act was adopted, and in 2012, it was replaced by a new Enforcement Act (OG NN112/12). The valid Enforcement Act has been amended as many as seven times since its entry into force (OG NN, 25/13, 93/14, 55/16, 73/17, 131/20, 114/22).

44 For example, when the first Enforcement Act entered into force (1996), half of the debtor's salary was exempted from enforcement (art. 149/1). Since 2008, only half of the average net salary in the Republic of Croatia was exempted from enforcement, regardless of the debtor's salary amount (new art. 149/1). In the Enforcement Act of 2010, exemption from enforcement was increased to two-thirds of the average net salary in the Republic of Croatia (art. 92/1). In the Enforcement Act (2012) currently in force, the rule on the exemption from enforcement of two-thirds of the average net salary in the Republic of Croatia has been retained regardless of the real amount of the debtor's salary (art. 173/1). However, a new rule was incorporated on exemption from enforcement: if the debtor's salary is lower than the average net salary in the Republic of Croatia, three-fourth of the debtor's salary is exempted (art. 173/2).

45 Since 2017, the Enforcement Act of 2012, in the new art. 80b, limited the enforcement over an immovable only for claims exceeding the amount of 20,000 HRK (c. 2,666.00 Euro). If the claim was higher than this amount, the court could reject the enforcement over immovables if selling them would disturb the balance between the debtor and the creditor. The criteria for the assessment of the balance were such that, in principle, the debtor's interest was crucial (the amount of the claim, probability that enforcement over any other objects would be unsuccessful, whether it was a residential immovable, whether there was any urgent interest in the settlement of the debt, or whether the debtor agreed that an immovable had be sold to settle the claim). Already in 2020, this amount was increased to 40,000 HRK (c. 5,260.00 Euro).

immovables legally bought in a public auction.[46] Finally, in 2020, a separate rule was drafted laying down that enforcement against a natural person to sell and vacate an immovable would not be carried out in the period from 1 November to 1 April, unless there was a justified reason for the opposite.[47] Special measures were taken for a discharge of citizens' debts. In 2018, the Act on Discharge of Citizens' Debts was adopted.[48] It was a one-time measure to solve the problem of the citizens' frozen/blocked accounts because of the enforcement of debts. The Act laid down a one-time *ex lege* write-off of debts to the amount prescribed by the Act that citizens owed to some creditors (e.g., the Republic of Croatia, state-owned companies), or the write-off of debts upon the creditors' decisions (e.g., local self-management units, financial institutions, and all other legal or natural persons, et al.). Such a one-time debt, together with interest and costs resulted in unfreezing the bank accounts and the cancellation of enforcement.[49] In the same year, a new Act on Enforcement of Debts on Accounts (2018)[50] was adopted introducing the new rule of *ex officio,* automatic termination of enforcement of debts on blocked/frozen bank accounts not charged in three years from the beginning of

46 In 2014, by the new art. 127/2-5 of the Enforcement Act (2012), the right to use the sold immovable was introduced for the debtor and his/her family after it had already been sold in a public auction, with an obligation to pay rent to the buyer. In such cases, the buyer was not entitled to the possession of his/her immovable. In 2017, such right to use a sold immovable was replaced by the right to a pecuniary compensation for the costs of housing care via the social welfare system (art. 131a of the Enforcement Act of 2012).

47 See art. 46/3 of the Enforcement Act (2012) amended by the Act on Amendments to the Enforcement Act (OG NN131/20).
At the same time, a new ground for the postponement of enforcement was introduced on the basis of a notarial deed of enforcement laid down in consumer contracts. The postponement of enforcement will be applied if any contract term in a consumer contract can be declared null and void. Enforcement is then postponed until an action is brought against null-and-void contract terms. See art. 65/1/p. 11 of the Enforcement Act (2012).

48 Natural Persons' Debt- Write Off Act (OG 62/18).

49 As many as 150,474 citizens' debts (whose accounts were frozen) were written off, that is, 46% of citizens with frozen accounts. Data on the Implementation of the Act on Discharge of Citizens' Debts, 2018.

50 Act on Enforcement of Debts on Accounts, OG 68/2018.

the freezing.[51] The aim was to unfreeze the accounts of citizens whose accounts had been frozen for many years and to make it possible for them to withdraw their money. This was why the rule was retroactively applied to all debts which, at the time of the entry into force of the Act, had been outstanding during the last three years. However, it was not a one-time measure. This rule is still in force. It continues to be applied to all outstanding debts regardless of whether the creditors were private or public persons, or regardless of their legal basis when the debt was created, and to what amount. However, debts do not cease to exist by the termination of enforcement. Creditors may only initiate new enforcement proceedings.[52] At the same time, numerous important civil law effects of such termination of enforcement have remained unregulated. An open question still remains on how the limitation periods are calculated in such circumstances, how default interest is calculated, who bears the costs of the termination of enforcement, and so on. The described trends continued during the COVID-19 crisis (2020) when, because of the particular circumstances caused by the pandemic, new regulations were passed for a one-time unblocking of debtors' frozen accounts, a temporary suspension of enforcement, a temporary suspension of bankruptcy proceedings, and the termination of running default interest.[53]

The crisis caused by destructive earthquakes (2020) also showed that the traditional regulation of civil law relations could not efficiently contribute to the elimination of their consequences, let alone to quick reconstructions of buildings in residential areas ruined by earthquakes. The application of general civil law rule according to which the agreement of all co-owners of a building is required for any construction

51 Art. 12, Act on Enforcement of Debts on Accounts.

52 Since the entry into force of the Act on Enforcement of Debts on Accounts (2018), the number of citizens whose accounts have been frozen is constantly falling. See Podaci o broju ovrha na novčanim sredstvima poslovnih subjekata i potrošača, 2023.

53 See arts. 25a and 25b of the Act on Enforcement of Debts on Accounts (2018) added by the Act on Amendments to the Act on Enforcement of Debts on Accounts (OG 47/29); *Zakon o interventnim mjerama u ovršnim i stečajnim postupcima za vrijeme trajanja posebnih okolnosti* [The Act on Intervention Measures in Enforcement and Bankruptcy proceedings] (OG 53/20, 83/20).

work would completely block the reconstruction process. Although it is a rule by which the will of all the co-owners of a building is respected to the maximum, and their private autonomy in the management of their property is protected, quick reconstruction has required a deviation from the rule that the consent of all the co-owners is required. Under a separate Act, reconstruction after earthquakes is proclaimed to be in public interest.[54] This has been the basis for the new statutory restriction on owners and co-owners of residential buildings when deciding on their reconstruction, or on tearing them down if they are badly ruined. It is expressly laid down that any decision on the reconstruction of buildings and removing those that are seriously ruined are considered regular management. Therefore, the reconstruction of damaged buildings requires a simple majority of all co-owners, and they are all obliged in terms of any financial obligations connected with the reconstruction and in terms of putting up with any construction work, vacating the building, or any other obligation. Under a separate law, in case of reconstruction, the consent of owners who together own more than a half of the building is required and, if necessary, it can be replaced by a court decision.[55] At a certain point in time, the rule that for the removal of a badly damaged building, the owners' agreement was required, ceased to exist.[56] Finally, separate rules on proving the ownership of buildings and pieces of land have been adopted, and they have completely ignored all traditional civil law principles of proving the ownership of immovables based on traditionally maintained land registers on the model of the Austrian land register. In order to accelerate the process of decision

54 See art. 2 of the *Zakon o obnovi zgrada oštećenih potresom na području Grada Zagreba, Krapinsko-zagorske županije, Zagrebačke županije, Sisačko-moslovačke županije i Karlovačke županije* [Act on the Reconstruction of Buildings Damaged by the Earthquake in the Zagreb Area, in Krapinsko-Zagorska County, Sisačko-Moslavačka County, and the Karlovac County] (OG NN, 102/20, 10/21, 117/21), hereinafter: The 2020 Reconstruction Act. See art. 3/1 of the 2020 Reconstruction Act.

55 See art. 16/7, 8 of the 2020 Reconstruction Act; see art. 22 of the 2020 Reconstruction Act.

56 The Act on Amendments to the 2020 Reconstruction Act of 2021 (OG NN117/21) by which art. 24 of the 2020 Reconstruction Act was abolished where it was laid down that the consent of owners was necessary to remove a badly damaged building, see also art. 25a of the 2020 Reconstruction Act.

making on reconstruction, when land register entries differ from the real legal status of an immovable, ownership can be proven by various public documents, contracts, or even certified witness statements.[57]

Specific state interventions in contract relations happened because of the energy crisis, which caused disturbances on the energy market and drastic increases in energy prices, particularly for vulnerable end users. To protect end users, the State started with regulation of prices for the delivery of energy sources and prescribed new obligations for all energy suppliers in the form of contracts for the supply of energy. By way of separate ordinances, the Government of the Republic of Croatia temporarily fixed the energy prices in already concluded supply contracts for particular categories of customers regardless of the movement of prices of energy sources on the energy market.[58] Independent energy regulators also temporarily fixed their tariffs and charges for public supply services of some energy sources in already concluded energy supply contracts.[59] This was how public energy service suppliers' legal obligation of the conclusion of energy supply contracts with end users was reinforced. They were ordered to offer their public supply service to the category of household users whose supply contracts, made under the existing market conditions, had expired. The main goal was to alleviate access to public energy services and to protect end users who had cancelled their contracts with the suppliers delivering energy under market conditions and who were under no obligation to apply the prescribed and fixed energy prices. For suppliers of energy sources under the existing prices on the market, there were special duties to

57 See art. 23 of the Reconstruction Act/2023. For more, see Ernst, 2022, pp. 531–540.

58 See *Uredba o otklanjanju poremećaja na domaćem tržištu energije* [Ordinance on the Elimination of Disruptions on Domestic Energy Market], OG NN 104/22, 106/22, 121/22, 156/22; *Uredba o otklanjanju poremećaja na domaćem tržištu energije* [Ordinance on the Elimination of Disruptions on Domestic Energy Market], OG NN 31/2023, 74/2023, 107/2023.

59 For example, see: Croatian Energy Regulatory Agency (HERA). The Agency brought several decisions on the amounts of tariffs for the public supply of gas for the period from 1 April 2022 to 31 March 2024 (OG NN 32/22, 108/22, 51/23). These decisions led to temporarily fixing the supply of gas, tariffs, and monthly fees.

inform their end users of the right to cancel the contract and to opt for a public service model.[60]

3.2. THE IMPACT OF MULTIPLE CRISES ON CIVIL LAW

Various State interventions and *ad hoc* measures because of the above mentioned multiple crises have significantly changed the concept of regulation of particular civil law relations. The civil law branch is founded on an individualistic and liberal concept, market competition, and private ownership, and it is mostly adjusted in favour of vulnerable individuals to protect social values of modern society. Therefore, civil law started to develop under the strong influence of public law, although the starting point of civil law reform was to eliminate public law reform from civil law norms. This led to many controversial questions in connection with the measures aimed at mitigating the effects of the multiple crises. For example, we must mention here the justification of the retroactive application of some *ad hoc* measures, proportionality of the new restrictions on individual rights, impact of the measures on the acquired rights, and even the constitutionality of some of the measures adopted.[61] Undoubtedly these were the measures that imposed some new limitations on the freedom of contract and private autonomy owing to many new mandatory rules. These limitations can be justified

60 For example, see the decision of the Croatian Energy Regulatory Agency of 23 September 2022 for the beginning of public supply of gas to household end users whose contracts on the supply of gas have expired, available at Odluku o početku pružanja javne usluge opskrbe plinom krajnjim kupcima kategorije kućanstvo kojima prestaje ugovor o opskrbi plinom [Decision on the start of the provision of public gas supply services to end-consumers of the household category whose gas supply contracts end], 2022.

61 For example, the Constitutional Court, upon the application for review of constitutionality of the provisions of the Consumer Credit Act on mandatory conversion of credits denominated in CHF into credits denominated in Euro held that these were not unconstitutional provisions because it was a measure by which *fundamental social rights and social security were ensured.* See the ruling of the Constitutional Court of the Republic of Croatia no. U-I-3685/2015 et al. of 4 April 2017 (OG NN 39/17).

by the seriousness of the consequences of the crises for the economic and social positions of individuals. However, it is justified to ask whether in all the above mentioned cases the intervention in the existing civil law relations was an optimal route to protect vulnerable individuals. In a large number of cases, the intervention resulted in a situation where the State, instead of by publicly financed social measures, transferred the burden of solving the consequences to other participants in civil law relations (creditors, service providers, co-owners).

4. PROSPECTS FOR DEVELOPMENT OF CIVIL LAW

Civil law development has been a very dynamic and complex process after the Republic of Croatia became an independent country. Civil law reform had to face many challenges requiring substantial changes in existing civil law relations. Numerous legal, political, social, and economic factors in various ways determined the entire civil law system. They have all led to a situation where, in many general and separate Acts, a rich, diverse, and a very complex body of civil law norms, which are not mutually adjusted, exists. Future development of the civil law in Croatia should primarily be marked by its consolidation and a simultaneous recodification of individual civil law areas aimed at their modernisation.

Major challenges in this process include the need to define all civil law principles and unify terminology to determine optimal solutions for the conflict between old and new interests and values to be protected by modern civil law adjusted to the challenges brought about by the multiple crises. This will require special attention when establishing optimal relationship between mandatory and dispositive rules, proportionality of the limitations on individual subjective civil law rights, and a balanced protection of individual fundamental rights and social values in civil law. However, the most serious challenge will continue to be the provision of effective enforcement of citizens' individual civil law rights and increased awareness of their rights and interests. The extension of the catalogue of individual rights in civil law relations also requires regulating the corresponding effective remedies for their

protection and their permanent upgrading. In this respect, reforms aimed at the establishment of well-organised and efficient courts will continue to play an important role, as well as develop new methods of enforcement of citizens' rights such as collective protection, alternative and online dispute resolution. Only by a coordinated development of all these segments, can civil law contribute to further development of Croatian society and meet the challenges brought about by increased digitalisation, sustainable development, and green transition.

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CODIFICATION OF CIVIL LAW IN BOSNIA AND HERZEGOVINA

MELIHA POVLAKIĆ

ABSTRACT

This chapter offers a comprehensive analysis of the historical development and current state of civil law codification in Bosnia and Herzegovina. It underscores the profound influence of Austrian law, particularly the Austrian Civil Code, on Bosnia and Herzegovina's legal system from the Austro-Hungarian period through socialism and into the present. Despite socialist reforms after World War II that marginalized private law and emphasized state ownership, the principles of the ABGB persisted through the application of 'legal rules' from prior statutes. In the post-Yugoslav era, Bosnia and Herzegovina embarked on a transition process to reform its property system and codify civil law. However, progress has been hindered by incomplete property reforms and a complex constitutional structure that divides legislative competencies among entities and the Brčko District. This fragmentation impedes the adoption of a uniform civil code, resulting in civil law being codified in separate statutes without a general part. The chapter examines the current codification of contract and tort law, still largely governed by the Obligation Act of 1978. It also reviews recent reforms in property, succession, and family law, noting a return to foundational principles like the superficies solo cedit doctrine. Challenges remain, such as the lack of recognition

Povlakić, M. (2024) 'Codification of Civil Law in Bosnia and Herzegovina' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 291–337. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_12

for same-sex partnerships and issues concerning the deprivation of contractual capacity for adults. Concluding, the chapter emphasizes that the evolution of civil law in Bosnia and Herzegovina is characterized by legal transfer and reception. It questions the feasibility of autonomous legal development in a globalized world, highlighting the necessity for integrating international legal principles to foster a cohesive legal system.
Keywords: *Bosnia and Herzegovina, civil law codification, Austrian Civil Code, legal transfer and reception, property law reform.*

1. INTRODUCTION

In presenting this topic, two approaches will be followed. First, a general overview is provided to present the historical development and basic information on the current legal and political/social order of Bosnia and Herzegovina (hereafter, B&H), section 2. This is essential for a better understanding of the main topic of this paper, namely, the current state of affairs in the codification of private law in Bosnia and Herzegovina (section 3).

2. A BRIEF OVERVIEW OF THE DEVELOPMENT OF MODERN PRIVATE LAW IN B&H

2.1. INTRODUCTION

The story of the historical development and current status of civil law in B&H could be surprising. The first attempt to modernise civil law in B&H was undertaken during the last decades of the Ottoman Empire governance in B&H – the so-called *Tanzimat reforms* (1839–1876 – but, these reforms were not carried out efficiently.[1] The second attempt was more successful and has given shape to the current civil law in B&H. In

1 Karčić, 2013, p. 1028.

other words, civil law in B&H under the strong influence of Austrian law, and therefore predominantly a continental European law, from the end of the 19th century until World War II. Even during socialism, the impact of Austrian law was pronounced, although only in the domain of private law based on private property (more about this under section 2.4.2). B&H never completely abandoned this legal family, although it was a part of the socialistic legal circle. One could say that the development of modern private law in B&H is a history of the influences of the Austrian Civil Code (hereinafter, ABGB) and Austrian law in general. Since the Bosnian and Herzegovinian civil law had never ceased to be part of the continental European law family, the transformation process meant an almost complete return to this legal family, with the exception of institutions and regulations that were increasingly subject to Anglo-American law.[2] The development of civil law in B&H will be traced through the various epochs.

2.2. PERIOD BETWEEN 1878 (BERLINER CONGRESS) AND 1918 (END OF THE WORLD WAR I)

This overview begins with the takeover of the governance of B&H by the Austro-Hungarian monarchy and the replacement of the Ottoman administration towards the end of the 19th century. From 1878 till 1918, B&H was a part of the Austro-Hungarian Monarchy. By the decision of the Berlin Congress, governance over B&H was transferred to the Austro-Hungarian monarchy, while the sovereignty remained with the Ottoman Empire.[3] B&H was later annexed by the Austro-Hungarian monarchy through a unilateral act (1907).

2 Anglo-American law has had a particular influence on criminal law. Civil procedural law (litigation, enforcement, and non-contentious civil procedure) was and remained under the influence of Austrian law, but the influence of Anglo-American and Scandinavian law was also noticeable here, especially in the area of basic principles of litigation proceedings. For more, see Povlakić, 2011, pp. 216, 230.

3 Art. XXV of the Berlin Peace Agreement transferred the mandate to govern B&H to the Austro-Hungarian monarchy; however, B&H remained under the sovereignty of the Sultan. Čaušević, 2005, p. 195.

The inclusion of B&H in the continental European legal circle started with the implementation of Austrian law in B&H, which happened in a rather unorthodox manner. After the transfer of governance, the Austrian-Hungarian administration issued several regulations that sent out a clear message on how courts should apply the Ottoman law in civil cases, because the latter was in force in B&H at that time, until new laws were enacted. Only under three conditions, the current Ottoman law could not be applied: if it does not exist in a specific case (legal gap), if the law offers only an inadequate solution, and if it is inapplicable due to the new and changed circumstances: in other words, provided these rules do not conflict with the provisions of the monarchy.[4] However, as a rule, the judges educated in the monarchy did not know the Turkish language or Turkish legal sources.[5] Hence, they resorted to the implementation of the ABGB *via facti,*[6] although ABGB was never officially enacted in B&H. Nevertheless, its impact on the B&H legal order was (and is) still essential. The reception of the ABGB in this epoch happened at three levels. One, the direction of reception was originally permeated by case law. Further, this code was partially and formally incorporated into the new regulations enacted specially for B&H, and after the annexation, certain parts of the ABGB were integrated into the first projects for codification of substantive civil law in B&H.[7] However, the judges and case law played the main role in the process of the reception of Austrian law.[8] The judges applied the Ottoman regulations only in exceptional cases and primarily applied the ABGB as a subsidiary source of law. To the same extent as the national structure and education of judges were

4 Karčić, 2013, p. 1030; Bećić, 2014, p. 56. The author lists these regulations.

5 The new administration has attempted to translate the laws of the Ottoman Empire from Turkish into German. See Die Sammlung für Bosnien und Herzegowina erlassener Gesetze, 1881. In addition to the newly enacted regulations, official translations of Turkish legal texts have also been published in this edition, but *Medjele* was not entirely translated. *Medjele* was gradually translated, and this process was completed in 1906. It was a translation from French, and this translation was not considered entirely suitable for official use, rather only as a source of information on the content of *Medjele*. Bećić, 2022, pp. 114, 126.

6 For more, see Karčić, 2013, p. 1029.

7 Bećić, 2022, p. 115.

8 Ibid.

heterogenic, the implementation of the law was equally heterogenic. As is said, the judges at courts of the first instance ruled by using common sense, at the second instance, in accordance with the ABGB, while the judges at the Supreme Court ruled in accordance with the *Medjele* (the statute regulating private law in the Ottoman Empire – author's note). [9]

2.3. PERIOD FROM 1918 UNTIL WORLD WAR II AND THE SOCIALIST REVOLUTION

The Kingdom of Serbs, Croats, and Slovenians, established in 1918 and later renamed as the Kingdom of Yugoslavia, had, for the first time, united South Slavic peoples into one state. These peoples had lived separately for centuries in independent states or as parts of other states, and thus in different legal systems. In addition, the economic, social, and legal development in these regions sharply differed.[10] Hence, it was not possible to create a new common legal system overnight; the task is a notoriously lengthy process. However, awareness of the importance of unifying the laws existed in the Kingdom of Yugoslavia. Therefore, a special Ministry for the Unification of Laws was established (1919–1938) with the task of drafting laws to harmonise the legislation in the entire Kingdom.[11] The process of enacting new statutes had started, and the codification of private law was planned as well, but complete harmonisation of the legislation was never achieved. The Kingdom of Yugoslavia was characterised by legal particularism during the entire period of its existence.[12] Over time several new statutes were adopted, but until then, regulations that were in force in certain parts of the Kingdom before 1918 continued to be applied. This is why during this period, in B&H, one of the six different legal areas within the Kingdom of Yugoslavia, ABGB was applied to private relationships, with exception of family

9 So Karčić, 2006, p. 98. About the influence of education and legal culture of judges on the process of the reception of ABGB in B&H see Bečić, 2022, p. 120.

10 Nikolić, 2013, p. 93.

11 Ibid., p. 92.

12 For more, see Povlakić, 2010, p. 211.

and succession matters, where the differences between different legal areas were the greatest. In family and succession matters, religious law and customs were applied. For citizens of the Islamic faith, family and succession relationships were regulated by sharia.[13]

In 1930, the process of drafting a new civil code was launched by the Ministry of Justice, but never successfully completed. The work resulted in the Draft Civil Code of Yugoslavia from 1934, which had the ABGB as a model. The key reasons to follow ABGB were the different levels of development of certain areas and the fact that there were more underdeveloped rural areas; hence, Austrian law were considered more suitable than the more modern codifications of the time such as the German or Swiss Civil Code.[14] An additional consideration was that Austrian law had an impact on a considerable part of the Kingdom.[15] In a broad-based public discussion, this Draft was criticised because it was based on the oldest civil code in Europe, which was, above all, perceived as foreign to the national spirit.[16]

Civil law has never been codified in the Kingdom of Yugoslavia; nevertheless, this was the only time a comprehensive codification was considered in Yugoslavia (and B&H). Not only was the Draft Civil Code under the influence of Austrian law but so were several other statutes, which were enacted in this Kingdom, the first being the different procedural codes.[17]

13 Karčić, 2013, p. 1029; Bećić, 2015, p. 113.

14 Nikolić, 2013, pp. 93.

15 Ibid.

16 Marković, 1939, pp. 28; Spaić, 1971, p. 73.

17 Three land registry laws were adopted in 1930 and 1931 regulating the establishment and organisation of land registries as well as the procedure of registration: Act on Land Registries [*Zakon o zemljišnim knjigama / Grundbuchgesetz*], Act on the Organisation, Establishment and Replacement of the Land Registries [*Zakon o unutrašnjoj organizaciji, osnivanju i izmjeni zemljišnih knjiga / Gesetz über innere Organisation, Anlegung und Austausch von Grundbüchern*] (1930), and Act on the Land Register's Divisions, Separations and Attributions [*Zakon o zemljišnoknjižnim diobama, otpisima i pripisima / Gesetz über grundbuchrechtliche Teilungen, Ab- und Zuschreibungen*] (1931). For more, see Povlakić, 2010a, p. 211. The Civil proceeding (litigation, enforcement and non-contentious procedure) represented the reception of the respective Austrian statutes. Povlakić, 2011, p. 206.

2.4. PERIOD AFTER WORLD WAR II AND THE SOCIALIST REVOLUTION UNTIL THE TRANSFORMATION PROCESS

2.4.1. Implementation of so-called legal rules (legal transfer)

The influence of the ABGB or Austrian law, in general, had not stopped with the socialist revolution. Immediately after the end of the war, legislative activities aimed at breaking legal continuity with the Kingdom of Yugoslavia were carried out. The result of this was the adoption of the Act on Termination of Validity of Laws adopted before 6 April 1941 and during the Occupation (hereafter, Termination Act),[18] which interrupted the continuity of the legal order of socialist Yugoslavia with the Kingdom of Yugoslavia. The regulations that had been in force in the Kingdom of Yugoslavia by 6 April 1941 went out of force, and regulations enacted during the occupation were declared null and void. However, by the provision of Art. 4. of the Termination Act, the implementation of the so-called *legal rules* contained in the regulations being in force in the Kingdom of Yugoslavia was made possible. Conditions for implementation of the legal rules were prescribed as well. The legal rules could be used in cases when a certain relationship had not been regulated by the new socialist law (legal gap), and when the relevant legal rule was not contrary to the Constitution, to mandatory rules, or the customs of the socialist state.[19]

In B&H, the legal rules contained in the ABGB or the laws of the Kingdom of Yugoslavia, which were strongly influenced by the ABGB, were applied. Thus, for almost 35 years, the legal rules were applied across a wide sphere of property and obligation relationships, until

18 Official gazette of the Federative People's Republic of Yugoslavia [*Službeni list FNRJ*], N° A84/1946.

19 For more about the implementation of legal rules see Konstantinović, 1960, p. 3; Gams and Đurović, 1990, p. 52; Rašović, 2006, p. 38; Vedriš, Klarić, 2000, p. 19; Borić, 1996, p. 52.

these branches of the law were codified.[20] The situation was different regarding family and succession law; the new family law was enacted in 1946/47, and the new succession law in 1955.[21] In family and succession matters, application of legal rules of the ABGB, church law, or sharia, which distinguished between positions of male and female successors, children born in or out of wedlock, between matrimony and extra-marital community etc., was not possible, since these rules were not in accordance with the new socialist principles.

20 In the obligation relationships, the legal rules of the ABGB were applied until the adoption of the Obligations Act [*Zakon o obligacionim odnosima*] in 1978, Official Gazette of SFRY [*Službeni list SFRJ*], N° 29/1978, 39/1985, 45/1989. In the field of property law, the legal rules were applied until the adoption of the Act on Basic Ownership Relations [*Zakon o osnovnim vlasničkopravnim odnosima*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 6/1980, 36/1990. The same happened with the civil procedure. The legal rules from the Enforcement and Security Procedure Act [*Zakon o postupku izvršenja i osiguranja*] from 1938 were applied until the adoption of the Enforcement Act [*Zakon o izvršnom postupku*] in 1978, while the legal rules from the Non-litigation Procedure Act [*Zakon o vanparničnom postupku*] enacted in 1934 were applied up to 1989 when the Non-Litigation Procedure Act [*Zakon o vanparničnom postupku*], Official Gazette of the Socialist Republic of Bosnia and Herzegovina [Official Gazette of SR B&H – *Službeni list SR BiH*], N° 10/1989, was enacted. The branch of private law where the application of legal rules has lasted the longest is land registries law. The three mentioned acts regulating different aspects of the land registries (see note no. 17) i.e., the legal rules contained therein, survived the socialist Yugoslavia and continued to be applied in independent B&H; in other words, these rules were applied in the Brčko District BiH until 2001, until the enactment of the Act on the Real Estate Registry and Rights Over Real Estate [*Zakon o registru zemljišta i prava na zemljištu*], Official Gazette of BD B&H [*Službeni glasnik BDBiH*], N° 11/2001, 1/2003, 14/2003, 19/2007, 2/2008, while in the two entities they were applied up to 2002, i.e., 2003, until the enactment of two fully harmonised Land Registries Acts: Land Registries Act of the Federation B&H [*Zakon o zemljišnim knjigama FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 58/2002, 19/2003, 54/2004 and 32/2019 – Decision of the Constitutional court of the FB&H N° U-10/15 and U-22/16 and Land Registries Act of the Republik Srpska [*Zakon o zemljišnim knjigama RS*], Official Gazette of Republic Srpska [*Službeni glasnik RS*], N° RS 67/2003, 46/2004, 109/2005, 119/2008.

21 Codification of succession law of former SFRY was enacted in 1955. The Succession Act [*Zakon o nasljeđivanju*] was a solid piece of codification. While the property, land registry, and procedural laws were influenced by Austrian law, this law was influenced by Swiss and French law, with certain adjustments to the socialist system. See Gavella, 2008, p. 15.

Despite the interruption of continuity of the legal order of the socialist Yugoslavia and the Kingdom of Yugoslavia, as mentioned before, it was possible to apply the so-called legal rules contained in the regulations that were in force in the Kingdom of Yugoslavia. In B&H, the legal rules contained in ABGB were primarily applied, but it was possible to apply the legal rules contained in other civil law codifications that were in force in other constitutive parts of the Kingdom of Yugoslavia (e.g., Serbian Civil Code or General Property Code of Montenegro). Over time, this influence of Austrian law diminished since, for example, the Succession Act, enacted in 1955, was modelled after the Swiss law in many aspects. The Obligation Act followed the best law approach and overtook legal solutions from different legal orders, such as Swiss law or CISG (more about it see *infra* 3.3). The property law, regulating proprietary relationships on privately owned assets, did not deviate significantly from the ABGB, that is, Roman law.

In the modern theory of civil law, the possibility of applying legal rules has led to the belief that the interruption in legal continuity was merely formal.[22] The older literature insisted, and argued that the continuity between the kingdom and the new socialist state was broken,[23] which was a consequence of the influence of socialist ideology.

2.4.2. The position of private law during socialism

During the decades when socialism prevailed, private law was marginalised. The legal order in the former SFRY and B&H was characterised by a dichotomy between state and private ownership. The former had a dominant role and it was better protected, but in parallel, private ownership also existed and had never been abolished, not even on immovable assets. However, on some important assets, such as on immovable

22 In this sense, see Nikolić, 2008, p. 42.

23 Spaić, 1971, p. 74. This author saw the application of 'legal rules' as an act of creation of new rules. Namely, not the statutes, which had been in force in the Kingdom were applied, but the rules developed for centuries that regulated property relations in areas where the market economy was in place. The legal basis for this manoeuvre was created by the socialist legislator. Ibid., p. 74.

assets, it was greatly restricted.[24] The legal relations between private persons involving private objects on which private property existed, to the extent it existed, were subject to the classic private legal regime with classic private law institutes mostly influenced by Austrian law.

When it came to the state/non-private enterprises and their proprietary relationships, they were subject to a completely new socialistic regulation. The concept of non-private ownership evolved in ex-SFRY from a state-directed economy and state ownership as the main form of ownership, to the concept of self-management and social ownership, to even recognising the market economy to a certain extent.[25]

The marginalisation of private law was mirrored in the scarce regulation of some institutes of property law, since the entire property law was regulated by the Act on Basic Ownership Relations[26] by only 90 legal provisions of which only 7 were devoted to mortgage. This was a consequence of the remote practical importance of some institutes (e.g., collateral law). The other rights *in rem* were scarcely regulated (real servitudes) or not regulated at all (personal servitudes, real charge). Nevertheless, if it was not a matter of state/non-private enterprises and their proprietary relationships, a private legal order existed and was subject to the classic private legal regime, with classic private law institutes that were predominantly influenced by Austrian law.

2.4.3. Codification of private law in socialistic Yugoslavia

As in the Kingdom of Yugoslavia, the civil code was never enacted in socialist Yugoslavia for various reasons. First, the prevailing thought was that social relationships are in a permanent state of restructuring, not sufficiently stable to be codified. Codification was even seen as an obstacle to the development of the legal system.[27] In the period from 1955 to 1971, an idea was considered to codify civil law not through the adoption of a single civil code, but by passing special laws for certain

24 For more about these restrictions, see Stanković, Orlić, 1989, p. 97; Gavella, 2003, p. 21.

25 Povlakić, 2009b, pp. 19–52.

26 See footnote no. 20.

27 Spaić, 1971, p. 34.

parts of civil law. Work on the development of a general part of civil law had started as well.[28] However, these efforts ended with the constitutional reforms in 1971; later, another obstacle stood in the way of adoption of civil codification, namely, the lack of legislative competencies of the federal state.

In former socialist Yugoslavia, after the first Constitution from 1946 was enacted, several constitutional reforms were undertaken (1953, 1963, 1971, and 1974). In addition, the reforms of 1989/1990 aimed at transition and abandoning the socialist legal and social model need mention.[29] The reforms of 1971 and 1974 led to a strong decentralisation of the state and transfer of new competencies to the former socialistic republics (B&H, Croatia, Macedonia, Montenegro, Slovenia, and Serbia) and autonomous regions (Kosovo, Vojvodina). According to the Constitution of 1974, the federal state was empowered to regulate basic proprietary relationships but not an entire corpus of property law. It was competent to regulate the general part of contract law and contractual and other obligation relationships in the field of trade in goods and supply of services (art. 281, no. 4). After the constitutional reform of 1971 and 1974, competence to regulate substantial and procedural succession law was transferred to the socialistic republic and autonomous regions; the same happened in the area of family law. Later, there were eight different succession and family acts in the former Yugoslavia. The division of legislative powers between the federal state and its components, socialistic republics, and autonomous regions became an obstacle to the adoption of the Civil Code.

Although the Uniform Civil Code was never enacted, and neither was it planned in former ex-Yugoslavia; although one cannot say that civil law was not codified; the standard parts of a civil code were codified in the ex-SFRY, but not combined into one code, rather they were codified by separate acts: Obligation Act and the act on basic proprietary relationships, which were enacted on a federal level, but did not regulate the entire corpus of the obligation and proprietary relationships and eight Family Acts and eight Succession Acts, enacted by each federal

28 Nikolić, 2013, p. 98.

29 For more see Povlakić, 2009b, p. 31.

state. In B&H, the Succession Act was enacted in 1973 and amended and supplemented in 1980,[30] and the Family Act in 1979.[31]

Even without the Civil Code, it is obvious that the codified parts of private law followed the pandect system. However, something was missing: a general part of the Civil Code has not been adopted.

Even if a civil code had been enacted in the former SFRY, family law would not have been part of it, as the socialist doctrine did not consider family law to be part of private civil law, which primarily regulates proprietary relationships. It was argued that the subject and method of the regulation of property and family law differ, that proprietary relationships were not primary for family law, and that protection of family and children was in the public interest, and therefore these relationships were regulated by mandatory norms, which meant the limitation of private autonomy, etc.[32]

This was the situation when B&H separated from the ex-SFRY and declared its independence. It should be mentioned here, although it has no direct bearing on the subject of civil law codification, that in 1989/90 far-reaching reforms were undertaken in the former SFRY that initiated the transition process. B&H separated from former Yugoslavia during the phase of crucial reforms being undertaken in the socialistic economy, socialist legal system, as well as in property order. The Amendments to the Constitution of the SFRY (1988)[33] and to the Constitution of the Socialistic Republic of BiH (1989 and 1990)[34] represented the

30 Succession Act [*Zakon o nasljeđivanju*], Official Gazette of SR B&H [*Službeni list SR BiH*], N° 7/1980, 15/1980.

31 Family Act [*Porodični zakon*], Official Gazette of SR B&H [*Službene novine SR BiH*], N° 21/1979, 44/1989.

32 Gams, Đurović, 1990, p. 45; Spaić, 1971, p. 46.

33 Amendments IX–XLII to the Constitution of the SFRJ [*Amandmani IX – XLII na Ustav Socijalističke Federativne Republike Jugoslavije*], Official Gazette of SFRY [*Službeni list SFRJ*], N° 70/1988, 57/1989.

34 Amendments XX–LVIII to the Constitution of the Socialist Republic Bosnia and Hercegovina [*Amandmani XX–LVIII na Ustav Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SRB&H [*Službeni list SR BiH 13/1989*], as well as Amendments LIX–LXXX to the Constitution of the Socialist Republic Bosnia and Hercegovina [*Amandmani LIX–LXXX na Ustav Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SR B&H [*Službeni list SR BiH 21/1990*].

main pillar of property order reform: guarantee of property was established, restrictions of private property were abrogated, and all types of property rights (private and public property) were declared equal.[35] During the war (1992–1995), this reform process was interrupted or slowed down, but nevertheless, some reforms were also undertaken during the war in different parts of B&H (the current Federation of B&H and the Republic Srpska) primarily focusing on proprietary relationships.[36]

2.5. AFTER 1995 AND UNTIL NOW

2.5.1. Transition process

After 1995, B&H went through the transition process like all other former socialist states, which is, according to some, 'one of the greatest challenges of the end of the twentieth and the beginning of the twenty-first century'.[37] Similar to most other former countries during the decades of socialism, private law in B&H law was marginalised; therefore, the essential part of this transformation process was reform of the property regime because the greatest deviations from the classical legal order of the continental European legal system were in the very area of property law[38]. The reform of property order is a main reform within the transformation process in all post socialist countries. B&H separated from former Yugoslavia during the phase of crucial reforms of the socialistic economy, socialist legal system, as well as the property order, as mentioned earlier.

35 Povlakić, 2009b, p. 32.

36 For more about the transition process and reforms of property legal order, see Povlakić, 2009b, pp. 30–70.

37 Šarčević, 2003, p. 759. After the collapse of the USSR and socialism, the changes that took place were so profound that they had no parallel in history. See, for instance, Chanturia, 2008 p. 115.

38 Gavella has spoken about 'deformations' of civil law. Gavella, 2003, p. 21; Povlakić, 2010a, p. 216.

Property system reform usually begins with the adoption of various measures of denationalisation and (re)privatisation, which was true, to a certain extent, in B&H as well. However, these processes did not include all the necessary measures and happened very slowly in B&H, facing many challenges. Hence, even 30 years after the war ended, property law reform has not yet been completed; B&H remains in a never-ending transformation process.

The rules regulating restitution have not yet been adopted, which usually happened in the first phase of reforms in former socialist countries. The decision to not implement restitution is conceivable, but such a decision should be made promptly at the beginning of the transformation process, which did not happen in B&H. Instead, since 1991, there has been a ban on the disposal of property that was expropriated under various nationalisation laws between 1945 and 1958.[39] This prohibition has mainly affected the most important real estate for a national economy, such as agricultural land, forests, construction land, etc. In former Yugoslavia, at the beginning of the 1990s, constitutional and economic reform should, logically, lead to denationalisation with restitution as the next step. Considering that this process can take longer, a prohibition on disposal of properties that were once expropriated without compensation should have served to protect former owners and should have lasted until the enacting of the restitution act. Since the Act on Real Estate Legal Transaction was repealed by the enacting of the Property Law of the Federation B&H, the regulation regarding the ban on the disposal of nationalized property, established in 1991, was completely taken over into this new Act (Art. 365–369. The existence of this long-standing ban causes

39 Act on Real Estate Legal Transaction [*Zakon o prometu nepokretnosti*], Official Gazette of SR B&H [Službeni list SR BiH], N° 38/1978, 4/1989, 22/1991.

enormous problems in practice, especially in real estate transactions.[40] The enactment of the restitution law is still pending; three decades after comprehensive constitutional reforms in former Yugoslavia (1989/90), which launched the transformation process, there is neither discussion for implementing the restitution process nor a clear decision to not conduct the process. An apt statement by Ferenc Madl should be quoted here: From the economic point of view, restitution is not crucial, but clear and settled ownership relations are. It is not so important who the owner is, but that someone actually is the owner.[41] The ownership relations in B&H are in fact still not cleared and settled!

A ban that lasts for over 30 years cannot be effective, and it was circumvented in many cases. In other cases, however, this prohibition and undefined relationships jeopardised investments. On the contrary, many properties remain unused and lost value or perished. Both did not contribute to the rule of law. B&H is still waiting for Godot, namely, that property reform is yet to be accomplished. It does not necessarily mean implementing the restitution, but a clear decision on whether the restitution will be carried out or not.

Without certainty about the subject of restitution, privatisation was carried out; it is quite possible that real estate, which could be once the subject of restitution, has already been sold to third parties in the privatisation process such that every further step undertaken before the restitution has been completed or decision rendered that the restitution would not take place (which would be a better solution considering the circumstances, could be questionable respectively, or could be, after the restitution act is passed, a subject of litigation. Step two was undertaken

40 The position of former owners in favour of whom the ban was proclaimed is uncertain; however, the same is the case of those subjects who owned certain assets for years in the former SFRY but are not allowed to dispose of them after 1991. A recent decision by the Constitutional Court B&H (hereafter: CC B&H) bears witness to this uncertainty. A municipality disposed of the land and transferred it to a third party, but the former owner (a religious community) filed an objection. The CC B&H ruled that this former owner had a legitimate interest in opposing this disposition, which the ordinary courts failed to examine. S. AP-3332/21 from 23.02.2022 [Online]. Available at: https://www.ustavnisud.ba/uploads/odluke/AP-3332-21-1319368.pdf. (Accessed: 22 October 2023).

41 In this sense, see Madl, 1998, p. 598.

before step one, as if like building a house without building a solid foundation first. There were several drafts of the Restitution law, but none had been passed by the Parliament of B&H. In the RS, two acts were enacted in 2000/2001, and revoked by the High Representative arguing that the state of B&H could not bear this burden. So far so good, but the political decision that there would be no restitution in B&H was never rendered – a pending restitution is like a Damocles sword.

Privatisation of state enterprises was a slow process burdened with significant challenges (unclear property relations, annulations of certain privatisation transfers resulting from frequent abuses, etc.). The new property acts in the entities (FB&H and RS) and BD B&H were passed without the former socialist ownership relationships having been fully clarified or revised. Instead, these acts contain extensive transitional provisions, which were intended to enable the completion of the transformation process. Unfortunately, these provisions have often been ignored in practice, poorly understood, and on this basis, numerous lawsuits have been conducted, which were ultimately decided by an appeal before the Constitutional Court of B&H.[42]

2.5.2. Legal continuity

The new independent state of B&H is the successor of the Socialist Republic of B&H (hereafter, SR B&H), which implies that the laws enacted in the former SFRY and SR B&H would continue to apply in the new state until new regulations are adopted. However, this happened in different ways in three different parts of B&H.

42 Povlakić, 2019, p. 181.

The Federation of B&H assumed a number of legal instruments of the former Yugoslavia *en bloc*[43] or by assuming certain statutes separately.[44] In the Republic Srpska, all the statutes that had been in force in ex-SFRY have been adopted into the legal system of the Republic Srpska under the condition that they were not in conflict with the constitutional order of the Republic Srpska.[45] The Statute of the Brčko District B&H provides that all statutes in force in SR B&H shall continue to apply as the statutes of the District in accordance with the Decision of the Supervisor of the Brčko District of BiH of 4 August 2006.[46]

The influence of the ABGB / Austrian law has continued in B&H even after its dissolution from ex-SFRY. The Termination Act was assumed in the Republic Srpska and BD B&H as well as all other acts that were in force in former Yugoslavia. However, in the FB&H, this act was not among the laws that were assumed from ex-SFRY, which leads to the question of whether, in case of legal gaps in the FB&H, the legal rules from the ABGB could still be applied? Their application was possible but on a different legal basis. The Act on Property Relations of the Federation BiH from 1998[47] did not regulate personal servitudes, vicinity rights, and real charge but it stipulated that with respect to those specifically listed institutes, legal rules from the ABGB may be applied

43 Act on proprietary relationships of the Federation B&H [*Zakon o vlasničkopravnim odnosima Federacije BiH*], Official Gazette of FB&H [*Službene novine FBiH*], N° 6/1998, 29/2003.

44 Ordinance with legal effect on taking over of the regulation from former SFRY [*Uredba sa zakonskom snagom o preuzimanju propisa bivše SFRJ*], Official Gazette of the Republic B&H [*Službeni list Republike BiH*], N° 2/1992), Law on confirmation of the Ordinance with legal effect on taking over of the regulation from former SFRY [*Zakon o potvrđivanju Uredbe sa zakonskom snagom*], Official Gazette RB&H [*Službeni list Republike BiH*], N° 13/1994.

45 Art. 12 of the Constitutional Law on Implementation of the Constitution of the Republic Srpska [*Ustavni zakon o sprovođenju Ustava Republike Srpske*], Official Gazette of RS [*Službeni glasnik Republike Srpske*], N° 21/1992.

46 Art. 76 of the Statute of BD B&H.

47 See footnote no. 43.

(art. 94).[48] While adopting the Obligations Act into the legal order of the FB&H, the same was stipulated for gift, partnership, and borrowing contract (*comodatum* – lat.).[49] However, the courts in the FB&H adopted decisions by applying legal rules from ABGB even when it came to other legal institutes, not just those explicitly enumerated in the Act on Property Relations FB&H and Obligation Act. With each new law passed in B&H, legal loopholes became fewer, and the need to apply legal rules from ABGB decreased.

2.5.3. A new constitutional order and state organisation

Aggression and war were stopped after the signing of the Dayton Peace Agreement in 1995, of which Annex IV represents the Constitution of B&H, which established a new state organisation. B&H is a complexly organised federal state divided into two entities: Federation B&H (hereafter also: FB&H) and Republic Srpska (hereafter also referred to as RS) and the Brčko District B&H (hereafter also referred to as BD B&H). The legislative competencies are divided between the State and its parts. The Constitution provides for the presumption of competence in favour of the entities; the competencies of the State BiH are only those that are explicitly stated in the Constitution. The competence for the regulation of civil law in general, or its part (property, contract and tort, family and succession law), is not given to the State B&H, but to the entities and BD B&H. Furthermore, the Federation B&H is divided into ten cantons, which also have some legislative competencies in the field of property law.

This is why, today, in B&H, as an independent state, it is still not possible to adopt the Civil Code; the state of B&H has no corresponding legislative powers. However, certain constitutional mechanisms would

48 After the Property Law of FB&H entered into force in 2014, there was no need to apply legal rules from the ABGB, since the mentioned institutions were now regulated by a new property law; the Law on Property and other rights *in rem* of the Republic Croatia and ABGB were models for the new regulation.

49 Art. 27 Ordinance with legal effect on taking over of the Obligation Act [*Uredba sa zakonskom snagom o preuzimanju Zakona o obligacionim odnosima*], Official Gazette [*Službeni list Republike BiH*], N° 2/1992, 13/1994).

enable the adoption of the Uniform Civil Code at the federal level, for example, according to Art. III.5 of the Constitution, a transfer of jurisdiction from the entities to the State of B&H is possible. This requires political will, which has generally been lacking until now, and this mechanism has been used extremely rarely.

Art. I.4 of the Constitution of B&H provides for freedom of movement throughout Bosnia and Herzegovina and forbids States or Entities from impeding full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. A parallel between four fundamental freedoms and the European single market can be recognised here. Further parallels are (a) B&H as well as the EU has only those legislative competencies that are explicitly provided in the Constitution B&H, respectively, in the Treaties[50] and (b) the internal market competence and undisturbed functioning of fundamental freedoms did not provide sufficient basis to bring about a European civil code. In B&H, too, the Uniform Civil Code is not expected to be adopted on this constitutional basis, but it means that the differences in legislation that may impede the free movement of persons, goods, services, and capital throughout country would not be in line with the Constitution. It could not be argued that the legislators of various legislative levels in B&H (State, entities, BD B&H, Cantons) took the prohibition prescribed in Art. I.4 seriously since all legislative levels have enacted the regulations, which is not in line with this constitutional provision; more over this provision was extremely rarely used as the constitutional basis for the adoption of the laws of the entire state. The differences in property, contract and torts, family, and inheritance law are becoming ever greater. Until about 2006, the international community made efforts and successfully supported the entities so that the parliaments of the entities

50 Art. 5 para 2 of the Treaty on European Union. For more about the principle of conferral, see Meškić, Samardžić, 2012, p. 96; Misita, 2010, p. 211. A subtle distinction should be made here: B&H existed before the entities, and there was no conferral of competences from the entities to the federal state, but, according to the Dayton Constitution, B&H was for the first time organised as a federal state, which was a compromise to negotiate a peace agreement. Nevertheless, in the end, the B&H and the EU have only these individual competences, which are listed in the Constitution of the B&H and the TEU, respectively.

pass their own acts but these acts have been mutually harmonised to a large extent[51]. Unfortunately, this trend has not been maintained, and with each subsequent amendment or supplement to certain statutes, the previously harmonised statutes have become increasingly divergent.

Regarding codification of civil law, the situation remained similar to that in ex-SFRY: parts of civil law are codified according to the Pandects system but without the general part of civil law. However, one significant difference can be noted: not only family and succession laws in all three parts of B&H, but also property and contract and tort are regulated separately. In a small state of about 3 million inhabitants, there are three separate, closely related but nevertheless different civil law legal orders.[52]

3. THE CURRENT STATE OF PLAY OF CODIFICATION OF CIVIL LAW

3.1. INTRODUCTION

The new position and role of private law and property as its central institution should have actually lead to a new attitude towards codification of civil law, but this did not happen. First, as described in section 2.5.3 the state B&H has no competence to enact the civil code. With regard to a uniform codification of civil law, the situation is comparable to the situation in former Yugoslavia. It is interesting that in none of the successor states of the ex-SFRY, where there are no constitutional reasons

51 It concerns *inter alia* the property, notary, and land registries acts of both the entities (Federation B&H and Republic Srpska).

52 It can lead to conflicts of laws in different fields of private law, whereupon Bosnian-Herzegovinian law does not provide suitable solutions for all cases of such conflicts of law. There are no conflicts of law rules in the field of contract and tort law and property law. For more, see Meškić, Duraković, Alihodžić, 2018, p. 642.

against civil codification, has the civil code been adopted.[53] However, even missing a civil code, civil law in B&H is codified – each core part of the civil law/civil codification is regulated by a separate statute, with the exception of the general part of the civil code.

3.2. GENERAL PART OF THE CIVIL CODE

Although the general part of civil law is still missing, this fact does not lead to enormous difficulties in the application of the law. The issues of natural and legal persons, legal objects, subjective rights, their enforcement, protection and termination, as well as legal transactions are not regulated in a general part of the civil code, but they are regulated, although not completely and systematically, in separate statutes. The general part of civil law is, so to say, fragmented in many laws, but some parts of the puzzle are still missing.

Obligation Act (hereafter: OA) regulates only contracts, but it stipulates that these provisions should accordingly be applied to all kinds of legal transactions (Art. 25 para. 3). The capacity of natural persons is regulated by legislation on family law[54] and partially by OA (Art. 56–59). The Family Acts regulate capacity issues such as the status of minors and of the person under tutelage. In this regard, the Family Acts substitute the non-existent codification of civil Law. All natural persons acquire, independent of their gender, a full contractual capacity on turning 18. Both genders can get contractual capacity even earlier. A minor, older than 16 years, can conclude marriage under previous approval by the court, which assessed the justified reasons. In this case, contractual capacity is achieved with the conclusion of marriage.

53 There were, or still are, projects in this direction in Serbia, North Macedonia, and Montenegro, but without a final outcome. In Serbia, an expert group was established in 2006, and it had, over the years delivered comprehensive material. Without completing this work, the project was terminated by the government in 2019. In North Macedonia, a working group was established in 2012, and codification preparation is ongoing. Montenegro started it in 2019, but many interruptions and no real continuity can be observed in these efforts.

54 Art. 134, 157 of the FA FB&H; art. 138 and 139 FA BD B&H; art. 94 and 126 FA RS.

In the Federation B&H and Brčko District B&H, the minors, older than 16 years, who become parents (or one of them) may apply in judicial procedure for approval of full contractual capacity. In this case, contractual capacity is acquired by the finality of the court decision.[55] On turning 14, minors acquire partial contractual capacity and can conclude contracts with the approval of the parents/legal guardian.[56] In the FB&H and RS it additionally means that these minors can conclude only the contracts that benefit them without creating obligations on their side.[57] In BDB&H, this is possible on turning 16.[58]

Art. 54 OA regulates some aspects of the legal and contractual capacity of legal persons. However a comprehensive and systematic regulation of legal entities is still missing. The companies are regulated in detail by Company Acts in all three parts of B&H, but all other legal persons are scarcely regulated in special statutes, and this regulation is unsystematic and incomplete; a red thread, guiding idea, is missing there.

The same applies to legal objects. While the things, claims, and goods of intellectual creation are regulated in corresponding statutes, personal goods are not. In addition, there is a lack of general provisions on what constitutes a legal object. We testify to the fact that economic development always gives rise to new legal objects, new intangible goods, which can be objects of property and/or other material or contractual relationships. It can be the pettiness of a professor, but a general regulation of legal objects could help when it comes to recognising new values or entities as new legal objects, such as data and digital assets.[59]

55 Art. 137 para. 3 and art. 355–356 FA FB&H; art. 139 para. 3 FA BD B&H.

56 Art. 157 para. 1 FA FB&H; art. 120 para. 2 FA BDB&H; art. 94 para. 1 FA RS.

57 Art. 157 para. 1 FA FB&H; art. 94 para. 1 FA RS.

58 Art. 120 para. 2 FA BDB&H. For minors under tutelage, this age is 14 years (Art. 169 para. 2 FA BDB&H). This may be a technical error on the part of the legislators, as there is no reason to treat these two categories of minors differently.

59 Here, the words of the famous French scholar Réné Savatier can be quoted: he wrote that the end of the 19th and the beginning of the 20th centuries spread to the legal dogmatic a large spectrum of intangible, immaterial goods, which were unknown until then. See Savatier, 1959, p. 122. This happened again in the 21st century with digital assets, data, etc.

3.3. CONTRACT AND TORT LAW

Contract and tort law remains regulated by Obligation Act from 1978,[60] enacted in former Yugoslavia, and transferred into the legal order of B&H; as it was mentioned under 2.5.2, the legal basis for this transfer differs in the three parts of B&H, but the regulation of contract and torts is almost the same, with only a few minor changes made in the entities of B&H[61]. In the Brčko District B&H, this Act is applied without any changes or additions. Considering that the OA has more than 1100 articles, these amendments in both entities, do not disturb the unity of the regulation of the obligation relationships in the whole B&H.

Although the OA was passed in a socialist country, it was a modern act and has paid only a small obolus to the socialist legal system.[62] This was recognised in the literature of Western European countries at the time of its enactment,[63] as well as now[64]; according to *Rüssmann,* the OA was and still is a remarkable legal creation.[65] The doctrine on the territory of the former Yugoslavia did not consider this codification as a socialistic deformation of the classical contract and torts law.[66]

60 For the history of the creation of this law, background, and sources, see Slijepčević, 2008, p. 29.

61 In the FB&H, the changes were related only to the omission of the word 'socialist', which is found in around 30 provisions of the OA. In the Republic Srpska, a few terminological adjustments to the new social organisation were made: the provisions that regulated the conflict of law between the former republics and autonomous regions in the former Yugoslavia were deleted. The scope of the law was also changed by deleting from the first article the words that the law regulates the general part of debtor relationships (without changing the content of the law). The provision on the liability of restaurateurs and hoteliers was amended (Art. 724 OA RS). The main change concerns the general prescription period, which was extended from five to ten years (Art. 371 OA RS).

62 '... but socialist elements, especially of the general part of the Law, were not so essential (and could later on be easily deleted'. Jessel-Holst, 2009, p. 167.

63 Bar von, 1981, pp. 1742.

64 See Hondius, 2006, p. 22. In a reform of contract and tort law in Germany in 2002, preparatory works included comparative research of the most advanced foreign legal orders, among them Yugoslav Obligation Act. See Jessel-Holst, 2009, p. 170.

65 Rüssmann, 2009, p. 101.

66 Gavella, 2003, p. 21, footnote no. 6.

The fact that OA survived the former Yugoslavia and has continued its existence in all successor states of the former Yugoslavia is proof of this statement. All successor states of the former Yugoslavia, except Serbia and B&H, have adopted new codes of their own, which, at least in their first version, differed only slightly from the original OA of 1978.[67]

The creator of this law is undisputedly Prof. Konstantinović from the University of Belgrade,[68] who, after years of work, presented a Sketch for the Obligation Act, which was then discussed and edited by a number of experts over the next 10 years. It has already been mentioned that in drafting the Sketch, the best law approach was followed. In other words, Prof. Konstantivnović researched and used solutions from comparative law, customs and usage, uniform international instruments, case law, and doctrine.[69] The comparison between OA and some international instruments or European projects on contract law demonstrates a large compatibility among them. For example, a great convergence is observed between the OA and PECL. It is possible to establish compatibility, for example, in the regulation of *culpa in contrahendo*, offer and acceptance, performance of contract, and even non-performance of contract, although PECL has borrowed here from Anglo-Saxon law. Here, a convergence with the Draft Common Frame of Reference (DCFR) and UNIDROIT Principles of International Commercial contracts can be recognised.[70]

The OA regulates the general part of the obligation law, contractual, and other obligation relationships; a special part of the law of obligations regulates different types of contracts. The monistic principle is followed, and OA applies to both private and commercial contracts, unless the law provides otherwise (Art. 25 para 1 and 2 OA).

The reform of the contract and torts law was initiated in 2002, but in 2010, the project was abandoned without being finalised. The last

67 For example, the Slovenian OA from 2001 contained only minor and cosmetic changes compared to the OA of 1978. In this sense Možina, 2008, p. 11. In this sense also, see Jessel-Holst, 2009, p. 164; Josipović, 2008, p. 149.

68 Prof. Mihajlo Konstantinović was the main creator of the Succession Act from 1955 too.

69 Slijepčević, 2009, p. 27.

70 For more see Povlakić, 2012, p. 147; Miladinović, 2006, p. 191.

preliminary draft of the Law on Obligations dates to 2006 and was introduced to the parliamentary procedure. The project failed in parliament due to allegedly non-existent legislative powers of the state B&H to regulate this branch of law. Two main changes were concerned with the regulation of some new types of contracts (leasing, franchising, etc.) and the incorporation of consumer protection into this law, whereby the corpus and concept of the law from 1978 were to be preserved to the greatest possible extent; the vast majority of the provisions of OA 1978 have been retained. Here, the first preliminary draft from 2003 should be mentioned, which represented a subtle incorporation of certain EU Directives into the corpus of the Obligation Act.[71]

Some consumer directives, being in force in this period, were transposed into this draft, although the first Consumer Protection Act was enacted in 2002 (hereafter: CPA 2002),[72] and the second Consumer Protection Act, which is still in use, in 2006 (hereafter: CPA 2006)[73]. At first glance, one might think that the decision to follow a codification method (regulation of consumer protection in a separate act) had been taken, but Art. 140 CPA 2002 stipulates that the provisions of arts. 48–100 of this Act are temporary until this matter was regulated in the new Obligations Act. This transitional provision considered the fact that a reform of the OA was also being carried out at the time, intending to incorporate the main consumer protection directives into the new Obligation Act. The CPA 2006 does not contain a similar provision.

The transposition of consumer directives into national law was preceded in many countries by a discussion about the method of transposition. As some 'consumer law' rules affect the core of the law of obligations, the discussion focused particularly on the question of whether a special consumer protection law should be adopted or whether the provisions of consumer protection should be incorporated into the corpus of the civil code. What is special about the case of Bosnia and

71 The credit for this goes to Professor Helmut Rüssmann, from the University of Saarland, who prepared this draft on behalf of the German association Gesellschaft fur technische Zusammenarbeit (GTZ), now Gesellschaft für internationale Zusammenarbeit (GIZ).

72 Official Gazette of B&H [*Službeni glasnik BiH*], N° 17/2002, 44/2004.

73 Official Gazette of B&H [*Službeni glasnik BiH*], N° 25/2006, 88/2015.

Herzegovina is the absence of any professional exchange or discussion on the subject.[74] Presently, neither a reform of consumer law nor OA is planned, although many new consumer protection directives have been adopted or amended since 2006.

3.4. PROPERTY LAW

Both entities (Federation B&H and Republic Srpska) and BDB&H have enacted new legislation in the field of proprietary relationships. Chronologically, they are: Property and other right *in rem* Act of the Brčko District B&H (hereafter: PLA BDB&H),[75] Property Law Act of the Republic Srpska (hereafter: PLA RS),[76] and Property Law Act of the Federation B&H (PLA FB&H).[77] PLA RS and PLA FB&H are harmonised to a large extent; two groups of experts worked together and drafted two almost identical legal texts, which were forwarded to the respective ministries. In all three parts of B&H, it was a political decision that the model for the reform of property law should be the ABGB; the reception of the Austrian property law was understood as something like 'back to the roots'. In this way, PLA BDB&H also demonstrates great convergence with the PLAs of the entities.

Between the enactment of the PLA RS (2008) and PLA FB&H (2013), several years passed, and this fact was used in the FB&H for improving the legal text: there are more detailed final and transition provisions; provisions on condominiums were modernized and revised; and an additional security right *in rem* over immovable assets was introduced (land charge).

74 For more, see Povlakić, 2010b, p. 140.

75 Property and other rights *in rem*, Act of the Brčko District B&H [*Zakon o vlasništvu i drugim stvarnim pravima Brčko Distrikta BiH*], Official Gazette of BD B&H [*Službeni glasnik BD BiH*], N° 11/2001, 8/2003, 40/2004, 19/2007, 26/2021, 44/2022.

76 Property Law of the Republic Srpska [*Zakon o stvarnim pravima Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 124/2008, 58/2009, 95/2011, 60/2015, 18/2016 – Decision of the Constitutional Court, 107/2019, 1/2021 – Decision of the Constitutional Court, 119/2021 – Decision of the Constitutional Court.

77 Property Law of the Federation B&H [*Zakon o stvarnim pravima Federacije BiH*], Official Gazette FB&H [*Službene novine Federacije BiH*], N° 66/2013, 100/2013.

The main characteristics of the new property law in B&H can be summarised as follows: these Acts represent the first comprehensive codification of property law, that is, rights *in rem* in B&H; the main principles underlying these Acts are the *numerus clausus* principle, the prohibition of abuse of rights *in rem*, and the principle of property obliges, which demonstrate a social function of property as well the principle of equal treatment of the property right regardless of who the owner is, be it a public or a private person.

For the first time, in all three PLAs, the things as a subject of the rights *in rem* were regulated in detail. The new legal definition of real estate considers only the plot of land as immovable unless the law provides otherwise. The plot of land is the main legal object and everything which is by nature or mechanically connected to it represents its part and belongs to the owner of that land.[78] This was a consequence of the reestablishment of the *superficies solo cedit* principles. The (re)introduction of this principle was accompanied by the denationalisation of urban constructing land, which opened the door for the reestablishment of this principle.[79] After nearly five decades of neglect, the new property law in B&H reintroduced this principle and provided for a completely new legal definition of real estate.

The new property law in B&H accepts a liberal regime regarding the possibility that foreigners can acquire ownership of real estate. Foreigners are considered equal in terms of succession with domestic citizens, but on the basis of legal transactions, real estate can be acquired only under the condition of reciprocity. [80]

A number of changes have been introduced regarding acquisition of ownership rights *in rem* on movable and immovable assets. First is the reform of land registry law, which was implemented in both entities and

78 Art. 7 para. 2 PLA BD B&H; art. 6 para 2 PLA FB&H; art. 6 para 2 PLA RS.

79 For more about this context, see Josipović, 2003, p. 99; Simonetti, 2008, p. 417. In Croatia, the reestablishment of this principle is considered in the context of the reestablishment of the market economy and together with renewal of land registries as a precondition for modern real estate transactions. See Gavella, Josipović, Gliha, 2007, p. 86.
The same can be observed in B&H. For more, see Povlakić, 2009b, p. 98.

80 Art. 200–203 PLA BDB&H; art. 15 PLA FB&H; art. 15 PLA RS.

BD B&H at the beginning of the 21st century, while respecting legal tradition, following the Austrian and German regulation of land registers; this strengthened the role of land registers and, above all, the principles of public trust. Property law reform has followed these principles and explicitly regulates the possibility of acquiring rights *in rem* by third *bona fide* persons even in a situation where the land register is incorrect and incomplete.[81]

Condominium ownership is regulated in a new way, which is also a consequence of the principle of *superficies solo cedit*; in contrast to the previous arrangement, in the new property law within condominium, the primary ownership is on the land. Additionally, in FB&H, the reforms implemented in Austria to protect the buyer of an apartment under construction are respected.[82]

For the first time, personal servitudes, real charges, and vicinity rights are regulated in detail so that there is no more need for applying the 'legal rules' from ABGB. Besides property, real and personal servitudes, pledge, mortgage, and real charges, two additional rights *in rem*, which are building right[83] and land charge,[84] were recognised.

Owing to the fact that credit and credit guarantees have undergone a paradigm shift in the transformation process and gained a crucial role in the market economy, the law on secured transactions, that is, law on security rights over movable and immovable assets became the subject of the most significant reforms and was designed under very different influences. Further, an infrastructure, needed for the effectiveness of these rights was created: notary law, land registry law, and enforcement and insolvency procedure law. Notary law, enacted in 2002/2003 was influenced strongly by German law, enforcement law and land registry law remained under Austrian influence, and land charge was modelled on German law.[85]

Despite the fact that secured transactions law has been exposed to different influences and that the reforms in this branch of law were not

81 Povlakić, 2016, p. 520.
82 Art. 86 para 4–8 PLA FB&H.
83 Art. 298–314 PLA FB&H; art. 74–90 PLA BD B&H; art. 286–302 PLA RS.
84 Art. 186–197 PLA FB&H.
85 For more, see Povlakić, 2010a, p. 230.

enacted simultaneously and with coordination, and that a systematic approach was not followed by the legislators, there is little to complain about the legislation in this area. First, surprisingly, the regulations borrowed from different legal orders are not mutually contradictory. Although this seems like a positive assessment or a successfully performed reform, in the application of law, this is a far from optimistic picture.

A paradigmatic example of this is the land charge, the device transferred from Germany. In Germany, the credits are predominately secured by land charge; the mortgage/hypothec is not broadly applied.[86] The main reason for this is the fact that the land charge is not an accessory security right, which allows for more flexibility and overcoming of some shortcomings of accessory mortgage in the banking and credit practice. In B&H the hypothec/mortgage was traditionally strictly an accessory, which hindered some flexibility in the different legal transactions. PLAs in B&H had followed the amendment of the ABGB from 1916 (The third Novelle), which meant that the accessoriness of the mortgage had been softened. The mortgage creditor can use a registered mortgage several times, or dispose with the rank of an extinguished mortgage, or the landowner can register a new mortgage parallel to the previously registered mortgage, which, after settlement, will take the place of the first registered mortgage (an operation that allows obtaining of a new more favourable loan, which also satisfies the creditor secured by the first registered mortgage). Parallel to these novelties, the PLA in the Federation B&H foresaw the land charge from German law, where this institute was not really regulated by the statutory provisions. It was rather developed by the German doctrine, judicial, and bank practice. For a successful transfer, it was necessary to transfer the entire German 'Acquis' of the land charge. This is definitively more problematic than adopting foreign statutory provisions. This problem was recognised in the Federation B&H and by actually drafting the land

86 According to reports from the practice of land registries, the ratio of registered land charges to mortgages should be around 80% to 20%. See Leider, 2023, § 1196, point 6.

charge regulating provisions, the German *law in action* in this field was adopted.[87] Although this task was successfully fulfilled, neither bank practice nor notary has recognised the advantages of this security right in comparison to a less flexible mortgage.

A further example that the new institute and possibilities of their use for different purposes are not recognised in the practice is the building right. The building right is a legal institution that enables economic use and investment by a person other than the owner, whereby the owner retains the property on the plot. This construction is particularly recommended in cases where cities or municipalities or the church are the owners of the land, that is, legal entities that may have a legitimate interest in not letting the land out of their hands and still want to use it commercially or realise a project without investing in it themselves. Unfortunately, however, in B&H, neither the public sector nor the church recognises this right as an economically interesting legal institute,[88] not even in its new important role in the context of renewable energies.[89]

The reform of securities on movable assets primarily means the introduction of non-possessory securities into the legal system of B&H. This reform does not imply the return to the legal tradition and acceptance of the Austrian legal provisions, since the Framework Law on Register Pledge (hereafter, FLRP)[90] which is uniform for the entire country, is highly influenced by art. 9 of the United States Uniform Commercial Code. [91] The FLRP represents a complete codification of the registered pledge stipulating the requirements for the creation of the pledge right, organisation of the register, the procedure of the registration, and enforcement over personal property encumbered with

87 Some authors limit the transplantation of law to the adoption of statutory provisions, although it can also take the form of transfer of case law. See Rehm, 2008, p. 6.

88 On its economic purpose as a 'legal form of urban housing' often when a property is owned by the public sector see Baur, Stürner, 2009, § 29, point 30, p. 385.

89 The building right can enable construction of solar panels and wind turbines.

90 Official Gazette of B&H [*Službeni glasnik BiH*], N° 28/2004.

91 The same happened in Montenegro, Kosovo and Romania. More by Jessel-Holst, 2003, p. 73; Živković, 2003, p. 319; Teves, 2004, p. 43; Povlakić, 2008, p. 37. More about key features of art. 9 see by Sigman, 2004, pp. 56; Creydt, 2007, p. 51.

registered security. This law accepts the basic principles on which Art 9 UCC is based. All forms of personal property, present as well as future property (tangible and intangible), can be encumbered by registered security. Furthermore, each obligation can be secured, and this regulation applies to all types of debtors or creditors. The different security rights regulated by different laws and created in accordance with respective provisions are submitted to a uniform principle with regard to priority. In general, only the registration is relevant for their ranking. The registration does not have a constitutive effect but is crucial for the priority ranking of the different securities. In B&H, the filing notice system providing information on possible interest on some property is accepted. The database is publicly available, but only accessible under payment of prescribed fees. The procedure of registration is simple, fast, and effective. In fact, there is no procedure of registration in the sense of a court or administrative procedure. The research and registration have to be conducted by the creditor who can directly register his right, without the participation of the court, without an examination of the application *au fond*. All procedural steps have to be performed electronically. In the procedure of settlement of secured creditors, special enforcement rules apply, which are more flexible and efficient than the rules of the general enforcement procedure.

The banks in B&H use the registered pledge in practice. The feedback is positive, and apparently, this legal transplantation was successful. The non-pragmatic and functional approach of the provisions of Art 9 UCC makes them neutral and applicable in different legal systems. This regulation has already inspired different national legal orders, not only continental and common-law legal orders, but also some international documents such as Cape Town Convention on International Interest in Mobile Equipment from 2001.[92] However, the success is still incomplete since some possibilities offered by this instrument are still not recognised and used in practice.

92 Povlakić, 2008, pp. 31–32.

3.5. SUCCESSION LAW

The two entities and Brčko Districts have reformed their succession law, by enacting their own succession acts: Succession Act of the Republic Srpska (hereafter, SuccA RS),[93] Succession Act of the Federation B&H (hereafter, SuccA FB&H),[94] and Succession Act of the Brčko District B&H.[95] The SuccAFB&H and SuccA BDB&H are almost completely harmonised and regulate both substantive succession law and non-contentious procedure in succession matters whereas in the Republic Srpska the procedure in succession matters is the subject of a separate Act on non-contentious procedure.[96]

The substantive law of succession in B&H dates to 1955, when the first Succession Act was passed in socialist Yugoslavia. After the constitutional reforms in 1971 and the transfer of competencies from the federal state onto former socialistic republics and autonomous regions (*supra* 2.4.3), almost all former republics/autonomous regions have passed their own successions acts, which have followed to a great extent the Succession Act from 1955. An exception was Croatia, where this federal act was overtaken by the Act of Socialistic Republic Croatia and was enforced until 2003. This can be explained by the fact that this Act from 1955 was a solid part of a legislation that followed mainly Suisse law with few concessions to the socialist legal order.[97] Therefore, it is not surprising that, after the secession from the former Yugoslavia, former republics when passing their new inheritance acts have followed their former

93 Succession Act of the Republic Srpska [*Zakon o nasljeđivanju RS*], Official Gazette of the Republic Srpska [*Službeni glasnik RS*], N° 1/2009, 55/2009 – corr., 91/2016, 28/2019 – Decision of the Constitutional Court, 82/2019.

94 Succession Act of the Federation B&H [*Zakon o nasljeđivanju FBiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 80/2014, 32/2019 – Decision of the Constitutional Court of the Federation B&H.

95 Succession Act of Brčko Distrikt B&H [*Zakon o nasljeđivanju BDBiH*], Official Gazette of the BDB&H [*Službeni glasnik BD BIH*], N° 36/2017.

96 Non-contentious Procedure Act of the Republic Srpska [*Zakon o vanparničnom postupku RS*], Official Gazette of the Republic Srpska [*Službeni glasnik RS*], N° 36/2009, 91/2016, 16/2023.

97 The author of this Act is Professor Mihajlo Konstantinović, who was the main architect in drafting OA (see *supra* section 3.3).

succession acts and have retained the principles and institutions of the previous acts which stood under the impact of the Succession Act 1955.[98] Slovenia, even 40 years after secession from the former Yugoslavia, continued to apply the Succession Act adopted in the Socialist Republic of Slovenia in 1976.[99]

It is therefore not surprising that the same situation prevailed in B&H; the new succession acts in B&H lean on the former Succession Act of the Socialistic Republic B&H and since 1955 on the existing concept of succession law, whose main principles are equality of female and male heirs, legitimate and illegitimate children, *ipso iure* succession, binding direct universal succession, voluntary succession, limited circle of legal heirs, very narrow circle of compulsory heirs, compulsory succession as *pars hereditas* but not only monetary claim, equality of legal heirs of the same degree, division of legal heirs according to the parentelic system, etc.

The most striking innovations in the new inheritance law in B&H include the expansion of the circle of legal heirs, since this circle was limited during socialism, transfer of responsibility for probate proceedings to notaries, inclusion of illegitimate partners in the circle of legal heirs in the Federation B&H and BDB&H (Art. 9 SuccA FB&H, Art. 9 SuccA BDB&H), and the introduction of the inheritance contract (Art. 126–134 SuccA FB&H, Art. 130–136 SuccA BDB&H), into which both a spouse and an unmarried partner can enter.[100] This contract should be concluded in the form of a notarial deed, which, in the Federation B&H, was declared as not in line with the constitution.[101] SuccA FB&H and SuccA BDB&H have provided for the possibility of depositing

98 For Croatia see Josipovć, 2009, p. 190. For Serbia, Szalma, 2009, p. 186; for B&H, Povlakić, 2009a, p. 142.

99 Rijavec, 2009, p. 96.; Rudolf, 2020, p. 1338, N° 9.

100 The possibility of concluding an inheritance contract is not foreseen in the RS, which raises the question of recognising such a last will disposition concluded for example in the Federation B&H in probate proceedings in the Republic Srpska, where such a contract is forbidden. For more about the interlocal conflicts of laws in succession matters, see Meškić, Duraković, and Alihodžić, 2018, p. 637.

101 Decision of the Constitutional Court of the Federation B&H U-22/16 from 04.08.2019. This decision was sharply criticised by scholars, but it remains final and binding. For this criticism instead of many, see Softić, Kadenić, 2020, p. 535.

testamentary dispositions and other last will disposals in the registers kept by the Chamber of Notaries of the Federation B&H and Judicial Commission of the BDB&H.[102]

The right to a compulsory portion deserves special attention, as this institution was at the heart of the planned reforms in German or Austrian law. Regardless of whether these reform approaches are realised, it should only be noted here that there was no similar need for reform in B&H. First, in B&H the circle of compulsory heirs has traditionally been very limited. Only spouses (or, in the new inheritance law, illegitimate partners), children, and fully adopted children are compulsory heirs without having to fulfil any additional conditions[103]. Other descendants of the deceased, parents, and siblings can only claim a compulsory portion if they are incapacitated and without means. The fulfilment of these cumulative conditions is not easy. Second, there is a wide range of grounds for disinheritance, which means that the will of the testator is more strongly respected. Third, everything that a legal heir receives from the testator during his or her lifetime as a gift or similar gratuitous attribution, with the exception of minor gifts, is counted towards the compulsory share. These three points were the focus of discussions about inheritance reform in Germany and Austria.[104] Same-sex partnerships are not recognised by new inheritance law and generally in B&H law.

3.6. FAMILY LAW

As mentioned *supra* 2.3 and 2.4, the ABGB did not exert any influence on this brunch of law either between 1918 and 1941 or after World War II. The first codification of family law and the first rules that separated family law from religion and customs were enacted in B&H, respectively, in former socialistic Yugoslavia in 1946/47, in the very early stages of

102 Art. 124 SuccA FB&H; art. 128 SuccA BD B&H. Such a register is also maintained by the Notary Chamber of the Republik Srpska.

103 Art. 28 SuccA FB&H; art. 30 SuccA RS; art. 32 SuccA BDB&H.

104 Welser, 2009, pp. 11–23; Krajcer, Philadelphy, 2009, p. 73.

the development of the socialistic system. After the first Constitution of the socialistic state was adopted in 1946, it was not possible to follow the legal tradition in this field of law since all applicable family regimes in the Kingdom of Yugoslavia have recognised gender inequality, they treated women differently from men, and illegitimate unions and children born to such unions were not recognised.

The Federal Act on Marriage from 1946 states that the husband and wife were equal within the marriage (Art. 4).[105] This Federal Act empowered the former socialistic republics (and B&H was one of them) to regulate patrimonial regime within the marriage. The Property Relationships between Spouses Act was adopted in B&H in 1950[106] providing for joint ownership for spouses. In other words, the property acquired through work during marriage was declared as joint ownership, characterised by shares that were not determined in advance and by the fact that one spouse could dispose of the shared ownership only together with the other partner and in mutual consent.

Neither cohabitation nor its eventual patrimonial consequences were regulated by this act. It was the case law that recognised the patrimonial effects of cohabitation in former socialistic Yugoslavia in the early fifties. There was a wide range of court decisions, starting from those recognising claim on the basis of unjustified enrichment by a cohabitation partner[107] to recognising the patrimonial rights (rights *in rem*); contributions comprising housekeeping or raising of children were recognised.[108] After the recognition of participation in the property in a non-marital partnership by the case law, the same provision was incorporated in the Family Law of the Socialistic Republic of Bosnia and

105 Federal Act on Marriage [*Osnovni zakon o braku*], Official gazette of the Federative People's Republic of Yugoslavia [*Službeni list FNRJ*] N° 29/1946.

106 Property Relationships between Spouses Act [*Zakon o imovinskim odnosima bračnih drugova]*, Official Gazette of the People's Republic Bosnia and Herzegovina [*Službeni list Narodne Republike Bosne i Hercegovine*], N° 32/1950.

107 A leading case was a recommendation of the former Federal Supreme Court of Yugoslavia from 4 March 1957. For more details, see Bosiljčić, 1978, points 137–144.

108 Decision of the Supreme Court of the Socialistic Republic Bosnia and Herzegovina Gzz-15/71 from 22 July 1971.

Herzegovina from 1979.[109] This Act has established the principle of full equalisation of spouses, regardless of whether they are married or not; the similar status of children born within marriage and illegitimate children was also confirmed here. The principle of 'free parenthood' was proclaimed, which meant that everyone was free to decide about whether he/she wanted to become a parent, within the marriage or out of wedlock. In general, it was a modern and liberal Act, which served as the basis for new legislation in the field of family law in B&H after the dissolution of the former SFRY.

In B&H as an independent state, three separate Family Acts were adopted: the Family Act of the Federation B&H (hereafter, FA FB&H),[110] [111] the Family Act of Brčko District of B&H (hereafter, FA BDB&H),[112] and the Family Act of the Republic Srpska (FA RS). The first dates from 2002[113] and the new one from 2023 (hereafter, FA RS)[114]. The FA BDB&H is harmonised with the FA FB&H to a large extent. The new FA RS differs from the other two FAs, but represents serious legislative work, which has considered the recognised shortcomings in the practice and has tried, mostly successful, to solve them.

The mentioned FAs regulate marriage, relationships between parents and children, adoption, tutelage, proprietary and non-proprietary relations within the family, and the actions of the competent authorities in relation to marital and family relations and tutelage. The FA FB&H represents a complete codification of substantive and procedural family law; all judicial proceedings (litigation, non-contentious, and

109 Family Act of the Socialist Republic of Bosnia and Herzegovina [*Porodični zakon Socijalističke Republike Bosne i Hercegovine*], Official Gazette of SR B&H [*Službeni list SR BiH*], N° 21/1979, 44/1989.

110 Family Act of the Federation B&H [*Porodični zakon Federacije BiH*], Official Gazette FB&H [*Službene novine FBiH*], N° 35/2005, 41/2005, 31/2014, 32/2019.

111 More about new family law in the Federation B&H: Bubić, 2005, p. 11.

112 Family Act of the Brčko District B&H [*Porodični zakon Brčko distrikta BiH*], Official Gazette BD B&H [*Službeni glasnik BD BiH*], N° 23/2007.

113 Family Act of the Republic Srpska [*Porodični zakon Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 54/2002, 41/2008, 63/2014, 56/2019 – Decision of the Constitutional Court of Republic Srpska.

114 Family Act of the Republic Srpska, [*Porodični zakon Republike Srpske*], Official Gazette RS [*Službeni glasnik RS*], N° 17/2023.

enforcement proceedings) relating to family law relationships are regulated by this act.

All three Family Acts are based on the same non-discriminatory principles as the Family Act from 1979. They take a few steps forward and incorporate in the family law values and principles that are set in some international agreements such as the Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Rights of the Child etc. The right to private and family life is among the fundamental rights that are recognised and protected by the Constitution of B&H (Art. II.3.f). Children's rights are the focus of relations between parents and children; the FAs of the Federation B&H and Brčko District B&H do not deal with parenthood rights but rather with parenthood responsibilities and duties (parental care).[115] Parental care is defined as a set of responsibilities, duties, and rights of parents aimed at protecting the personal and property rights and interests of the children. Parental care shall be exercised in the best interests of the child.[116]

Protection against family violence is one of the main principles of family law in B&H.[117] FA FB&H and FA BDB&H provide for a special proceeding in the case of family violence.[118] In addition, the autonomy of will is better recognised in the new family law. For example, the spouses may arrange their patrimonial regime by conclusion of the nuptial agreement.[119] This agreement can be concluded before marriage as a pre-nuptial agreement effective after the marriage. The autonomy of will plays a more important role in divorce and division of matrimonial patrimony. Division of matrimonial patrimony can be made by agreement or by court decision. This agreement has to be concluded as a notarial deed.[120] The spouses can conclude a written agreement on divorce within the mediation procedure. The failure of the legislator is that it did not provide for the possibility of concluding an agreement on

115 Art. 129–149 FA FB&H; art. 112–132 FA BDB&H.

116 Art. 120 para. 2 FA FB&H; art. 112 para. 2 FA BD B&H; art. 95 para. 2 FA RS.

117 Art. 4 FA FB&H; art. 3 FA BDB&H; art. 15 FA RS. For Federation B&H, see Bubić, 2005, p. 11.

118 Art. 380–382 FA FB&H; art. 288–289 FA BDB&H.

119 Art. 252 para. 2 FA FB&H; art. 229 para. 2 FA BD B&H; art. 314–327 FA RS.

120 Art. 258 para. 2 FA FB&H; art. 235 para. 2 FA BD B&H; art. 307 para. 3 FA RS.

divorce in the form of a notarial deed, as it could significantly unburden the courts. The divorce agreement must include an agreement on division of matrimonial property,[121] and this agreement must be concluded in the notarial form, etc.

One can therefore say that family law in B&H follows the basic principles of contemporary international family law.[122] However, some issues remain open or present loopholes when considering modern tendencies in family law. One of these is the possibility of deprivation of the contractual capacity of the adults. For the reasons prescribed by the law, the contractual capacity of adults may be withdrawn in its entirety within a special non-contentious proceeding.[123] It is questionable whether the possibility of depriving a major person entirely of contractual capacity is in line with protection of the fundamental right in general or especially with regard to the Convention on the Rights of Persons with Disabilities.[124] [125]

Further, same-sex partnerships are not recognised at all. Although marital and non-marital unions are equal, there is no full alignment between them; additional conditions should be met for a relationship to be recognised as a non-marital union within the meaning of the law (e.g., the co-habitation should last over a prescribed period). The right to family and right to marry, guaranteed by the Constitution B&H, comprises also the right not to marry, the right to enter and dissolve a marriage. These constitutional fundamental rights should lead to complete equalisation between marital and non-marital unions. The prescribed period of time should be abolished as potentially discriminatory and the will and intention of partners to live together in consensual union should prevail before the formal condition of time limitation. The possibility of registering non-marital unions is not foreseen; hence, enormous

121 Art. 44 para. 1 lit. b) FA FB&H.

122 More about these principles by Schwenzer, 2007, p. 711.

123 Art. 192–196 FA FB&H; art. 173–177 FA BD B&H; art. 243–248 FA RS. The FA FB&H regulates the judicial non-contentious procedure aiming at deprivation of the contractual capacity (Art. 325–339), since in the Republic Srpska and Brčko District B&H this issue is subject to the Non-contentious Proceeding Act.

124 B&H ratified this Convention on 12 March 2010.

125 For more, see Majstorović and Šimović, 2018, p. 68.

problems arise in the practice in proving the existence of these unions, which can lead to loss of proprietary and inheritance rights.[126]

The possibility for single persons or unmarried partners to adopt children is limited or subject to additional conditions. For example, this is possible only if there are special justifying reasons or if the non-marital union has lasted at least five years.[127]

4. REFORM AND LEGAL TRANSFER – INSTEAD OF A CONCLUSION

The short overview of the development of civil law in B&H and recent reforms have shown that the history of modern civil law in B&H is the history of reception and transfer of law. The B&H is no exception; the circulation of legal models and solutions is a universal process.

It is obvious that some fundamental institutes and principles of private law have a neutral nature and may exist in different social and economic patterns, which enabled legal transfer and reception of law throughout history. The former Yugoslavia and B&H are a suitable example of this process. This fact has enabled the implementation of law or 'legal rules' from statutes that were in force before 1941 in the Kingdom of Yugoslavia for more than 30 years in the socialistic Yugoslavia, as has been demonstrated *supra* 2.4.1. It appears that in certain areas of private law, the transfer or transplantation of law from one legal order to another is possible, regardless of transplant-sceptics.[128] The doctrine has already determined that there are two types of transfers. Some legal institutes are culturally deeply embedded, while others are less dependent on a certain culture and society. The transfer of the former is very difficult and seen as 'organic', while the transfer of the

126 Demirović, 2013, p. 129; Povlakić, Mezetović-Međić, 2018, p. 59.

127 Art. 102–104 FA FB&H; art. 86 para. 3 and 87 para. 4 FA FB&H; art. 179 para. 2 and 181 para. 2 FA RS.

128 Teubner believes that the term 'Legal transplant' is a misleading metaphor; in his opinion, 'legal irritant' is a better term for this phenomenon. He is also sceptical about the 'convergences thesis'. Teubner, 1998, p. 12.

latter is relatively simple and characterised as 'mechanical'.[129] In the areas of private law closer to the market (property law, law on obligations), the legal institutes are more neutral, and their transfer has been more successful, while, for instance, the institutes of the inheritance and family law have not been transferred to a large extent.[130] B&H could again be taken as an example in this respect: its legal history contains both mechanical and organic transfers.

Property law in B&H is a good example: almost all property law is based on the ABGB with the exception of the concepts of possession, condominium, and land charge, which were adopted from German law. It is fortunate that the reforms of the property law, land registry law, notary law, insolvency and, in part, enforcement law were carried out with the support of the very same subject (GTZ), which had two positive effects. First, it was an influence originating from the continental European legal system, which is not alien to the B&H legal system. Second, the reforms were to a certain extent mutually coordinated. The adoption of the rules of Art. 9 UCC in the area of security rights over movables was transferred from American law; nevertheless, these rules fit well into the B&H legal system and cannot be considered a legal irritant.

The question arises whether, in today's globalised world, characterised by a strong internationalisation of legal relationships facilitated by technological progress, communication capabilities, increased mobility, internal regional markets,[131] and activities of supra-national

129 Kahn-Freund, 1978, p. 298 et seq., as cited in Teubner, 1998, p. 17. See also Bećić, 2018, p. 38 et seq.

130 The same matrix is repeated in the European Community, where the harmonisation or unification efforts are more intense in the area of contract law (with a direct impact on the functioning of the common market) than in family or succession law, where social, moral, and cultural values are more strongly expressed. In this sense, see Verbeke, Leleu, 2011, pp. 459–479, pp. 460–462; Martiny, 2011, pp. 429–457, pp. 429–431, p. 451. However, more recent developments show that these areas of law are not anymore exclusively a matter to be regulated by national law; instead, they are under the influence of values and principles that are set in some international agreements, primarily in the agreements sourced from international human rights law. For more about these principles, see Schwenzer, 2007, pp. 711–712.

131 Kieninger, 2005, p. XI.

institutions tasked with unifying law in general, an autonomous development would be feasible or even desirable? It is hardly possible for the national law of any country to develop completely independently. The doctrine speaks of the denationalisation of private law,[132] of the integration of private law or of the need to reconstruct legal doctrines, which, in the globalised world, can no longer be confined to national frameworks.[133]

132 Ibid., p. XVI.
133 Hoecke, 2003, p. 108.

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CIVIL LAW CODIFICATION IN SLOVENIA

MIHA JUHART

ABSTRACT

The Civil Code of Slovenia, inspired by – and successor to – the 1811 Austrian ABGB, continues to be the major source of civil law of the country. Slovenia, as a post-Yugoslav state, found itself having to develop and modernise its legal system in the new economic, social, and political context, after achieving independence in 1991. Private (civil) law, for a long time, remained regulated by norms adopted during the time Slovenia was a member of the Yugoslav state. This was particularly true regarding the law of obligations, regulated in a separate act dating from 1978. Property law presented similar difficulties in application and modernisation. The Slovenian state and its legislator decided not to pursue codification, but rather focus on modernisation of the various sources of civil law (the law of obligations, property law, inheritance law, family law) leading to a peculiar and fragmented legal system and a continued possibility of civil law codification.

Keywords: *Yugoslavia, Slovenia, civil law codification, law of obligations, property law.*

Juhart, M. (2024) 'Civil Law Codification in Slovenia' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 339–366. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_13

1. INTRODUCTION

In the Republic of Slovenia, civil law is not regulated by a single comprehensive codification, but rather, individual classic fields of civil law are regulated by distinct acts. Such a situation is the result of historical development. Slovenia gained independence only in 1991; prior to that, it was part of the Austro-Hungarian Empire and, later, Yugoslavia. The last comprehensive codification of civil law in Slovenia dates to the 1811 Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch* – ABGB). With the collapse of the empire after World War I, the ABGB remained the primary legal source of civil law in Slovenia. While it was not officially legislated, courts often referred to the ABGB's legal rules as long as they did not contravene the constitutional framework. This practice persisted for many years, even under the socialist regime. For some civil law relationships in the field of obligation law (e.g. gift), the ABGB was applied until 2002, and in the field of property law, such as usufruct, it remained in use until 2003.[1]

Therefore, the ABGB has significantly shaped the development of civil law in the Republic of Slovenia. Not only were the legal rules of the ABGB used as a legal source for a long time, but Slovenian legal vernacular was also developed based on these rules. Much of the civil law terminology originates from the translation of the ABGB, which was prepared by the legal and translation profession since the ABGB was never published in Slovenian during the empire's reign.[2] Under the influence of the ABGB, both case law and the legal profession in Slovenia matured over the years.

1 The opinion of the profession is that the ABGB's legal rules could still be applied to issues not regulated by the applicable law of the Republic of Slovenia. See Brus, 2013, p. 104; Juhart, 2013, p. 69; Keresteš, 2011, p. 8.

2 Bezek, Regally, 1928.

2. REGULATION OF CIVIL LAW UPON THE INDEPENDENCE OF THE REPUBLIC OF SLOVENIA (1991)

In the Kingdom of Yugoslavia, numerous attempts were made to establish a unified civil law codification. However, these efforts never came to fruition. A Civil Code was drafted in the 1930s, but it was never enforced.[3] The onset of war and the subsequent post-war events sidelined its adoption.

In socialist Yugoslavia, creating a uniform civil law became even more challenging. Initial resistance stemmed from a rejection of bourgeois ideologies. Later, disputes arose over legislative competence between the Federation and its republics. Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), civil law jurisdiction was split. While some aspects were overseen by the Federation, others fell under the purview of the then-Socialist Republic of Slovenia. Specifically, the Federation was responsible for regulating the foundations of obligation relationships (the general part of obligations) as well as contractual and other obligation relationships in the field of trade in goods and services, fundamental property law relationships, fundamental relationships that ensure the unity of the Yugoslav market, fundamental property law, and other substantive law relationships in the field of maritime, inland, and air navigation and copyright.[4] All other parts of civil law were legislated by the individual republics. As a result, between 1974 and 1991, civil law in Yugoslavia operated on two distinct tiers: one for the entirety of Yugoslavia and the other exclusively for the Republic of Slovenia.

Following the establishment of socialism, socialist Yugoslavia swiftly addressed civil law areas, specifically inheritance and family law. Initially, federal laws governing these areas were applied across the entire Federation. However, once legislative powers shifted to the republics, the Republic of Slovenia introduced its own statutes. For family law,

3 Perić, 1939.

4 Art. 281(1)(4) of the 1974 Constitution of the SFRY.

the Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih* – ZZZDR) was enacted.[5] It covered marital relations, relations between *de facto* partners, parent-child relations, foster care, guardianship, and adoption. The area of inheritance was regulated by the Inheritance Act (*Zakon o dedovanju* – ZD).[6] The law regulates intestacy and testamentary inheritance and special procedural rules for inheritance matters. Preceding this, the Republic of Slovenia had already passed the Act on Inheritance of Agricultural Land and Private Agricultural Holdings (Farms).[7] This act regulated special rules for the inheritance of privately owned farms. A farm was defined as an economic entity capable of providing its owner with adequate economic security through agricultural activity. The basic principle of the act is that the farm shall be inherited by a sole heir to avoid its division, as fragmentation might undermine its economic viability. Other inheritors were to receive their share of the inheritance in monetary form.

The most important civil law act that was adopted in the SFRY is the 1978 Law on Obligations (*Zakon o obligacijskih razmerjih* – ZOR).[8] Despite the Federation's constrained legislative competence, the ZOR is a fairly comprehensive obligations law framework. In addition, it encompasses a series of legal rules in the general part of civil law in civil law's classic codifications. Its reach is broad, with some foundational principles covering the entirety of civil law, particularly regarding declarations of will and legal transactions. A monistic approach was favoured by the legislator, with the law addressing legal relations between all individuals, including economic entities. Only a few special rules apply to business entities, the most important of which is the rule on the shorter duration of the general limitation period, which is three years (art.374 of ZOR). For non-economic persons, the general limitation period is five years (art. 371 of ZOR). The ZOR was structured with both a general and special part. Alongside the basic principles and regulation of legal transactions, the general part also regulated damages and the law of unjust

5 Official Gazette of the Socialist Republic of Slovenia, no. 15/76.
6 Official Gazette of the Socialist Republic of Slovenia, no. 15/76.
7 Official Gazette of the Socialist Republic of Slovenia, no. 26/73.
8 Official Gazette of the SFRY, no. 29/78.

enrichment. The rules on performance and termination of obligations applied to all types of obligations. It is fascinating that the ZOR also regulated the issuance of securities as a unilateral legal transaction (Arts. 241 to 261 of ZOR). In a special section, ZOR regulated various types of contracts. The central part had a sales contract regulation (arts. 454 to 551 ZOR). Due to the monistic approach, the ZOR also regulated some typical contracts concluded between economic entities, such as licensing agreements (arts. 686 to 711 of ZOR), commercial agency contracts (arts. 790 to 812 of ZOR), contracts on the control of goods and services (arts. 847 to 858 ZOR), and contracts of allotment (arts. 885 to 896 of ZOR). Banking transactions were also sparingly regulated, such as bank deposits (Arts. 1035 to 1046 ZOR), safe deposit contracts (Arts. 1061 to 1064 ZOR), letters of credit (Arts. 1072 to 1082 ZOR), and bank guarantees (Arts. 1083 to 1087 ZOR). Although ZOR occasionally underscored socialist values, these instances were minimal, demonstrating its contemporary orientation. Therefore, we can conclude that ZOR was a modern regulation, as some rules consider the development trends of civil law in the European area. For example, ZOR specifically regulated producer liability (Art. 179 of ZOR); the concept of liability regardless of fault was broadly established (Art. 173 of ZOR), and contractual compensation was limited to expected damage (Art. 266 of ZOR). Above all, within the framework of instalment sale arrangements, it established the right of the buyer (art. 554(2)) to withdraw from the contract without providing reasons and without serious consequences if he changes his mind (the cooling-off right in consumer law). The same chapter also contained a provision that contractual provisions that are less favourable for the buyer than statutory provisions shall be void (art. 551). Finally, ZOR was an exemplary nomotechnical product, especially if contrasted with present-day legislation. The legal rules are abstract, the language is clear and fluid, devoid of excessive cross-references, repetitions, or over-explanation. The majority of its legal rules are captured succinctly, often in a singular sentence, a clarity seldom seen in more recent laws.

Another important regulation the SFRY adopted in civil law was the Basic Property Law Relations Act (*Zakon o temeljnih lastninskopravnih*

razmerjih – ZTLR).[9] This act was also considered to regulate the institutes of classical property law, although the fact remains that in socialist Yugoslavia, private property was limited in relation to social property. The ZTLR regulated the property rights of natural persons and legal persons under private law (these were allowed to a limited extent). Therefore, the regulation of property rights on movable property prevailed (Arts. 9 to 48 of ZTLR). Property rights on real estate were regulated sparingly, as the authorities at the time allowed individuals to acquire real estate in a very limited scope. Nevertheless, easements (Arts. 49 to 60 of ZTLR) and mortgages (Arts. 61 to 69 of ZTLR) had to be arranged,[10] as these rights *in rem* could be established on real estate owned by individuals. The ZTLR also regulated possession and, above all, the protection of possession (Arts. 70 to 81 of ZTLR). In doing so, it interestingly moved away from the Austrian concept of subjective possession and replaced it with the German concept of objective possession. The regulation of commonhold was the responsibility of the Republic of Slovenia. The Rights on Parts of Buildings Act was adopted (*Zakon o pravicah na delih stavb*),[11] which introduced the concept of commonhold as the right of an individual to own an apartment as part of a multi-apartment building. The regulation of real estate registration also significantly impacts the law of property relationships. In Slovenia, the Austrian regulation of the land register, which was introduced in the second half of the 19th century, has been preserved. Community property was also registered in the land register, for which special rules applied. However, since these entries were not mandatory, they were often not carried out, leading to inconsistency and unreliability of the land register, which had to be corrected after the fall of socialism.

Thus, in 1991, Slovenia found itself in a rather intricate situation regarding the sources of civil law. The conventional codification of civil law was dispersed among multiple legislations and legal rules. The area of the law of obligations was regulated by ZOR, some contracts of the law of obligations were regulated in ZD, and for the remaining relations,

9 Official Gazette of the SFRY, no. 6/80.

10 The lien on movable property was regulated in ZOR.

11 Official Gazette of the Socialist Republic of Slovenia, no. 19/76.

the provisions of the ABGB were applied as legal rules. The property law was largely regulated by ZTLR, while some republican rules were applied to a lesser extent, such as the Rights to Parts of Buildings Act (*Zakon o pravicah na delih stavb*) and some substantive rules of the Non-Contentious Civil Procedure Act (*Zakon o nepravdnem postopku*).[12] In instances where legal relationships were not explicitly defined, some provisions of the ABGB were invoked. The field of inheritance law was regulated by the ZD and the Act on Inheritance of Agricultural Land and Private Agricultural Holdings (*Zakon o dedovanju kmetijskih zemljišč in zasebnih kmetijskih gospodarstev*). The field of family law was regulated by Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih* – ZZZDR). After gaining independence, an opportunity emerged to unify these varied areas under a consolidated civil code.

3. INDEPENDENCE OF THE REPUBLIC OF SLOVENIA

With Slovenia gaining independence on 24 June 1991, the civil law framework remained unchanged. The Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (*Ustavni zakon za izvedbo Temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije* – UZITUL)[13] stipulated in Art. 4 that until the relevant regulations of the Republic of Slovenia are issued, the federal regulations that were in force in the Republic of Slovenia at the time of the entry into force of the UZITUL shall be applied *mutatis mutandis* as republican regulations, provided they did not contradict the new Slovenian legal order. This provision ensured continued applicability of ZOR and ZTLR. UZITUL also set an ambitious timeline for the new country to adopt its own set of laws, transitioning away from the former national regulations.

After the independence, there was a possibility of pursuing a comprehensive codification of civil law, mirroring the model found in most European countries grounded in the Roman law tradition.

12 Official Gazette of the Socialist Republic of Slovenia, no. 30/86.

13 Official Gazette of the Republic of Slovenia, nos. 1/91-I and 45/94 – UZITUL-A.

This would allow the consolidation of all four classical areas of civil law into a singular code. To bind these distinct areas, general provisions could be introduced, serving as a cohesive element. This unifying element is often referred to in legislation and theory as the general part of civil law. The profession also advocated for the creation of a uniform civil code. In his outline of the state and development of the law of obligations in Slovenia, Ilešič advocates for the obligation relations to be regulated within the framework of the general codification of civil law.[14]

The Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL) had set the deadline for 31 December 1993, but Slovenia could not adopt its own civil code by then to replace the Yugoslavian laws. The new country also failed to adopt any act to replace ZOR and ZTLR. The two main civil law statutes that were adopted from the former Yugoslavia continued to be applied. The case law had no particular problems with this continuation. Specific provisions within both acts, which pertained to social property and socialist self-management, were no longer applied because the prerequisites for these were no longer met. Others were skilfully bypassed by the case law with the interpretation and general provision of Art. 4 of the UZITUL, whereby the provisions of the regulations of the former Yugoslavia were to be applied as long as they did not contradict Slovenia's legal order. This mechanism ensured a smooth transition in civil law, echoing a similar transition after the two World Wars, maintaining the legal rules of the ABGB in Slovenia even into the new millennium. This continuity in the civil law system is the main reason for not implementing a comprehensive codification of civil law, maintaining instead distinct acts governing separate areas of civil law. Post-independence, Slovenia witnessed an evolution rather than a revolution in civil law development. Changes in inheritance and family law emerged due to the evolving societal conditions and their inherent challenges. For property and obligations law, the decision was to individually replace ZTLR and ZOR. The first shift came with the introduction of the Obligations Code (*Obligacijski zakonik* – OZ) on 1 January 2002, followed by the Law of Property Code (*Stvarnopravni zakonik* – SPZ) on 1

14 Toplišek, Ilešič, 1995, p. 495.

January 2003. Both statutes predominantly mirrored the rules of ZOR and ZTLR, with most rules enduring without any substantial change, except for linguistic updates and clarifications. Hardly any substantive interventions were made in the existing rules, making it difficult to discuss any important changes. However, both new codes regulated areas that ZOR and ZTLR could not regulate, because the Federation lacked necessary legislative competence. These are primarily legal relations for which special laws or legal rules of the ABGB were applied. The OZ introduced new regulations on gifts and articles of association, largely modernising terminologies from the ABGB. Since some *mortis causa* contracts (delivery contracts, life care contracts) were regulated in the ZD due to the defective regulation of the ZOR, the legal text was moved from the ZD to the OZ. In property law, the same applied to the regulation of personal easements and charges on property. The regulation of relationships under distinct statutes was also transferred to the SPZ. The regulation of plots of land boundaries was transferred to the SPZ from the Non-Contentious Civil Procedure Act and the regulation of commonholds from the Rights to Parts of Buildings Act.

The new legislation is distinctive not only in its content but also in its terminology. In the Republic of Slovenia, the term *'Act'* is generally used for broad regulations. Meanwhile, *'Code'* has traditionally been reserved for regulations concerning obligation and property law. This terminological distinction has historical roots, linked to the ABGB, which in Slovenian was called the *'Code'*. However, this specific naming does not suggest any particular hierarchy in the legal sources. It is an intriguing characteristic. This tradition was subsequently upheld in the new family law regulations.

The adoption of OZ and SPZ did not signify the end of the idea of codifying civil law. In fact, academic circles have made attempts at drafting such a code, urging primarily for the legal regulation of the general part of civil law.[15] The absence of a general part in civil law can harm the development of civil law.[16] It means the danger of a vast field of law developing without a concept instead of all branches of civil law being

15 The project is presented in Novak, 2004.

16 Novak, 2016, p. 54.

based on the same legal principles and legal terminology. The fact that the branches of civil law must be coordinated with each other and linked by general principles and rules applies regardless of whether these legal branches are legislatively and technically covered in individual chapters of the Civil Code or are regulated in individual statutes. Adoption of the general part of civil law is, therefore, necessary. The legislator who will not take a decision on the formation of the Civil Code will have to decide whether to regulate these rules in a separate statute or, in accordance with the current practice, to include them in the Civil Code.[17] However, that is where the conversation seems to have halted. Presently, Slovenia's civil law system functions within the bounds of existing legal frameworks, and there does not appear to be a pressing need to change the entire system and establish it on entirely new foundations.

Perhaps we should be relieved that the euphoria surrounding the establishment of a new nation did not prompt us into a hasty adoption of civil law legislation, akin to the rapid harmonisation of the Slovenian legal system with EU regulations. Unfortunately, such a rush to enact laws often results in low quality of legal text and major or minor irregularities that can cause unwanted effects. An example of this can be found in the OZ, concerning the rule where interest stops accruing once the unpaid interest matches the principal sum.

Choosing not to pursue a comprehensive codification of civil law, despite the available opportunity, significantly influenced the development of civil law sources. Above all, this meant the possibility of maintaining the continuity of existing texts and not approaching the terminological harmonisation that would be required by merging the four laws into a single civil law code. For the area of property and obligations law, this meant that the preparation of the new Slovenian law could be carried out by adapting ZTLR and ZOR. This was also firmly confirmed by case law, which continued to apply the provisions of ZOR seamlessly, even amidst significant societal shifts. The validity of this approach is underscored by the parallel evolution of civil law in other nations of the former Yugoslavia. Originating from largely identical

17 Ibid.

foundations, their modern frameworks are either influenced by ZOR, or they continue to uphold it directly.

4. APPLICABLE LEGAL SOURCES OF CIVIL LAW

4.1. LAW OF OBLIGATIONS

The central legal source of civil law in the Republic of Slovenia is the OZ. Beyond encompassing the traditional realm of obligations law, the OZ also serves extensively as a general source, the rules of which are also applied in other fields. Essentially, the OZ is an evolution of the ZOR. The majority of its provisions remain intact, albeit with altered numbering. Most modifications pertain to editorial refinements and modernisation, devoid of profound or conceptual shifts. The structure of the act, which is divided into general and special parts, remained the same. The regulation of some contracts, which were not regulated by ZOR, was added to the special part. However, with the adoption of the OZ, the ZOR did not cease to be applied in its entirety, but the provisions on banking contracts remained in force (art. 1061(2)). These were not transferred to the OZ; no other regulation was adopted in Slovenia to supersede these provisions.

To date, the OZ has been amended just once. Even this amendment stemmed from oversight during its drafting. One of the few substantive changes of the OZ compared to the ZOR was the re-enactment of the rule that interest ceases to accrue when the sum of due and unpaid interest reaches the principal amount (*ne ultra alterum tantum*). In ZOR, this rule was the first part of art. 401 among the contractual interest provisions. However, this provision was subsequently removed.[18] In the former Yugoslavia, the legislator realised that it was a rule that contradicted the developing financial market and a different way of doing business, so it justifiably abolished it. Hence, its removal was deemed

18 Art. 2 of the Act on Amendments to the Obligations Act, Official Gazette of the SFRY, no. 57/89.

logical and did not lead to any significant issues. The Slovenian legislator, however, revived the *ne ultra alterum tantum* rule within the OZ, albeit with a rather clumsy integration into the overarching interest regulation. The provision of art. 376 of OZ fully mirrors that of art. 401 of ZOR. However, its placement was among the general provisions regarding interest, affecting both contractual and default interests, rather than solely contractual interest as designated by ZOR. The implications of this relocation are severe. If the rule also applies to default interest, this means that at a certain point, the debtor is in a position to benefit from delaying the monetary payment of debt to the creditor. As long as default interest accrues, it puts pressure on the debtor to pay its debt due to the high late interest rate. However, when the unpaid default interest reaches the principal amount, interest ceases to accrue instantly. Thus, the debtor owes the creditor twice the principal regardless of when he pays it. No additional consequence befalls him if he pays it when the default interest has reached the principal or at any time thereafter. This provision starkly contrasts with the intended consequence of a debtor's default and the purpose of default interest. The Commentary of OZ interprets the placement of art. 376 of OZ as an editorial error and recommends ignoring the rule for default interest.[19] Such an interpretation, which makes sense in terms of content, directly conflicts with the legal wording, rendering its acceptance challenging. Further, the constitutionality of such legal provision was challenged. The Constitutional Court concluded that the provision of art. 376 of OZ was consistent with the Constitution.[20] The Court stressed that the legislator holds extensive discretion in shaping economic and social policy. Thus, there is no single *'correct'* legislative solution. The Constitutional Court did not assess whether such a legal arrangement is the most appropriate but found in it sufficient reasons for assessing that it is consistent with the Constitution. The Constitutional Court, therefore, did not, in principle, prohibit the rule for default interest and allowed the legislator to enforce this rule if it deemed that such an arrangement is appropriate. Shortly after

19 Plavšak, 2003, p. 533.

20 Decision of the Constitutional Court of the RS U-I-267/06 of 15 March 2007.

the decision of the Constitutional Court, the OZ was amended.[21] The legislature deemed the inclusion of the rule within the scope of default interest as untenable, thereby proposing an alternative resolution.

The default interest is regulated by a distinct act. After Slovenia achieved independence, the regulations concerning default interest rates have undergone multiple revisions. These were ultimately established following the Euro's introduction with the Statutory Default Interest Rate Act.[22] Currently, the default interest rate is pegged to the benchmark interest rate – specifically the rate employed by the European Central Bank for primary refinancing operations executed prior to the first calendar day of the respective half-year, augmented by eight percentage points.

Increasingly, obligation relationships in the Republic of Slovenia are regulated outside the OZ and are found within individual statutes. This question first arose in the process of approximation of the Republic of Slovenia with the EU when directives in the field of consumer protection had to be properly transposed into the legal order. This transposition commenced in the late 1990s, predating the OZ's adoption in Slovenia. Therefore, the legislator had no real choice. If the rules on consumer protection were to be embedded within the system of general obligations law, ZOR would have to be amended. Instead of amending the regulations from the former country, they were replaced by new ones. As the OZ adoption process was still ongoing, the legislator decided to regulate consumer protection in a distinct statute. In 1998, the Consumer Protection Act was adopted.[23] The subject matter of regulation of this Act spans multiple legal fields, and in a significant part, the subject of regulation is the contractual legal relationship between businesses and consumers (B2C). For the first time, the Act incorporated the definition of *'consumer'* into the legal order and introduced some rules for consumer legal relations that belong to the general part of the law of obligations; but, above all, it regulated some special legal relations, such as product liability, general contractual conditions, special forms of sales,

21 Official Gazette of the Republic of Slovenia, no. 40/07.
22 Official Gazette of the Republic of Slovenia, no. 11/07.
23 Official Gazette of the Republic of Slovenia, no. 20/98.

and some special types of tourist contracts. This gave rise to the challenge of having dual regulations for identical legal relationships. Even minor discrepancies in legal texts can lead to debates over whether such differences necessitate distinct interpretations in individual cases. These discrepancies deepened with subsequent legal changes and additions, and consumer law is increasingly being formed as a distinct legal field. This is exemplified in the regulation of buyer notification statements in cases of latent defects, where three divergent rules are currently applicable. Art. 462(1) of the Civil Code lays down the general rule: for contracts that are not categorised as commercial or consumer, the buyer must inform the seller of a latent defect within eight days from when the defect was noticed. A special rule within the same article for business-to-business contracts (B2B) mandates immediate notification of any defect by the buyer.[24] For consumer contracts, however, art. 84 of the Consumer Protection Act stipulates that the defect must be reported within two months of its discovery. While the appropriate rule can be applied to specific cases by considering the parties' nature, it remains a pertinent question whether such differences are both necessary and justified based on party characteristics. At least from an application perspective, things are straightforward. The Act is considered special regulation in relation to the general rules of the law of obligations.[25] The new text of the Consumer Protection Act applies presently.[26] The general Consumer Protection Act was followed by the Consumer Credit Act, instituting specific regulations for consumer credit. This pertains to loan agreements, credit contracts, and other agreements with comparable economic effect.[27] Although the legislator could potentially have integrated this within the general act, a standalone act was chosen. This act has seen multiple amendments, with its latest iteration currently in force.[28]

24 It is one of the few peculiarities that applies to commercial contracts in the monistic system of the OZ.

25 Judgement of the Administrative Court of the Republic of Slovenia, ref. no. U 978/2005 of 25 April 2007.

26 Official Gazette of the Republic of Slovenia, no. 130/22.

27 Official Gazette of the Republic of Slovenia, no. 70/00.

28 Official Journal of the Republic of Slovenia, nos. 77/16 and 92/21.

In general, we can conclude that the OZ remains largely untouched by the transposition of content from European directives into the Slovenian legal framework, especially when it concerns the regulation of contractual relationships. As a result, numerous sector-specific laws, such as those governing insurance, the financial instruments market, banking, and portfolio management, contain specific provisions detailing the conditions for concluding contracts and their contents. To illustrate, the Insurance Act[29] has a dedicated section on insurance contracts (Arts. 516–531), which defines unique rules for various insurance types and, above all, the special rights of the policyholder. The insurance contract is generally regulated in a special part of the OZ (Arts. 921–989). Application and interpretation challenges arise due to inconsistencies in terminology, as the special Act takes its cue from the language of European directives rather than the established terms used in the OZ. The same applies to some of the more general requirements of European directives that affect the regulation of contractual relationships. A case in point is Directive 2011/7/EU,[30] which has been transposed into the Slovenian legal system by the Act on Prevention of Late Payments (*Zakon o preprečevanju zamud pri plačilih* – ZPreZP-1).[31] However, issues arise with supplementary regulations where the legislator fails to employ established terms and concepts from the OZ, opting instead to paraphrase specific directive texts. This leads to inconsistencies in wording, despite their similar intent and content. For instance, the notion of a '*commercial contract* in the directive aligns with what is considered a commercial contract under art. 13 of OZ in Slovenian law. Yet, the legislator did not adhere to this exact definition in the specific act; it slightly modified the conditions, drawing directly from the Directive's language. The difference between art. 13 of OZ and art. 6 of the special act is trivial, making it challenging to envision someone fitting the economic entity criteria under one regulation but not the other. Therefore, the legislator could

29 Official Gazette of the Republic of Slovenia, no. 93/15.

30 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ L 48, 23.2.2011, p. 1).

31 Official Gazette of the Republic of Slovenia, nos. 57/12 and 61/20 – ZDLGPE.

certainly have acted more wisely if it had used an established concept from the general law in a special law.

The development of the regulation of special rules pertaining to the sale of real estate is interesting. There are two statutes through which the legislator endeavoured to fortify the legal stance of the real estate buyer, typically perceived as the weaker party in the transaction. The Real Estate Agencies Act[32] sets out special rules for the contract between the real estate agent and their client. Compared to the general rules, the agent is bound by certain special obligations that extend beyond merely facilitating contact between the parties. This significantly impacts the legal nature of the relationship, imbuing it with elements reminiscent of a mandate. The special rules are of a mandatory nature, with deviations allowed solely if they manifestly favour the client – a hallmark of consumer protection principles. The agent is obliged to conduct a thorough inspection of the property on behalf of their client and provide a written notice of any deficiencies. Should the agent represent the buyer, they are duty-bound to disclose all relevant attributes of the property they are either aware of or ought to have been aware of based on diligent inspection, as these factors are crucial for the buyer's decision-making process. If acting on behalf of both seller and buyer, the agent is mandated to uphold the interests of both parties and share all the pertinent details as mentioned. Failure to uphold this obligation makes the agent liable for damages.[33] Another such special regulation is the Protection of Buyers of Apartments and Single Occupancy Buildings Act.[34] Special rules apply to the sale of single occupancy buildings and apartments as individual parts of buildings in commonholds. The technique of the Act parallels general consumer protection laws. Individual mechanisms are set as minimum standards of customer protection, and any divergence from these provisions is not permissible. A cornerstone of buyer protection is the prohibition of demanding payment of the purchase price before the occurrence of the comprehensive possibility of fulfilment without special insurance. If a seller seeks a portion of the purchase

32 Official Gazette of the Republic of Slovenia, no. 49/11.
33 See in detail, Juhart, 2015.
34 Official Gazette of the Republic of Slovenia, no. 18/04.

price (barring earnest money payment) before the property handover is feasible, he must provide the buyer with special protection against systemic risks, such as financial inability to complete the construction, non-performance of the contract, and latent material defects. The Act meticulously delineates the obligation surrounding property handovers. An essential element of any sales contract, as per this Act, is the determination of the time limit by which the seller is to hand over the property to the buyer. It is impermissible to circumscribe the handover obligation within a particular span using justifications related to construction, especially when such factors ought to be under the investor's control. Due to the delay in delivery, the buyer is granted an *ex lege* right to liquidated damages. This is an important departure from the general regulation where a contractual penalty is enforceable only the terms have been agreed upon expressly and unequivocally. The provisions regarding liability for defects are also distinctive, blending the rules of sales agreements with those of service contracts.[35]

4.2. PROPERTY LAW

The main legal source of property law is the Law of Property Code (*Stvarnopravni zakonik* – SPZ), which comprehensively regulates the realm of property law, characteristic of civil law codifications. As articulated in art. 1 of SPZ, this Act lays down the fundamental principles of property law, possession and rights *in rem,* as well as the acquisition, transfer, protection, and extinguishment of such rights. Before the SPZ's enactment, property law relationships were primarily governed by ZTLR. Furthermore, for relationships that lacked explicit regulation, the legal rules of the ODZ were observed until the SPZ came into force. In addition, the SPZ also contains fundamental principles and definitions of concepts that, at least in some codifications, typically reside within the general part of civil law.

Structurally, the SPZ is divided into 12 parts, arranged in a logical and systematic sequence. The first two parts, which determine the

35 See in detail, Plavšak, 2004; Juhart, 2023.

fundamental principles and definitions, are followed by the legal regulation of property as a kind of factual relationship with legal consequences, followed by the regulation of individual rights *in rem*. Among the regulation of rights, we also find substantive parts that regulate certain special institutes, such as commonhold and fiduciary assets. In addition to the classic provisions of property law, the SPZ also incorporates some provisions that, in terms of content, pertain to general property and obligations law.[36]

The SPZ was amended twice. The first amendment was adopted in 2013.[37] With it, the land debt as a special type of right *in rem* was abolished. The reason for abolishing the land debt as a special form of non-accessory security *in rem* was primarily political. There were no compelling professional grounds for abolishing the land debt. Even the anomalies cited as a reason for the abuse of the land debt could have been addressed differently within the legal system, rather than by abolishing the institute that allowed the establishment of security *in rem* in some special cases where it was not possible to apply the general rules on the lien on real estate (mortgage) or where these rules offer only limited security options.

The second amendment was adopted in 2020. While its content is more complex, it does not disrupt the fundamental principles and solutions of the Act. Among the noteworthy additions is the regulation of connected real estate (Arts. 127a–127č), which refers to the connection of two standalone properties into a singular legal entity for the time duration of their connection. In the legal relationship of connected real estates, it is the connection of the main and ancillary real estate. Various forms of real estate can serve as either the main or the ancillary real estate. The connected real estate can be a plot of land, an individual part of a building in a commonhold, or a building built based on the right of superficies. The relationship between the main and ancillary real estate is significant, the ancillary real estate is essential for the regular use of the main real estate. The actual connection between the two properties is based on two essential elements: durability and regular

36 See, in more detail, Juhart, 2002, p. 1367.

37 Official Gazette of the Republic of Slovenia, no. 91/13.

use. Both elements must be assessed on a case-by-case basis. The legal relationship of connection is created by the legal transaction of the owner or owners of the main and connected real estate, which only becomes effective upon their entry into the land register. Due to the legal consequences of the connection, the establishment is permissible only if the legal status or encumbrances of both properties allow it. Upon connection, the two properties form a collective entity. Yet, the ancillary real estate retains the legal status of an independent thing and remains the subject of property rights and other rights *in rem*. With the establishment of a connection, only the independent right to dispose of the ancillary real estate ceases, converging with the right to dispose of the main thing. Therefore, together with the property right to the main thing, the property right passes to the ancillary thing. In essence, this means that the owner of the ancillary thing is always the owner of the main thing. The termination of the connection is contingent on the owner's volition, executed through an appropriate legal transaction. The termination can also be requested by creditors. In adjudicating such a motion, the court primarily considers the necessity of the existence of a connection and the legal interest of the creditor and, particularly, the creditor's better repayment possibilities, should the separation of the main and ancillary real estate be re-established.

In addition to the SPZ, another fundamental legal source of property law is the regulation surrounding real estate registration. One of the essential characteristics of property rights is the provision of its publicity. In the case of movable property, this is provided by ownership, whereas for immovable property, real estate records serve this purpose. The basic land record that practically determines real estate is the land cadastre, governed by the Real Estate Cadastre Act (*Zakon o katastru nepremičnin* – ZKN).[38] The land register that serves as the legal record of real estate is based on the cadastre as an actual real estate record. The legal regulation of the land register stems from the Land Register Act,[39] which was adopted after the enforcement of the SPZ and is harmonised with it. The legal regulation of the land register in Slovenia is also

38 Official Gazette of the Republic of Slovenia, no. 54/21.
39 Official Gazette of the Republic of Slovenia, no. 58/03.

based on the Austrian regulation since the land register was introduced at a time when the territory of Slovenia was part of the Austrian state. Presently, the land register is entirely digitised and available online. This modern approach ensures a swift and efficient registration process for real estate transactions in the land register, significantly bolstering the security of such transactions. Consequently, in recent times, legal disputes over issues like multiple real estate sales or legal defects in a sale have become exceedingly rare.

Beyond the general legal sources of property law, specific regulations pertain to particular types of things. While the SPZ addresses the commonhold principle as a general institute, the Housing Act (*Stanovanjski zakon* – SZ-1) provides a specialised regulation for commonholds within multi-apartment buildings.[40] The regulation of commonhold in SPZ is based on the general principles of property freedom. It often leaves the regulation of relations between commonhold owners to their discretion. However, for multi-apartment buildings – where most commonholds are apartments – it becomes essential to occasionally curtail this freedom. This is done to uphold general societal interests. Therefore, a more extensive set of dispositive rules is provided, coming into play when autonomous decision-making falters or when the intent of the commonhold owners is not adequately articulated. Generally, the relationship between the SPZ and SZ-1 can be seen as one between general and special law. It is noteworthy that SZ-1's framework is deeply rooted in the SPZ, with multiple direct references to it. SZ-1 respects the core tenets of the SPZ's approach to commonholds. Any deviations are tailored to address the unique challenges present in multi-apartment contexts. Therefore, SPZ and SZ-1 are not in conflict with each other, but together, they provide a basis for a coordinated and comprehensive regulation of all real-law relationships in housing.

A distinct legal framework is applied to vessels, including ships and aircraft, within many legal systems. These vessels are typically recorded in dedicated registers and are unique, finite entities. Despite their inherent mobility, the rights associated with them closely resemble those tied to real estate. The specifics of legal relationships *in rem*

40 Official Gazette of the Republic of Slovenia, no. 69/03.

on ships are governed by the Maritime Code (*Pomorski zakonik* – PZ),[41] and on airplanes, the Obligations and Real Rights in Air Navigation Act (*Zakon o obligacijskih in stvarnopravnih razmerjih v letalstvu* – ZOSRL).[42]

4.3. INHERITANCE LAW

Inheritance law has seen minimal changes over time. The ZD continues to be the primary general legal source. From its inception, the Act has been influenced by the legal structures of the ABGB, underpinned by three fundamental principles: freedom of testamentary disposition, equality, and universal succession.[43] Above all, the principle of equality in inheritance for all citizens (Art. 4) and, under the condition of reciprocity, also for foreigners (Art. 6) is highlighted. The Act distinctly states that children have equal rights in inheritance, whether born in or outside of wedlock (Art. 4(2)). The Act treats spouses and those in partnerships governed by family law equivalently. As regulations around partnerships in family law have modernised, subsequent impacts have been noted on inheritance matters.

The ZD regulates the system for both intestate and testate succession. Intestate succession follows prescribed orders of succession. Conversely, testate succession allows for free disposal of one's property in the manner and within the limits specified by the Act (Art. 8). The freedom of testamentary disposition is limited by the institute of statutory portion. This provision benefits the deceased's descendants, parents, spouse and, under special conditions, some extended relatives (Art. 25). Forced heirship has the legal status of intestacy. A unique aspect of intestacy is that everything an intestate heir has received in any way as a gift from the decedent shall be included in his or her hereditary portion of the inheritance (Art. 46). Inheritance is initiated by death or a declaration thereof. By law, a deceased person's estate shall be transferred *ex lege* to his or her heirs at the moment of his or her death (Art. 132).

41 Official Gazette of the Republic of Slovenia, no. 62/16.
42 Official Gazette of the Republic of Slovenia, no. 27/11.
43 Zupančič, Žnidaršič Skubic, 2009, p. 39.

The ZD not only regulates substantive legal rules but also regulates the powers of administrative bodies and courts, as well as the decision-making procedures in inheritance law matters. Perhaps one of the advantages of regulating civil law in individual areas is that substantive and procedural rules can be covered in a single statute. In this way, inheritance law emerges as a holistic and comprehensively regulated field of law.

The ZD has been amended thrice: once before Slovenia gained independence[44] and twice post-1991.[45] None of these amendments affected the fundamental principles of the 1976 regulation. The amendments have predominantly modernised the rules in alignment with other civil law codifications, reflecting evolving societal norms. The procedural segment of the law has seen more extensive modernisation than the substantive legal provisions. For instance, certain responsibilities have been delegated to notaries to expedite processes. With the latest amendment, the conditions and method of application of Regulation 650/2012/EU were also ensured.[46]

The same applies to the inheritance of farms. Slovenia has maintained a distinct regulation for the inheritance of agricultural holdings. The previous Act has been superseded by the Inheritance of Agricultural Holdings Act.[47] The new Act mirrors societal evolutions and is more in line with the general legal principles of property law and private property. The purpose of the special arrangement is to sustain the farm as a cohesive economic unit, thereby allowing its proprietor to make a living from agriculture. The intestacy system has been tailored accordingly so that the entirety of the farm is inherited. The farm as a whole shall be taken over by one sole heir, who is selected from among the legal heirs (Art. 7). Meanwhile, other heirs are entitled to a monetary value equivalent to their respective shares (Art. 14).

44 Official Gazette of the Socialist Republic of Slovenia, no. 23/78.

45 Official Gazette of the Republic of Slovenia, nos. 67/01 and 63/16.

46 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

47 Official Gazette of the Republic of Slovenia, no. 70/95.

4.4. FAMILY LAW

We do not expect any significant changes in inheritance law in the near future. The modernisation of rules will likely continue without interfering with the established fundamental principles and conceptual solutions. It is the most stable part of the civil law system.

The Republic of Slovenia adopted its own legislation in the field of family law as early as 1976. While the inheritance law system was influenced by the ABGB, making it analogous to other civil law codifications, the regulation of familial relations was profoundly shaped by socialist political and ideological tenets. Therefore, the ZZZDR paid much attention to gender equality and fully equated marriage and extramarital partnerships between men and women (Art. 12). Therefore, the law did not allow spouses to determine their matrimonial property regime. The legally determined matrimonial property regime, however, determined the community property regime and the assumption that both spouses' shares in the community property are equal. Likewise, the law made no distinction between children born within marriage and those born outside of it, treating them as completely equal (Art. 5). The ZZZDR provided a comprehensive regulation of family law and in addition to marriage and the parent-child relationship, it also regulated adoption, foster care, and guardianship.

The ZZZDR underwent multiple amendments before 1991 and several more post-independence, reflecting the gradual distancing from socialist ideology. These revisions also addressed broader societal and developmental challenges. The first attempt to fundamentally change the family law legislation dates to 2011. Although Parliament approved a new Family Code, it did not enter into force due to opposition from some civil society organisations, which gathered enough signatures to prompt a legislative referendum. The ensuing debate surrounding the Code's adoption was intense, primarily focusing on the contentious issue of equating rights for same-sex couples with those of heterosexual pairs. Proponents and opponents of the Code also differed on what constitutes the best interests of the child and the definition of family. A referendum on the Code was held on 25 March 2012. A referendum on

the Code took place on 25 March 2012, with 45% of voters in favour and 55% opposing it.[48]

In 2015, an amendment to the ZZZDR was adopted, allowing same-sex couples the right to marry. Marriage was defined as a life union between two individuals, as per the law. Opponents of this reform, however, again rallied and gathered signatures to initiate another referendum, which took place on 20 December 2015. The electorate once again rejected the changes to family law: only 36% of voters supported the amendment, while a significant 64% opposed it.

After a failed attempt at a more comprehensive reform and later modernisation of family law, the Civil Union Act was adopted.[49] This Act defined a civil union as a domestic community between two women or two men, with the formalisation, legal ramifications, and dissolution outlined therein. Such union shall have the same legal consequences as marriage in all legal spheres unless otherwise provided by this Act (Art. 2). However, these exceptions notably included prohibitions on joint child adoption and the utilisation of certain biomedical fertility treatments.

The legislator cut through the partial regulation of partnerships with the adoption of the new Family Code.[50] The process of adopting the Code was protracted, incorporating various compromise solutions to address contentious issues that resulted in the rejection of the 2012 Code. Despite initial signals, no legislative referendum was initiated. DZ entirely replaced ZZZDR, but the introduction was gradual. Some changes took effect immediately, and some only after a relatively long adjustment period of two years (Art. 305). The DZ also encompasses the comprehensive regulation of family law and includes the areas of marriage, parent-child relationships, adoption, foster care, and guardianship. Above all, an important novelty was introduced in the field of regulating matrimonial property regime. DZ allows an agreement on the use of the contractual property regime and determines the terms

48 Available at: https://en.wikipedia.org/wiki/2012_Slovenian_Family_Code_referendum (Accessed: 15 September 2024).

49 Official Gazette of the Republic of Slovenia, no. 33/16.

50 Official Gazette of the Republic of Slovenia, no. 15/17.

and content of the contract on the regulation of property relations, which is concluded in the form of a notarial record. Additionally, the DZ infuses family law regulations with softer elements, such as the regulation of mediation, counselling, and involvement of non-governmental organisations in the field of family policy.

In 2022, the Constitutional Court intervened in the ongoing saga concerning the rights of same-sex individuals. It deliberated on a constitutional complaint against a decision by an administrative body that had denied a same-sex couple's application to adopt a child.[51] The Constitutional Court took a broad view of the constitutional complaint and also ruled on the definition of marriage in the DZ (Art. 3). According to the Court, art. 3(1) of DZ was inconsistent with the Constitution in the part where it stated that a marriage is the lifelong union of a husband and wife. In response to the Constitutional Court's decision, the definition in the legal provision was subsequently amended.[52] Now, the DZ defines marriage as a lifelong union of two persons, the conclusion, legal consequences, and dissolution of which shall be governed by this Code. The Constitutional Court did not allow a legislative referendum on this amendment to DZ.[53] With this change, however, the need for a special regulation of same-sex partnership communities disappeared, and therefore, the Civil Union Act was rendered obsolete and ceased to be in effect.

5. CONCLUSION

The question is whether to have a uniform codification of civil law or regulation in separate acts. Undoubtedly, a single codification has its advantages, especially if it follows the established systematics. Such a structure fosters cohesive integration of different fields, allowing for a clearer delineation of shared rules. However, it is also important to acknowledge that this approach is deeply rooted in tradition. Several

51 Decision of the Constitutional Court U-I-91/21-19 of 16 June 2022.
52 Official Gazette of the Republic of Slovenia, no. 5/23.
53 Decision of the Constitutional Court U-I-398/22 of 14 December 2022.

separate acts may mean that some legal relationships would remain unregulated or lead to redundant regulations. More problematic are instances where contradictory provisions arise across different acts, resulting in potential conflicts. In the Republic of Slovenia, such inconsistencies often require judicial interpretation to reconcile them. Yet, separate acts bring their own benefits. They can be tailored with specific rules that would not typically feature in a standardised civil law codification, providing a more holistic treatment of individual fields. This is evident in Slovenia's approach to inheritance law. In essence, asserting one legislative approach as superior to the other in the context of civil law is subjective. It seems unlikely that the Republic of Slovenia will shift towards a singular, unified codification anytime soon. Historical trends suggest that practitioners generally resist alterations that are not confined in scope and disrupt established norms. Even with the partitioned legislative structure, there has been a surge of unique rules in recent years governing civil law relations embedded within other statutes. These sector-specific acts are becoming more foundational, while supplementary provisions are getting increasingly intricate, often deviating from the traditional civil law lexicon.

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THE FRENCH CIVIL CODE AFTER ITS BICENTENARY (2004–2023): CATCHING UP WITH MODERNITY

LUKAS RASS MASSON

ABSTRACT

The French Civil Code, enacted in 1804 as the first major result of early 19th-century codification, has now reached a venerable age and is clearly in need of rejuvenation. The latest phase of this process of rejuvenation began in earnest in 2004, the bicentenary year of the code, under various pressures from forces of social and economic modernisation to influences of European community law, and the international human rights law as well. The modernisation of the code, a constant and perpetually ongoing process, has now resulted in the systematic renewal of its major components, such as the law of persons, family law, and the law of obligations (specifically that of contracts), in a process that ensures the progress of the 'French civil constitution'.

Keywords: *legal reforms, recodification, civil law, foundation of the legal system, dynamic and continuous adaptation.*

1. INTRODUCTION

The French Civil Code has undergone major reforms over the last two decades. This is the result of the influence of not only foreign and

Rass Masson, L. (2024) 'The French Civil Code after its bicentenary (2004–2023): Catching up with modernity' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 367–394. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_14

European legal systems, but also the sociological and cultural evolution of French society. These evolutions have led to a renewed conception of the legal system, of the role of legal sources, and of the judge. Some reforms of the *Code civil* involved mere harmonisation with foreign legal systems. In others, France was *avant-garde* and expresses the modernity of its civil law. This gave rise to the process of recodification of the *Code civil* from 1804. The evolutions cover the general part of civil law, law of persons and family law, as well as law of obligations. Some long-awaited reforms are still necessary, and probably will not be achieved in the near future, whereas others are expected to be adopted soon. These developments reveal that the Civil Code is a living instrument, based on the creative balance between conserving and reforming. The Civil Code is the foundation of the society in France, a monument of the French culture, and the 'civil constitution of France'. The Civil Code is also considered a structuring and dynamic pillar and a legal model of the French nation, with a dynamic future ahead of it.

Napoleon declared,

> *My real glory is not to have won forty battles; Waterloo will erase the memory of so many victories; what nothing will erase, what will live on forever, is my Civil Code*.[1]

Civil law in France is the *Code civil*. Going beyond Napoleon's words, Jean Carbonnier describes the Civil Code as the 'civil constitution of France'.[2] It is a 'lieu de mémoire', a realm of memory, 'through which the presence of the law is guaranteed in the collective memory'.[3]

Therefore, it is no surprise that French society is attached to the Civil Code for emblematic societal questions,[4] as recent family law reforms confirm. The possibility for same-sex partners to conclude a marriage needed the symbolic dimension of being codified in the Civil Code,

1 'Ma vraie gloire n'est pas d'avoir gagné quarante batailles; Waterloo effacera le souvenir de tant de victoires. Ce que rien n'effacera, ce qui vivra éternellement, c'est mon code civil!', Badinter, 2004; Tricoit, 2019, pp. 141–146.

2 Carbonnier, 1986, p. 309.

3 '[P]ar lui seul qu'est assurée la présence du droit dans la mémoire collective'. Ibid.

4 Mazeaud, 2004, pp. 152–159.

not important protests against the reform.[5] One of the major points of concerns was to keep the terms of 'father and mother' and not replace them by the term 'parents' in the Civil Code, in light of the symbolic value of the semantic choices of the Civil Code. Further, when the law created the possibility for a woman alone or a couple of women to use medically assisted procreation while being recognised as legal parents, this possibility also needed incorporation into the Civil Code.[6]

This attachment of the civil society to the Civil Code is quite understandably shared by a large section of French legal scholars as observed from the reactions to the possibility of a European Civil Code supplanting the French Civil Code illustrated in the 2000s.[7] The Civil Code is also a main source of reference for the judges, whose office it is to apply and enforce the law.[8]

The present chapter focuses on the evolution of the French Civil Code after its bicentenary in 2004. Even though the celebrations around the bicentenary of the code praised the Civil Code as a 'monument of French law',[9] the Code was perceived as being largely outdated. Important legal fields were left aside and subject to special rules developed by case law or sectoral legislations not codified in the Civil Code. Technical deficiencies were also identified, especially in the 'Doing Business Reports' of the

5 The Law no. 2013-404 of 17 May 2013 opening marriage to same-sex couples was adopted after large protests that gave rise to the political association *La Manif pour tous* which coordinates associations undertaking demonstrations and actions in opposition to laws enabling same-sex marriage and adoption or use of assisted reproductive technology by same-sex couples in France.

6 Created by Law no. 2021-1017 of 2 August 2021 on bioethics and codified by arts. 342-9 to 342-13 of the Civil Code.

7 Lequette, 2003, pp. 97–126.

8 Hauser, 2005, pp. 139–153.

9 See Catala, Lequette, Audit, 2004; Le Code civil 1804-2004 – Livre du Bicentenaire, 2004.

World Bank[10] that caught the attention of French legal scholars and lawmakers.[11] It was apparent that despite continuous reforms, especially Jean Carbonnier's family law reforms in the 1960s and 1970s,[12] social evolution within the French society made it necessary to adapt the Civil Code to new social and economic realities and trends.

In 2004, the need for Civil Code reform was already clear to maintain the central position of the Civil Code as the main reference of French civil law. The drivers of these reforms were both the internal pressure of adapting the code to contemporary social and economic needs and the external pressure. The latter can be divided into horizontal and vertical pressure. Horizontal pressure resulted from comparing the attractiveness of Civil Code to that of foreign legal systems. Foreign law reforms were perceived as a strong incentive to adapt the French Civil law as well.[13] Vertical pressure is the normative influence exercised by European and international norms, such as the European Convention on Human Rights[14] or the projects of a European Civil Code.[15]

This normative pressure, especially the project of a European Civil Code, led to a strong rejection by important parts of French civil law scholars, which translated, interestingly, into a perceived need to reform the national Civil Code in order to protect it from this external

10 The Report to the President expressly states that 'the "Doing business" reports published by the World Bank, which regularly highlight Common law legal systems, have contributed to developing the image of French law as complex, unpredictable and unattractive. Against this backdrop, a written contract law that is easier to read and predict, especially if it is drafted in a simple style and presented in a clearer and more didactic way, is likely to attract foreign investors and operators wishing to link their contracts to French law'. Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, 2016; NOR: JUSC1522466P; JORF n°0035 11 February 2016.

11 Canivet, 2018, pp. 31–51.

12 Cornu, 2018, pp. 51–55.

13 According to Fauvarque-Cosson, 2008, pp. 45–51; Witz, 2006; Dunand, Winiger, 2005; Sonnenberger, 2004, pp. 127–130.

14 See Rass-Masson, 2023, pp. 153–165.

15 See Schmidt-Kessel, 2012; von Bar, 2000, p. 1; von Bar, 2001, p. 127; Wurmnest, 2003, p. 714; Riedl, 2004; McGuire, 2006, p. 163; Schulte-Nölke, 2009, p. 9.

pressure.[16] The need to conserve the main national characteristics of civil law therefore expanded to the need to reform the Civil Code.

This tension between conserving and reforming is still emblematic of the living nature of the French Civil Code. The last two decades illustrate the ongoing process of recodification of civil law in France via systemic reforms and sectoral reforms. Actors of this process of recodification are the judges interpreting the Civil Code and its relationship with other legal sources, including the Constitution and international and European law, the government, and within the governmental bodies, the *Commission supérieure de la codification*,[17] and the legislator, even though he frequently intervenes in strong collaboration with the government.[18]

All parts of the Civil Code have undergone deep legal changes within the last two decades. The general part of the Civil Code, which is brief and therefore largely subject to case law, has been transformed through new judicial interpretations, without a dedicated legislative reform. Law of persons and family law, as well as law of property, law of obligations, and law on securities, were part of decisive legal reforms, sometimes via reforms that were complete recodifications of the entire legal field. These realised reforms are accompanied by ongoing reforms that are still expected and projected, such as the reform of law on non-contractual obligations.[19] For reforms that are still to come, it remains to be seen whether they will be systemic, in order to respect the general philosophy of codification of civil law, or whether they will be sectoral and fragmented, risking the loss of coherence of the Civil Code.

This coherence of the Civil Code can be seen in the combination of the foundational element of a general methodology and a common framework for French civil law, based on the content and the interpretation of

16 In the context of contract law, see Fauvarque-Cosson, Wicker, 2019.

17 See the description of the competences of the Superior Commission for Codification [Online]. Available at: https://www.gouvernement.fr/commission-superieure-de-codification (Accessed: 15 September 2024).

18 Reforms are often taken via *ordonnances*, i.e., governmental decrees for which the government receives special permission by the parliament; in addition, bills passed by the parliament are mostly on bills sponsored by the gorvernment.

19 See Borghetti, Whittaker, 2019.

the Civil Code, and the pillars constituted by essential substantive principles, such as individual freedom, equality, and private property.

The evolutions undergone by the French Civil Code since 2004 demonstrate that the Civil Code still is, first, the 'civil constitution of France'[20] and, second, the foundation of the French civil legal order.

2. THE CIVIL CODE, 'CONSTITUTION CIVILE DE LA FRANCE'

As the 'civil constitution of France', the French Civil Code provides the main foundations and pillars of French society since this society is based on the respect of legality and the rule of law. The evolutions of the last 20 years prove that the civil code is an evolving and dynamic instrument, whose content is constantly adapted to the needs and prevailing trends of civil and legal society. This is confirmed by the changes brought to the two first parts of the Civil Code. The general part of the Civil Code provides the main characteristics of the understanding and operation of Civil Law in France. Even though the articles of the Preliminary Title on 'the publication, effects, and application of legislation in general'[21] have remained unchanged, except for the introduction of two new articles related to general principles of family law,[22] the legal sense of the articles has fundamentally evolved, mainly through evolutions in the judicial interpretation of these articles. Law of persons and family law, enounced in Book I of the Civil Code on 'Of the Persons', were subject to major social evolutions that called for legislative reform and led to important reforms of the Civil Code.

20 Carbonnier, 1986, p. 309.

21 Translations are taken from Gruning, Levasseur, Trahan, Roy, 2016; see also Séjean, 2020.

22 Arts. 6-1 and 6-2 reaffirm the principle of equality of marriage and adoption for same-sex and opposite sex marriages and the principle of equal treatment of children regardless of the ways in which parenthood is established.

2.1. LEGISLATIVE REVOLUTION WITHOUT LEGISLATIVE REFORM: THE GENERAL PART OF THE CODE CIVIL

The extreme conciseness of the Preliminary Title that forms the general part of the French Civil Code makes it possible to analyse the changes made to each article. If art. 1[23] was updated in 2004 in order to harmonise the enforcement of new statutes and administrative acts within the French territory, in light of the possibility of publishing the official journal electronically, the changes brought to the question of enforcement are minor and do not affect the overall understanding of civil law in France.

Art. 2 on the temporal scope of application of legal rules, which remained unchanged, on the contrary, was subject to new interpretations that reveal a fundamental renewal of the relationship between the legislator and judges. The article states that 'legislation provides only for the future; it has no retroactive effect'. Since the absence of retroactivity was established at the legislative level, the Court of Cassation traditionally accepted that the Parliament could derogate from art. 2 of the Civil code and provide for the retroactive effect of a statute if this was explicitly provided for by the law. This was justified, in continuation with Montesquieu's vision of the judge as the *'mouth of the law'*,[24] by the separation of powers[25] and the prohibition on judges to interfere with the exercise of legislative power.[26] Just 200 years after the enforce-

23 Art. 1 of the Civil Code:
Statutes and administrative acts, when the latter are published in the Journal officiel de la République française, take effect on the date they specify or, if none is specified, on the day following the date of their publication.
Nevertheless, if the enforcement of some provisions of such acts requires an additional enactment, the effective date of the enforcement of these provisions is deferred to the effective date of the additional enactment.
In case of an emergency, statutes whose decree of promulgation so declares and administrative acts for which the Government so orders by special provision shall enter into force immediately upon their publication.
The provisions of this Article do not apply to acts applicable to individuals.

24 Montesquieu, 1979.

25 Sauvé, 2011.

26 Cornu, 2007, pp. 198–199.

ment of the Civil Code, the Court of Cassation broke this decisive *equilibrium* between the legislative and judicial power, strongly influenced by European law, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms. A highly remarked ruling of the Plenary Assembly decided on 23 January 2004 that the judge has to control over whether the retroactive effect of the new law is justified by sufficiently compelling grounds of general interest, regardless of the formal characterisation of the law as interpretative law.[27] The result is an entirely renewed understanding of the determination of the temporal scope of application of laws, despite the absence of reform of art. 2 of the Civil Code.

The evolution related to art. 3 of the Civil Code,[28] laying down the main principles under which almost the entire French private international law system was construed, more understandably took place outside of the Civil Code. It is a long-established fact that art. 3 is insufficient for providing suitably precise rules on conflict of laws. Therefore, traditional French private international law is considered largely shaped by case law, influenced by leading decisions of the Court of Cassation.[29] The major changes affecting private international law over the

27 Cass., ass. plén., 23 janv. 2004, n° 03-13.617, D. 2004. 1108, note by Gautier; *ibid.* 2005, 1090, observations by Rozès; Just. & cass. 2005, 290, note by Canivet; AJDI 2004, 201, observations by Blatter; *ibid.* 175, study by Lassner; RFDA 2004, 224, note by Mathieu; RTD civ. 2004, 341, observations by Théry; *ibid.* 371, observations by Raynard; *ibid.* 598, observations by Deumier; *ibid.* 603, observations by Deumier; RTD com. 2004, 74, observations by Monéger; R., pp. 199 and 429; BICC 15 mars 2004, report by Favre, conclusions by de Gouttes; JCP 2004, II. 10030, note by Billiau; JCP E 2004, 514, note by Monéger; Defrénois, 2004, 525, observations by Ruet; LPA 28 avr. 2005, note by Mecarelli; *ibid.* 22 juill. 2005, note by Chassagnard; RDC 2004, 699, observations by Lardeux; *ibid.* 791, observations by Marais; RJS 2004, Chron. 343, as per Prétot.

28 Art. 3 of the Civil Code:
Statutes concerning public policy and safety are binding on all those living on the territory.
French law governs immovables, even those possessed by aliens.
Statutes concerning the status and capacity of persons govern French citizens even those residing in a foreign country.

29 The strongest illustration hereof is the importance of the *Grands arrêts* (the 'Great Rulings') on private international law, Ancel, Lequette, 2006.

past two decades, mainly due to the Europeanisation of large parts of this legal field, necessarily lead to an even stronger marginalisation of the practical relevance of art. 3 of the Civil Code. There is no doubt that contemporary French private international law has little in common with what it was like in 2004.

Arts. 4 and 5 have undergone a similar process of revolution without a legislative modification of their wording. Art. 4 enounces, 'A judge who refuses to give judgement on the pretext of legislation being silent, obscure, or insufficient may be prosecuted for being guilty of a denial of justice'. It affirms the fundamental principle that every conflict affecting French society has to be resolved by the French judge if the dispute is brought to him. This idea of universal access to justice is a direct consequence of French revolutionary principles inspired by the philosophy of the Enlightenment. Art. 5 counterbalances Art. 4 by affirming that 'in the cases that are referred to them, judges are forbidden to pronounce judgement by way of general and regulatory dispositions'. The consequence is a formal prohibition for French judges to edict general rules. There is no binding nature of precedent in the French legal system. Traditionally, French civil law scholars therefore considered case law as no formal source of law, that is, a ruling cannot constitute the basis for a subjective right or entitlement. This traditional acceptance of the role of the judge has been increasingly contested over the past two decades,[30] to such a point that the position has been reversed, and it is now accepted that case law forms a source of law.[31] The Plenary Assembly affirms that a reversal of case law produces a change of a legal norm, and that it is part of the duties of the judge to apply the new norm that is the result of such a reversal.[32] This acceptance of the normative power of the judiciary is a profound revolution of the understanding of the role of the judge in relation to the legislator.

In comparison, the evolution of the interpretation of art. 6 of the Civil Code, even though highly significant, seems a tranquil process. Art. 6

30 Molfessis, 2008, pp. 87–100.

31 Gaudemet, 2022, pp. 791–798.

32 Ass. plén., 2 avril 2021, n° 19-18.814; D 2021, 1164; AJ fam. 2021. 312, note by Houssier; D Actu. 9 avr. 2021, note by Hélaine; JCP S 2021, 1143, note by Asquinazi-Bailleux; B. HAFTEL, D. 2021, 1164.

states that 'one may not by private agreement derogate from laws that concern public order and good morals' and enounces the general principle pursuant to which public policy and good morals must be respected by contracts, agreements, and individual commitments. Judges have endorsed a thoroughly liberal interpretation of the article that authors were wondering whether good morals were still part of what needs to be protected by art. 6, with the concept of *'respect of dignity'* as part of public order replacing the reference to *'good morals'*, which are considered a reference to outdated moral principles.[33]

It is apparent from these changes in the interpretation of the general part of the Civil Code that the role of the judge has been massively renewed in French Civil Law over the last two decades[34] despite the lack of legislative reform on the matter. The introduction to the preliminary title of two new articles 6-1 and 6-2 dedicated to the principle of equality in family law, for marriage and for filiation, underlines that the attention of the law maker was directed towards sectoral reforms of the Civil Code, driven by considerations specific to the reformed legal field, but without considering the overall foundations of civil law. In the context of translating social revolutions into the Civil Code, the law of persons and family has clearly demonstrated that the *Code civil* remains the central legal reference within French society.

2.2. SOCIAL REVOLUTION CALLING FOR LEGISLATIVE REFORM: LAW OF PERSONS AND FAMILY LAW

The constant renewal of law of persons and family law confirms that the legal instrument defining the essential principles on which social life is based within French society is the Civil Code. Art. 16 of the Civil Code is particularly meaningful of the ethical dimension of the Civil Code, as it enounces that 'legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity, and guarantees respect for the human being from the outset of his life'. Respect for human dignity,

33 Charlin, 2014; Lavaud-Legendre, 2005.

34 See Mission de recherche Droit et Justice, no date.

which is not expressly stated in the French constitution, thus finds in the *Code civil* a particularly strong consecration.

Beyond this fundamental principle of respecting human dignity, the Civil Code also affirms essential principles in relation to ethical considerations around the existence and protection of human life. Created by a legislative package including the first law on bioethics in 1994,[35] the rules on how to deal with the human body are specified in the Civil Code and remain a field of constant attention of the law maker in light of the technological evolutions made in the field. Among the most relevant modifications, Art. 16-1-1 of the Civil Code provides this since 2008[36]:

The respect owed to the human body does not end with death.

The remains of a deceased person, including the ashes of one whose body has been cremated, must be treated with respect, dignity, and decency.

This very detailed approach with regard to bioethical considerations even extends to defining conditions under which brain imaging technologies can be authorised under French law, especially focusing on the type of consent that needs to be given and the intended purpose of the intervention.[37]

It is unsurprising that the 2021 Law on Bioethics[38] made significant changes to several articles of the chapters of the Civil Code dedicated to *'Respect for the Human Body'*[39] and *'Examination of Genetic Characteristics of a Person and the Identification of a Person by Genetic Markers'*,[40] confirming

35 Law no. 94-653 of 29 July 1994 on respect for the human body (*Journal officiel de la République française, Lois et Décrets*, 30 July 1994, no. 175, p. 11056-11059).

36 Law no. 2008-1350 of 19 December 2008 on funerary legislation.

37 Art. 16-4 of the Civil Code affirms as follows:
Brain imaging technology can be resorted to only for medical purposes or scientific research, or within the scope of a court-ordered expert examination, with the exception of functional cerebral imaging. The express consent of the person must be obtained in writing before the examination is conducted, after the person has been duly informed of its nature and its purpose. The consent shall specify the purpose of the examination. It can be revoked without formality and at any time.

38 Law no. 2021-1017 of 2 August 2021 on bioethics.

39 Chapter II of Book I of the Civil Code.

40 Chapter III of Book I of the Civil Code.

that the Civil Code is the receptacle of the essential social values of the French society in relation to respect for human dignity as the foundation of the French legal system.

When analysing the changes brought to the Civil Code in the context of family law, the symbolic dimension of the Civil Code as the foundation of civil society in France is even stronger. There is almost no domain in the context of family law in which there have not been significant changes as a response to the evolved perception of societal questions.

The year 2005 marks the starting point of these law reforms that completely revolutionised the Civil Code on family law matters. Legal rules defining filiation were entirely reconsidered in a systematic reform[41] based on the guiding principle that 'all children whose filiation is lawfully established have the same rights and the same duties in their relations with their father and mother. They enter into the family of each of them'.[42] The 2005 reform thus abolished the distinction between *'legitimate'* and *'natural'* children, following a clearly perceptible sociological trend where children in France were and are born when the parents are not married.[43] Remarkably, this principle has been shifted in 2021 from the part of the Civil Code dedicated to family law to the general part, enounced in the preliminary title of the *Code civil*.[44]

Further, the overall framework has remained stable since 2005; the 2021 law on bioethics introduced in France led to the possibility of assisted reproduction for women on an individual basis, or couples of women, irrespective of their legal status.[45] This possibility, which constitutes clearly a profound renewal of the conception of parenthood and the relationship between the State and the use of medically assisted reproduction, led to the introduction of rules specifying how to

41 Ordonnance n° 2005-759 du 4 juillet 2005 portant réforme de la filiation.

42 Art. 310 of the Civil Code in the version adopted in 2005.

43 In 2021, 63.5% of children born alive were born out of wedlock (INSEE, 'Naissances hors marriage, Données annuelles de 1994 à 2021', 18 January 2022).

44 Art. 6-1 of the Civil Code, created by Law no. 2021-1017 of 2 August 2021 on bioethics.

45 Law no. 2021-1017 of 2 August 2021 regarding bioethics; see Giovannini, 2022, p. ebac011.

establish filiation in these situations. Art. 342-10 of the Civil Code now provides as follows:

> *Couples of women, or the unmarried woman, who, in order to procreate, have recourse to medical assistance requiring the intervention of a third-party donor must give their consent beforehand to a notary, who will inform them of the consequences of their act with regard to filiation as well as the conditions under which the child will be able, if he or she so wishes, to access the non-identifying data and the identity of this third-party donor when he or she reaches the age of majority.*

Art. 342-11 further enounces:

> *When the consent provided for in article 342-10 is obtained, the couple jointly acknowledges the child.*
>
> *Parentage is established, in respect of the woman who gives birth, in accordance with article 311-25.*[46] *It is established in respect of the other woman by the joint acknowledgement provided for in the first paragraph of this article. This acknowledgement is given by one of the two women or, where applicable, by the person responsible for declaring the birth to the civil registrar, who records it in the birth certificate.*

It is thus evident that the *Code civil* is still the main legal instrument in which societal evolution finds a legal translation and which codifies and enounces the main and foundational values of French society on the most relevant principles of social life. This observation is confirmed by the evolution brought to the concept of marriage. The adherence to principles of pluralism and liberalism has become an evident marker of French society and finds confirmation in the law reforms brought to the possibility of same-sex marriages and divorce without a judge, both reforms attracting a strong public attention, for the former at a very

46 Under which 'filiation is established, with respect to the mother, by the designation of the latter in the act of birth'.

large scale[47] and for the latter more limited to the community of jurists and legal scholars.[48] Art. 143 of the Civil Code affirms that 'marriage is contracted by two persons of different sex or of the same sex', and the above-mentioned Art. 6-1, created by the law opening marriage to same-sex couples,[49] specifies that the principle of equality of marriage and of filiation applies regardless of 'whether the spouses or parents are of different or the same sex'.

A similarly important evolutionary reform was undertaken for divorce in 2016, when the possibility of a private divorce, without the intervention of the judge, was introduced in Civil Code 229-1, which now enounces,

> *When the spouses agree on the breakdown of the marriage and its effects, they record, each assisted by a lawyer, their agreement in an agreement in the form of a private deed countersigned by their lawyers*[...].
>
> *This agreement is filed with a notary, who checks that the formal requirements have been complied with [and] also ensures that the draft agreement has not been signed before the expiry of the stipulated reflection period*[...].
>
> *This filing gives effect to the agreement by conferring on it a definite date and enforceability.*

Consequently, divorce does not require the systematic intervention of a judge anymore, but can be a private divorce, assisted by lawyers and registered by notaries. This constitutes an evident revolution in relation to the institutional dimension of marriage, pursuant to which the

47 The Law no. 2013-404 of 17 May 2013 on the marriage of couples of same-sex persons was adopted after wide-scale demonstrations against this law, which gave rise to the political association *La Manif pour tous.* This association coordinated with other such bodies undertaking demonstrations and actions in opposition to laws enabling same-sex marriage and adoption or use of assisted reproductive technology by same-sex couples in France.

48 See Maria, 2020, pp. 87–96; Fautre-Robin, Beranger, 2017, 1/11; Fulchiron, 2016, 1267; Casey, 2016; Brenner, 2017, 262.

49 Law no. 2013-404 of 17 May 2013 on the marriage of couples of same-sex persons.

marriage, as official and public act, can only be dissolved under the control of the judge.

In terms of the parent-child relationship, the Civil Code has been very sensitive to social evolutions as well. In 2022,[50] reforms were undertaken in order to facilitate adoption by broadening the conditions of access through a series of new measures. The most significant among these are the opening up of adoption to all couples. Prior to the reform, adoption was open only to single persons or married couples. The law's key measure is that it is now also open to civil partnerships (Civil Solidarity Pact / *pacte civil de solidarité - PACS*) and cohabitants or de facto relationships.[51] The minimum age for adoption has also been lowered from 28 to 26, and the minimum period of cohabitation has been reduced from 2 years to 1 year.[52] Full adoption of children[53] over the age of 15 is possible up to the age of 21 if the child is the child of one of the members of the couple, a ward of the State, or a child who has been abandoned late in life.[54]

As a final illustration, rules on parental responsibility, still referred to as *'parental authority'* (*'autorité parentale'*) by Title 9 of Book I of the Civil Code, have been updated in 2019 in order to fight against domestic violence,[55] by specifying that *'parental authority is exercised without physical or psychological violence'*[56] and by introducing a series of measures allowing the judge to consider the exercised violence or the risk hereof when deciding matters of parental responsibility, including by issuing protective orders.[57] This segmented adaptation of rules on parental responsibility, although demonstrating a profound change of the way in which parental responsibility is perceived, underlines the need

50 By the Law of 21 February 2022 reforming adoption and the order of 5 October 2022.

51 Art. 343, para. 1 of the Civil Code.

52 Art. 343, para. 2 of the Civil Code.

53 *Adoption plénière*, which breaks the parent-child relationship with the family of origin.

54 Art. 345 of the Civil Code.

55 Loi n° 2019-721 du 10 juillet 2019 relative à l'interdiction des violences éducatives ordinaires.

56 Art. 371-1, para. 3 of the Civil Code.

57 Arts. 515-9 to 515-13 of the Civil Code.

for systematic reform, including the shift from parental authority to parental responsibility and reorganising the different rules on parental responsibility that are, to a certain extent, a patchwork of successive reforms without overall coherence.[58]

The recent evolution of the Civil Code in terms of general rules of civil law and law of persons and family law confirms that, in 2023 as in 1804, this Code is the *'civil constitution of France'*. It is a living instrument that holds a strong symbolic value for social evolutions, and the claims for reforms on societal questions include the claims for changes brought to the *Code civil*. Since French society has experienced rapid changes on many sensitive societal revendications, such as same-sex marriage, adoption and assisted reproduction for couples regardless of their marital status and sex difference between the parents, the principle of equality of filiation, and the end of life and death, the Civil Code has been and will be a major focus of attention of French society. However, beyond this foundation of a social order, based on common values enshrined in the rules of the Civil Code, the code also illustrates that the prospect of finding a legal solution to economic operations is among the fundamental values of private relationships in France. The code thus also confirms that social life in France is based on a civil order in which civil law provides the fundamental structure of property, transactions, and operations of exchange.

2.2. THE CIVIL CODE: FOUNDATION OF THE CIVIL ORDER IN FRANCE

The Civil Code is the fundamental instrument of a *'civil order'*, understood as the principle pursuant to which every social relationship receives legal signification. Social relationships are therefore shaped by the existence of a legal system applicable to all private relationships. This explains why the main principles and rules applicable to exchanges within the society are defined by the Civil Code. In this context, although the *Code civil* was able to keep pace and adapt to some of

58 Charles, 2018, pp. 45–58.

the main evolving economic needs (2.1), some important reforms are still expected and prepared, and their adoption would be necessary to fulfil the process of recodification of French civil law (2.2).

2.3. CATCHING UP WITH EVOLVING ECONOMIC NEEDS: THE REWRITING OF THE CODE CIVIL

The celebrations of the bicentenary of the Civil Code raised concerns about the modernity of the code, particularly regarding the state of the law governing contracts and extra-contractual liability.[59] The fear was that French law would be left behind by legal developments widely accepted by other European codifications, such as the reform of the German Civil Code in 2002,[60] and by common law, to such an extent that French law would be less adapted and attractive to the needs of business.[61] The first attempt to put forward a draft reform was the work done almost completely by academic lawyers under the leadership of Professor Pierre Catala, but with the general support of the French government, and published as the *'Avant-projet de réforme du droit des obligations et de la prescription'* in 2005.[62] This work was followed by a series of alternative drafts by another group of academics under the chairmanship of Professor François Terré,[63] and by the Ministry itself.[64] The French Government was finally given authority by Parliament to reform the Civil Code's provisions on contract law and certain related

59 See the contributions in Catala, Lequette, Audit, 2004; Le Code civil 1804-2004, 2004.

60 Allen, 2017.

61 Société de législation compare, 2006; See also Bienenstock, 2019, pp. 205–234.

62 Avant-projet de réforme du droit des obligations et du droit de la prescription, 2005; on this project, see Cartwright, Vogenauer, Whittaker, 2009.

63 For a reform of contract law, see Terré, 2009; for a reform of civil liability law, see Terré, 2011; for a reform of the general regime of obligations, see Terré, 2013.

64 2008 for contract law, 2011 for the general regime of legal obligations and proof of obligations.

areas by *ordonnance,* that is, government decree.[65] A draft law concerning contract, proof, and obligations in general was published in February 2015, and on 10 February 2016, the final form of the *Ordonnance* was enacted on 1st October 2016, reforming the provisions of the Civil Code on the law of contract, the general regime of obligations, and proof of obligations.[66]

This major reform endorses the systemic approach of codification under many aspects. It covers ancillary matters, such as the question of proof of obligations, in order to embrace the required elements not only for having an abstract right under the law of obligations, but also for having a concrete individual claim that will be recognised by courts and constitute the basis for identifying the material consequences that the legal obligation will produce. The reform also focuses on providing the main concepts for legal discourse on law of obligations, in order to ensure that legal argumentation will be conducted to shared, clearly defined, and predictable terminology and concepts. Therefore, the expected legal outcomes become more precise and foreseeable to economic operators, in whatever capacity they conduct the operation.

The reform restructures the part of the Civil Code dedicated to the law of contracts such that the overall coherence of the legal field becomes apparent, and the code an excellent tool to understand French contracts law. Remarkably, after having defined '*obligations*' and '*juridical acts*',[67] the reformed Code starts by defining the concept of contract and directly afterwards lays down, in a hierarchical manner, the general principles and objectives pursued by contract law.

Art. 1101 enounces that 'a contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations'. Art. 1102 consecrates the principle of party autonomy and contractual freedom, while introducing the need to respect rules that

65 By arts. 8 and 27 of Loi n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures.

66 Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, ratified by art. 1 of Loi n° 2018-287 du 20 avril 2018.

67 Arts. 1100 and 1100-1 of the Civil Code.

are an expression of public policy.[68] Art. 1103, in enouncing that 'contracts which are lawfully formed have the binding force of legislation for those who have made them' formulates the principle of *pacta sunt servanda*. Further, Art. 1104 introduces the principle of good faith, applicable to the negotiation, formation, and performance of the contract.[69] Art. 1105 constitutes the transition from general provisions dedicated to the pursued policy objectives to the technical part of the Code, in identifying the relationship between general contract law and particular rules applicable to specific contracts. The Civil Code continues later with the main definitions and rules applicable to the different aspects of the contractual relationship.[70]

The reform did not limit itself to reorganising the applicable rules in order to make them clearer and more accessible. It also made major changes to the role of the judge, underlining that the modernisation of contract law was not only a formal modernisation, but also a substantive and to a certain extent, institutional modernisation. The power of the judge was strongly reinforced,[71] and the possibility of unilaterally adapting the contract or to dissolving it has been expressly recognised by the new Civil Code.[72] It appears that the economic analysis of law plays an increasingly important role within the French legal system, under the supervision of a judge who can actively intervene in the determination and restoration of contractual justice.[73]

The 2016 reform did not mark the end of the process of reform of the Civil Code in the context of the law of obligations. The main confirmation of this ongoing process of recodification of the Civil Code is the 2021

68 'Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. Contractual freedom does not allow derogation from rules which are an expression of public policy'.

69 'Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy'.

70 Arts. 1106 to 1111-1 of the Civil Code.

71 Revet, 2016, p. 373.

72 Art. 1195 of the Civil Code.

73 Canivet, 2018, pp. 31–51.

reform on securities and guarantees.[74] This reform aims to modernise and unify the system of securities, particularly by bringing together the rules of securities law, which are dispersed in various codes and laws, within the Civil Code, confirming the central importance of the Civil Code for the French legal system. The reform also strengthens the effectiveness of the law on securities, while finding a renewed balance between the interests of creditors and those of debtors and guarantors. While reforming many securities,[75] the *ordonnance* repeals certain special securities that have become obsolete or outdated.[76] A major aspect of the reform is the renewal of rules applicable to the surety bond (*'cautionnement'*) regime.[77] This reform confirms that the French legislator and government are together continuously aiming to simplify and modernise the Civil Code, with a double focus on both ensuring the consistency of the rules as part of one codified, coherent, and unified system, and proposing solutions that are of high practical and concrete importance, insisting on the methodical realisation of the law.[78]

This continued monitoring of the adequacy of the Civil Code to suit current social and economic needs is ongoing, and civil recodification in France still needs to be completed as illustrated by the projected and outstanding legal reforms.

2.4. OUTSTANDING NECESSARY REFORMS: PROCESSING 'CIVIL RECODIFICATION IN FRANCE'

The Civil Code is considered outdated in many other legal fields as well; therefore, it does not adequately reflect positive French civil law, since

74 Ordinance no. 2021-1192 of 15 September 2021 reforming the law of securities; adopted by the government based on the power granted to it by a law adopted on 22 May 2019, known as the 'loi PACTE'.

75 Mainly surety bond ('cautionnement'), movable privileges, common law pledges, pledges of receivables, retention of title, pledges of securities accounts, and guarantees on business assets.

76 As provided for in the Commercial Code, such as commercial pledges, stock pledges, and oil warrants.

77 Simler, 2021, pp. 9–11.

78 Motulsky, 2002.

specific legislation outside of the Civil Code or case law have produced new solutions that implicitly replaced or supplanted the provisions of the Civil Code. In these fields, the Code is still lagging with some major expected reforms.

Some of them are well-identified ongoing sea serpents, such as the reform of tort law or the codification of private international law. Regarding the question of civil liability, identified as a major concern in the economic attractiveness of the French legal system,[79] the above-mentioned project Catala and project Terré included proposals for reforming civil liability, which were not included in the 2016 reform. Therefore, a logical second step of the French civil law modernisation would be a reform of rules on civil liability. On 21 April 2016, the French Ministry of Justice published a preliminary draft of the civil liability reform,[80] which led to a draft parliamentary bill in March 2017 for the reform of *'civil liability'*, putting together for this purpose liability for contractual non-performance and the general grounds of *'extra-contractual liability'*.[81] The draft bill is a compromise between the earlier Catala and Terré proposals and was welcomed well in legal literature. Civil liability law in France is increasingly inaccessible and hard to understand due to its dispersion. As civil liability law is based on few articles unchanged since the codification of 1804, supplemented by case law, reform is necessary to modernise and clarify principles relating to civil liability.[82] However, if the draft bill was proposed to be adopted by the Parliament, this has not happened, and the legislative proposal has expired.[83]

A similar situation of the reform process being blocked, if not coming to a dead end, concerns the codification of private international law. In July 2018, the French Minister of Justice invited Jean-Pierre Ancel, a former judge of the *Cour de cassation,* to establish a working group for reflecting on the codification of French private international law,

79 See, in particular, L'attractivité de la responsabilité civile : le groupe de travail rend son rapport, 2022.

80 Subject to a three-month public consultation period.

81 Borghetti, Whittaker, 2019.

82 Jourdain, 2021, pp. 277–282.

83 On this proposal, see Cerqueira, Monteillet, 2021.

and this working group handed its work to the Ministry of Justice in March 2022, including a draft code of private international law of 207 provisions and an explanatory report. The reception of the draft has been lukewarm, with a series of critical voices, some considering the idea of a national code in times of Europeanisation of private international law outdated,[84] others being opposed to codification of private international law in general, due to the strong influence of case law on the matter in France.[85] Even though there is continuous scientific interest in the project of codification,[86] the project has not been submitted to the competent authorities for the continuation of the legislative process.

Other reforms are already clearly abandoned, with little prospects of reform in the near future. A significant example hereof is the failed reform of property law, prepared at the initiative and under the auspices and initiative of the Association Henri Capitant.[87] In 2006, the Association set up a working group to consider reforming property law, and a proposal for reforming Book 11 of the Civil Code (on property law) was submitted to the Ministry of Justice towards the end of October 2008. Even though the draft took account of various comments and reactions, improving the initial text in May 2009, the reform has not been adopted by the Parliament.

However, other reforms seem well on track, such as the reform of French law of specific contracts. The draft bill represents a major piece of modernisation of the French Civil Code. After an initial draft bill in 2017,[88] and a revised version submitted to the French Ministry of Justice in March 2020 by another working group,[89] in April 2020, a new working group was set up by the Ministry of Justice, chaired by Professor

84 Lagarde, 2022, pp. 515–520.

85 Presenting the debate, Watt, Bureau, Corneloup, 2022, pp. 473–476.

86 See La codification du droit international privé français à l'heure européenne, 2023.

87 Perinet-Marquet, 2009.

88 Prepared by the Henri Capitant Association and a working group it created on the subject in 2013.

89 See Association Henri Capitant des amis de la culture juridique française, 2020; and in particular see Association Henri Capitant des amis de la culture juridique française, 2021.

Stoffel-Munck. The commission published the preliminary draft reform in July 2022.[90] This reform could be adopted in the near future.

A major actor in this process of ongoing recodification of the Civil Code is the *Commission supérieure de codification*. This '*Superior Commission for Codification*' reports to the prime minister, as successor, since 1989, of the *Commission supérieure de précodification*, which had been set up in 1948.[91] The *Commission supérieure de codification* is chaired symbolically by the prime minister, and effectively by the vice-president (Bernard Stirn at the time of writing). It plans codification work and, through its opinions and annual public report, establishes the methodology for drafting codes by issuing general guidelines. It leads and coordinates the work of the ministerial departments responsible for drafting new codes. The *Commission supérieure de codification* is consulted for all systematic reforms of codes and can be seized for draft texts amending existing codes. The annual reports of the Commission are a valuable element for measuring the vitality and methodology of codification in France.[92]

These different reforms of the Civil code that are still expected confirm the awareness of the need to constantly adapt the *Code civil* and to identify it not only as a monument of French law that needs to be conserved, but as a foundation of French society that needs to be dynamically rethought.

3. CONCLUSION: THE CODE CIVIL AS A LIVING INSTRUMENT

Analysing the evolution of the *Code civil* over the last two decades has made it evident that the Civil Code is a living instrument, based on the creative balance between conserving and reforming. This balance is implemented by the interplay among the legislator, government and experts appointed by it, the judges, and practitioners. The *Code civil* thus is not just a text. It is a method at the heart of the understanding and

90 Cerqueira, Monteillet, 2023; Bucher, Daillant, 2023.

91 By Decree no. 48-800 of 10 May 1948.

92 See the Rapports annuels de la Commission supérieure de codification.

operation of civil law in France. It is the promise of a national society based on respecting legal expectations, which in turn are respectful of fundamental social values. The last twenty years confirm that the Civil Code has been the foundation of society in France. It is also the structuring and dynamic pillar of the French nation, a legal model. In this sense, the place of the *Code civil* in the French legal system considering its recent evolutions gives the impression that the Code still has a bright future ahead of it: *longue vie au Code civil des Français,*[93] and long live the codification of civil law!

93 'Long live the French Civil Code'.

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ON UNITY IN THE AGE OF DIVERSITY: THE MONISTIC APPROACH OF ROMANIAN CIVIL CODE

RADU RIZOIU

ABSTRACT

The Romanian Civil Code, first enacted in 1864, and subject to substantive recodification resulting in the 'New' Civil Code of 2009 constitutes the backbone of the Romanian civil law regulatory regime. This chapter documents the process by which this code was adopted and subsequently reformed, from the specific perspective of the monist or dualist modus of regulation. While the monist system proposes regulating legal relationships without regard to the nature of the juridical act, or whether the parties thereto act in a professional capacity, the dualist system differentiates between purely 'civil' and business relationships when it comes to regulation. Traditionally, Romanian civil law had a dualist nature. However, during the current recodification in the early 21st century, the monist system was adopted, partially influenced by the Quebecoise model of regulation, with transformative effects.

Keywords: *monist system, dualist system, civil code, codification, Romania.*

Rizoiu, R. (2024) 'On unity in the age of diversity: The monistic approach of Romanian Civil Code' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 395–437. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_15

1. INTRODUCTION

Like any other nation in crowded Europe, Romania too had its share of historical conundrums. To the extent that laws mirror[1] the habits of the people using them, all laws in Europe reflect (some of) the history of the nation adopting them. The diverse legal landscape is especially apparent in Central and Eastern Europe, where multiple layers of influences shaped a particular imprint on each region. This idea is worth bearing in mind when reading legal texts from these jurisdictions, because similar texts could have a different meaning in adjacent jurisdictions[2] or, vice-versa, different texts produce similar results in practice.[3] After all, law is a type of social construct[4] and, as such, it is greatly influenced by the local culture as a whole.

This chapter does not intend to explain the entire system of the Romanian Civil Code (since this would require a more elaborate study) but will focus instead on a particular trait thereto: the choice of the drafters to work on a so-called monistic approach, that is, to integrate the main branches of private law ('pure' civil and commercial law) into one single unified codex. Some caveats about this approach are in order. Within this comparative project,[5] I may be singled out as an 'intruder': I represent the easternmost jurisdiction; I am by formation a transactional lawyer (having started out as a lawyer and 'converted' later to academia), and I am an adept of U.S. Legal Realism and its continuance as a Law & Economics approach to Continental Law. Therefore, the chapter follows a rather functional scheme: why the model was adopted, and which are its main effects in practice.

1 Some medieval regulations in the regions inhabited by German settlers in current day Romania were known as *Sachsenspiegel* or *Schwabenspiegel*. See Gogoașe, 2019.

2 For example, the termination of the guarantee caused by the death of the guarantor has a different meaning in Romania and Quebec. See Veress, 2015, pp. 69–75; Rizoiu, 2022, p. 267.

3 For example, the third-party effects of voidance in the Civil codes of Romania and Moldova start from different viewpoints but reach common solutions in practice.

4 See Searle, 1995; Berger, Luckmann, 2008.

5 *Codification of Civil Law: Assessment, Reforms, Options*, 2023.

To this end, I shall start with a (brief) historical presentation of the (legal) context announcing the modern Code (2) in order to present the main concept against this background (3) and show the consequences (both desired, and unexpected) triggered by the 'monistic' approach (4) before trying to come to (some sort of) a conclusion.

2. THE LONG WAY TO THE NEW CODE

2.1. THE OLD WAYS: A BRIEF HISTORY OF THE CODE

Current-day Romania is at the crossroads of East, South, and West. It has been the recipient of multiple influences during its complicated history. Since delving deep into this issue may not be warranted here to describe the entanglement of opinions, suffice it to say that the western part (Banat, most of Transylvania, Oltenia, and eastern Muntenia) was for almost 150 years part of the Roman Empire while the southeastern part (Dobrogea) remained in the Byzantine Empire until its fall. During medieval times, western Romania was under Hungarian rule, while the southern and eastern parts slowly fell under Ottoman influence. Later, Romania formed the border between Habsburg (west and north), Ottoman (south), and Russian (east) empires with much fighting going on and portions of the territory changing sides frequently.

One historical remark that is worth mentioning is that the Romanian-speaking population was orthodox,[6] maintaining strong ties with the Byzantine Empire and, later on, with its religious remnants at Mount Athos and its administrative base at Constantinople. Hence, the byzantine tradition was kept alive in this area even after the Ottoman conquest of the region. As a border region, current-day Romania was not technically part of the Ottoman empire; in other words,

6 At one point, some Romanians from Transylvania joined a Greek Catholic Church, where they continued to follow most of the orthodox rites which they previously practised, but came under the authority of the Pope. As such, several Romanian scholars (known as the 'Transylvanian School' – *Şcoala Ardeleană*) studied in Rome and (re)discovered Roman law and the Roman origins of the Romanian people.

its internal regulations were left to the local rulers. As such, they continued the (Eastern-) Roman law traditions by passing localised versions of the Digesta, in the form of *Basilicale* (a simplified collection of imperial laws).[7] When the advancement towards modernity in the 16th-17th centuries made these codices obsolete, local rulers 'updated' them in the form of local rules (most of them religious in nature). In the east (Moldova), Vasile Lupu collected these rules into the *Romanian Learning Book* (Rom.: *Carte românească de învățătură*) in 1646, while in the south (Walachia), Matei Basarab did a similar job with *Correcting the Law with God* (*Îndreptarea legii cu Dumnezeu*) in 1652. In Transylvania, the Hungarian laws were applicable in the period (*Corpus Iuris Hungarici*) since the *principatum* remained autonomous even after Hungary was overrun by the Ottoman Empire in 1526. Moreover, the German population continued to be ruled by their own laws.[8]

Later, in the modern era, Romanian states became increasingly influenced by French culture, even if Napoleon I had avoided these parts in his march East. At the beginning of the 19th century, new codes were put in place. These new regulations were of a different nature, being the first comprehensive codifications in the area. It is interesting to note that they were hardly based on local practices and were mostly seen as a vehicle to modernise morals. They were drafted by skilled lawyers and enacted by a special type of rulers. Since the early 18th century, the two provinces that were under Ottoman control (Wallachia and Moldova) were ruled by descendants of the Byzantine ruling families appointed directly by the Sultan. Since these families (of orthodox faith) resided in the Fanar neighbourhood of Istanbul, they were referred to locally as '*fanariots*'. Nonetheless, the century of *fanariot* rule prepared the country for modernity by bringing the culture of Enlightenment to the region. The legal codification was the last legacy of this period.

In Moldova, the Calimach Code (named after the ruler who enacted it) appeared in 1817, swiftly followed in Wallachia by the Caragea Code in 1818. While the first one used an Austrian (ABGB-like) template,[9]

7 See Ceterchi, 1980, pp. 207–212.
8 See Veress, 2022, pp. 13–26.
9 For the reasons, see *idem*.

the second was more likely based on the French model. Despite the Western framework used, both retained localised concepts that remained tributary to the Greek model. For example, they both started by distinguishing the types of legal subjects into several categories, depending on their status. The terminology was also Greek-inspired,[10] the persons were referred to as *faces* (Rom.: *fețe*) or *cheeks* (Rom.: *obraze*) in a clear approximation of the Greek term *prosopon* (*πρόσωπον*).[11]

A period of turmoil followed, with the Napoleonic Wars raging across Europe, followed by the Russian-Ottoman conflicts. Fanariot rule in Romania abruptly ended in 1821 after a popular revolt.[12] By the 1830s, the region was under *de facto* Russian rule, which resulted in modern constitutional-like regulations (the *Organic Regulations*) being imposed in each of the two provinces. Romanian elites started to send their younglings to Paris to study, with a minority studying in Berlin.[13] These young elites returned to the country with new ideas. This was the cultural landscape when the Revolutionary year 1848 reached Romania as its easternmost outpost (and whose local leaders where almost all educated in France). In the aftermath of the 1853 Crimean War, Russian 'supervision' of the two provinces ended, and French and British[14] influence grew significantly. Against this complex backdrop, the two Romanian provinces united under the same ruler in 1859. Now, most of the members of the

10 The Calimach Code initiated the use of the Latin term *persona* for the first time in these local regulations. As such, its use and declinations are unfamiliar today.

11 The debate is also imbued with the theological meaning of the word *prosopon* as different from *hypostasis*. See Turcescu, 1997, pp. 374–395; McLeod, 2010, pp. 393–424; McLeod, 2012, pp. 365–383; Lynch, 1979, pp. 728–738.

12 See Avram, Cercel, 2021, pp. 15–37.

13 See Boia, 2017.

14 For example, the Danube Commission was under English leadership and was based in the Danube Delta (at Sulina). The British were concerned with the expansion of the Russian Empire towards the Black Sea straits and tried to prevent Russian hegemony in the Black Sea by supporting the Ottomans as the *status quo*.

government were composed of western-educated young elites, that had spearheaded the failed local 1848 Revolution a decade earlier.[15]

The new ruler, prince Alexandru Ioan I, was determined to forcefully bring his country to the 19th century and in doing so he used the model of the French emperor Napoleon III. In 1864, the young Romanian prince passed a package of laws meant to wipe clean the vestiges of the medieval state of affairs. He confiscated large portions of land owned by the Church and apportioned it into parts to give small properties to the farmers. He also set the remaining slaves free (most of who belonged to the Church). In the process, the influence of the Church (and of the Athonite monasteries) faded. Following the same programme, the prince entrusted a law commission to draft a new package of civil regulations and a new Civil Code as well as a Civil Procedure Code, which were swiftly adopted and enforced on 01 January 1865. This could be enforced speedily because the 'new' codes were merely an 'updated'[16] translation of the French Napoleonic Codes.[17]

One might wonder why (and how come) a government from eastern Europe would choose a legislative implant from the far-side western border. One explanation is that it was the result of the recent exposure of the Romanian elite to French culture. Further, when the Napoleon Civil Code was adopted in France, the country was a mainly agricultural society with large feuds held by noblemen, very similar to the situation

15 See Stanomir, 2019. The revolution that started in France that year swept through all the empires in Europe at that time and ended in Romania. This is an important point because the members of the rebellion in 1848 were mostly young people who had studied in Paris and come from Paris with the idea of liberation, of freedom, and of equality, and it is important to understand that this generation of revolutionaries was captured and detained once the revolution failed in 1848. A decade or two later, they become members of the first freely elected parliament. They became prime ministers. They become heads of various political parties in the second part of the 19th century, which gave shape to modern Romania.

16 The update incorporated the new advances of French law in the past half century, i.e., the new Belgian mortgage law and notation registries and several corrections suggested by the French commentator Victor-Napoléon Marcadé.

17 In today's news slang, the title could sound like: 'Breaking News: Parliament gave a green light for the acquisition of two powerful second-hand Codes from France by direct negotiations (G2G acquisition). They shall be refurbished with the latest equipment via an offset program in Romania'.

in Romania of 1865, with its *boyars* and their large latifundial properties. Similar to the Revolution in France, the 'young wolves' wanted to wipe out the old habits and inject new stamina into a patriarchal society. Moreover, drawing from the research of Greco-Catholic priests from Transylvania, Romanians became aware of their Latin ancestry and tried to reconnect to the Latin West, with France seen as the 'big sister' from this perspective. In turn, France was looking for its lost glory as well; so, it was easy to accept this link across the continent. Last but not the least, German codification was not ready at the time, and the Austrian model was seen as the exponent of the Habsburg Empire, which actively participated in defeating the 1848 Revolution.

Strangely enough, by 1866, Prince Alexandru Ioan I became full of himself and was overthrown by his former fellow revolutionaries. Instead, a new prince was brought from Germany. Together with the foreign prince, a new Constitution was enacted, based on the 1831 Belgian model establishing a constitutional monarchy. In 1878, Romania escaped Ottoman supervision and became a kingdom under the same German prince, Karl I. The Civil Code remained untouched. In the new context, economy flourished and a need was felt to have a special regulation that would allow swifter transactions with merchants. Thus, in 1886, a Commercial Code was enacted using the Italian model. This was done because the Civil Code (with its complicated contract formation mechanics and limited number of regulated transactions) was obsolete and inadequate to deal with this kind of modern split-second transactions.

Nothing major happened[18] then for more than half a century. However, the integration of Transylvania, Bessarabia, and Bukovina regions after 1918 required some transitional laws to extend the application of the Civil Code throughout the country. More surprisingly, the imposition of the 'popular' republic in 1947 did not alter the Civil Code, which remained in place as a bourgeois monument in the middle of a socialist society. Despite several attempts to change it, the communist regime maintained most of its provisions intact. The only major change

18 Of course, the country navigated through the horrors of two world wars and the various crises of the 1930s.

was that the section dealing with the personal status and marriage was changed in 1954. In fact, this change was beneficial, because it emancipated women much before France did and created an equal status for spouses as well as for children (irrespective of whether they were legal or natural). Other important changes included shortening of the status of the limitation period from 30 years to only 3 years. On the contrary, the Commercial Code was no longer applicable since the economic relations were supervised by the State in their entirety. However, in the international trade (outside the Socialist cooperation – CAER) it continued to be used where the Romanian law was elected as *lex contractus*.

It is true nonetheless that the scope of application of the Civil Code shrank because most of the property belonged now to the State and its divisions. Further, some concepts that were considered too capitalist, such as freedom to contract, were limited by way of using the concept of *causa* as a tool by which the courts could void some arrangements that were not compatible with the 'socialist ethics'.[19] Overall, however, the Civil Code survived relatively unscathed as did its references to the French legal literature.[20]

After December 1989, reconnection with the free world led lawyers to rediscover the Commercial Code (which was mostly inactive, but never formally repealed) and to update large portions of it to suit the new realities (such as the law of corporations in 1990 or the insolvency law in 1995). Moreover, the passing of the new Constitution in 1991 generated a huge debate about the structure of property, which saw the reemergence of private property as the rule with public property as only an

19 See Ionașcu et al., 1973, pp. 55–58.

20 While much emphasis had been placed on the Soviet legal literature in the '50s and '60s, after 1968, events in Romanian sailed away from the Soviet Union and, at the same time, became more 'socially aware' of France, which made the reconnection easier in the '70s. The Romanian civil law literature of the time quoted extensively from their French counterparts to explain the meaning of certain texts found in the Civil Code.

exceptional circumstance.[21] As a consequence, the scope of applying the (old) Civil Code suddenly expanded. The transition years saw a lot of case law reorientation meant to eliminate the communist era restrictions attached to the interpretation of the Civil Code texts. The property debate again led to heated discussions about in the 2003 revision of the Constitution, but the prevalence of private property over public held and was reinforced.

Therefore, based on this brief presentation of the background issues about the Romanian legal system, the reader might have a glimpse of the structure of Romanian private law and its place within legal theory in the Romanian legal system. Although this is just a general introduction about what is specific to the Romanian law, it reveals that Romanian law, Romanian private law in particular, is deeply rooted in the European tradition of private law systems.

Once the economy recovered after the hard reset of the '90s, the need arose to modernise both the Civil and the Commercial Codes, which were vestiges of the past. This is the context that led to the adoption of the new Civil Code in 2009 (enforced on 01 October 2011). However, before discussing the Odyssey of this drafting process,[22] a short recapitulation of the socio-political context is in order.

2.2. THE RIGHT (!) WAY: UNITY IN DIVERSITY

Let us ask the question, what is so different about Romania? After all, it is part of the European Union system and, hence, it should be like any other country within the European Union. However, recent history tells us that Romania is a unique country and, hence, it has a very particular legal system because of its tradition. It is easy to spot it if you are looking at the map where Romania, in recent times, was placed on the wrong

21 Of course, both arguments had their supporters and, for example, the idea of having a welfare state was heavily defended by the socialist parties when they proposed a Swedish model or even a German model while the other parties were considering the need to implement liberalisation measures on a system more loosely based on the US neoliberal systems of the time.

22 See Nicolae, 2012, pp. xxvi–cii.

side of the Iron Curtain. This means that Romania experienced half a century of communism, which changed a little of the background of the Romanian legal system and that for several decades legal theory was considered an integral part of politics.[23] Why was that? Because during the communist times, it was important to follow the history of the state, the history of the centralisation of the state in order to explain that the communist state is the pinnacle of the social organisation of the legal system. Therefore, Romanian legal literature continues to see strong ties between legal theory and politics. We cannot speak, for example, as Hans Kelsen did of a pure theory of law. In any analysis of a legal institution we had to mention the political triggers behind that structure.

Romania succeeded in its most important modern country project in 2007 when it entered the European Union. It was part of one of the latest accession waves.[24] It still continues to be the easternmost border of the EU. This was the reason the European Union had some reservations about accepting Romania as a full member state and, therefore, it put in place two mechanisms that were meant to ensure that further reforms are undertaken by Romanian politicians with some having wide implications for Romanian law as well. One of the most debated in the last period was the attempt to enter the Schengen free-move area, which was a failure in December 2022. However, more important and even more debated in Romania in the autumn of 2022 (even if at the European level it was considered not so important) was the fact that Romania for 15 years after accession was part of a special mechanism called the 'Cooperation and Verification Mechanism' or CVM, which was meant that it had to ensure that rule of law was observed by Romanian institutions, especially by its legal institutions. This CVM led to several debates and specific rules under Romanian law in the recent years.

23 For example, one of the subjects in the first-year curricula in law school is still called the 'History of Law *and State*'. This is because it is considered that legal history is entrenched in state history (a sort of trivial application of the Marxist theory of 'superstructure').

24 It was then considered the last wave, but in the meantime, some other states in the West Balkans showed interest acceding to the EU, and the discussions were reopened regarding the Republic of Moldova, Georgia, and Ukraine.

In what concerns the legal traditions of Romania, the organisation of the territory where now modern Romania stands was a mix of Greek civilisation because being near the Black Sea the Greek explorers had founded several Greek cities. Towards the beginning of the first millennium AD, the Roman Empire conquered these lands and they brought together Roman laws, which led to the fusion of what we now call the western civilisation, Greek philosophy and politics, plus Roman laws. This continued for over a millennium because the current territory of Romania was under Byzantine rule for quite some time, which means that the Iustinian codification was present in these territories and, interestingly, during the Enlightenment era of the 18th century, Romanian rulers were appointed from among Greek survivors of the Byzantine Empire in Constantinople. This was because Romania was then under Ottoman influence (i.e., it was not an integral part of the Turkish Empire but it was a vassal state to the Ottoman Empire and therefore the Turks decided to appoint their own representatives. However, since they knew Romania was an Orthodox country and would reject a Muslim ruler, they appointed Greek rulers from a quarter of Istanbul called Fanar. These rulers were in fact heirs of former Byzantine emperors or ruling families. Therefore, during the Enlightenment period, Romania was once again part of the Byzantine idea after the Napoleonic wars, which swept Europe up to Moscow. French administration was considered a model of success in the modern era. As I mentioned before, many Romanian wealthy people sent their sons and daughters to Paris for their higher studies; some, but much fewer, went to Berlin and this elite came back into Romania and made efforts to modernise Romania by adopting the Napoleonic civil code as the Romanian civil code, well after the communist period.

After 1990, Romania become a part of NATO, which led the United States to take a keen interest in this area. The US concept of 'Reagonomics' – the idea of a free market and of neoliberalism[25] – appealed to a people who had for 50 years been prohibited from owning anything. Therefore, a major change from a communist system to a neoliberal system occurred. Then came accession to the EU in 2007, although debates

25 For a colourful account, see Bartel, 2022.

and discussions with the European institution had started as early as the end of the '90s (in 1999 the first papers were signed with the European Union) bringing in a new concept of European supremacy. This concept was initially considered a mere declaration of principle but in the past years it has led to much debate in the legal media in what is known today as the 'constitutional identity' debate. This is because the Romanian Constitutional Court tried to build this idea based on the Polish Constitutional Court drawing from the German Constitutional Court decisions of the '80s saying that the European Union cannot impose on a member state a certain set of values that is against the values of the individual country. This debate is still ongoing as shown by a recent decision of the Romanian Constitutional Court[26] trying to say that European institutions cannot overcome some local legal solutions. This decision was followed by certain decisions[27] of the European Court of Justice in Luxembourg, which were dealing with the same idea and stressing that rule of law is a general European value that cannot be changed in the name of some 'local identity'. This implies that the incorporation of the mix, that is, the current Romanian law into the European Union will face some struggle, but these struggles are responsible for the specific shape of Romanian law today.

A text in the Romanian Constitution[28] specifically states that Romania has a market economy, pointing to the ideal of neoliberalism on paper. Another text[29] says that business should be free for anyone, again a neoliberal approach. However, in the very first article of the Romanian Constitution, an important paragraph[30] states the general characteristics of the Romanian state as being a democratic and social state.

26 CCR 390/2021.

27 ECJ 355/19; ECJ 357/19. For more about this debate, see Bercea, Rizoiu, 2022, forthcoming contribution; Tănăsescu, Selejan-Guțan, 2021; Selejan-Guțan, 2021.

28 Art. 135 para. (1): 'The economy of Romania is a market economy, based on free initiative and competition'.

29 Art. 45: 'The free access of any person to an economic activity, free initiative and exercising thereof under the law are guaranteed'.

30 Art. 1 para. (3): Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values (...) and shall be guaranteed.

From here emerges the social democracy idea that came from Sweden and Germany. On the contrary, the rule of law is acknowledged expressly by the Romanian Constitution. Hence, the current debate in the EU about the observing the rule of law is part of the constitutional tradition of Romania. It can also be traced to the influence of the German Constitution in which human dignity is of main (and the only absolute) value, which implies that one has in this statement of principles all one needs to build a modern system of legislation.

These are the pillars on which the Romanian civil law system is built, and they are basically following the 'Kelsenian pyramid', because it is the fundamental law (i.e., the Constitution) at the top as being the law containing all the general principles that were approved directly by the people (who approved it by referendum), followed by regular laws beneath it. Some discussions have been held about this pinnacle of the pyramid because, for example, there is a text[31] in the Romanian Constitution saying that in case the European Convention of Human Rights or other international treaties to which Romania is a party guarantee more freedom to the individual, those freedoms will be considered more important than the constitutional freedoms. This means that the Constitution will be construed to accommodate all those values as being on a super-constitutional level. Further, when Romania entered the European Union and therefore it changed the Constitution (in 2003), a new text[32] was added saying that the European Constitutional Treaties will have precedence over the local Constitution as well. This is how the principle of European law supremacy was reflected. However, based on

31 Art. 20:
(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.

32 Art. 148 para (2):As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

that text, the Romanian Constitutional Court is still debating whether those texts are more important than the Constitution itself and if they should be applied with precedence on all the issues or only on issues that are restricted to the European Union. In here lies the spark of the 'constitutional independence' idea.

The subsequent level is the level of laws that are adopted by the Parliament and of ordinances that are adopted by the government. While laws and ordinances have the same legal power, the lower level is represented by the government decisions. They are meant only to implement the rules laid down by the laws in accordance with the Constitution. The Civil Code is placed in the middle level, since it is enacted as a law by the Parliament.[33] Therefore, all the constitutional debates mentioned before have an impact on the way the Civil Code is to be construed (through the lens of constitutional principles).

The Odyssey of the Romanian Civil Code started as early as in the mid-'90s when Professor Valeriu Stoica (then the minister of justice) initiated a working group comprising law professors at the Universities of Bucharest and Cluj to start working on a project meant to 'modernise' the existing Civil Code. The group started the work by analysing two former projects that were never implemented: one from 1940 (which was scrapped because of the war) and the 'communist' one from 1971 (allegedly scrapped because it was too indebted to the Soviet ideas).[34] During this phase, the choice of using the Quebec Civil Code as a model was made and Canadian experts joined the team. After proceeding with a first revision of (some) parts of the existing Civil Code, the group's works[35] were put on hold because the new minister of justice decided in 2001 that the reform on criminal law should take precedence.

33 Law no. 287/2009 on the Civil Code

34 See Nicolae, *cit. supra*, p. xxix; Lucian Mihai in dialog cu Anca Chilom despre schimbarea noului Cod Civil, 2012; Duțu, 2011a, 2011b; Capriel, 2007. The latter also mentions the fact that it was too 'conservative' in what the ownership regulation was concerned. Other authors (Baias, 2012) mentioned the reluctance of the drafters themselves in replacing a functional Code with a new one drafted only to reflect the political changes.

35 The result so far was published as a tentative Draft to amend the existing Civil Code.

However, some work continued at a slower pace in the legislature of 2001–2004 by using the internal resources of the ministry of justice and a draft Code was made public in 2004.[36] After the Government change in 2005, a new drafting committee was selected by the ministry of justice, bringing together law professors from the University of Bucharest.[37] After approval by the Parliament in September 2009, this new Civil Code was subjected to a further review meant to ensure its smooth transition into effective law. A commission of law professors (again from both Bucharest and Cluj Law Schools) embarked on this project,[38] and a consortium of legal professionals scrutinised the impact the new regulation on the existing institutions.

After all these discussions by 2011, a new Civil Code emerged, and this new civil code was something more than a simple update to the former Napoleonic system of the civil code. This is because the work for a new civil code started by the end of the '90s, and the initial idea was to keep in place the French structure because Romanian lawyers were used to this structure. However, to find a modern system based on that blueprint was difficult. Looking around, they found two modern codes in that period in the '90s. It was the Quebec civil code, which was on some points a continuation of the Napoleonic code into the new millennium, and the second was the Dutch civil code. The Dutch civil code was more inspired by the German system while the Quebec civil code was based on French tradition; therefore, the Romanian legislator at that time decided that the Quebec model is closer to what the Romanian lawyers would understand. There was an extra benefit because the Quebec Civil Code was somehow integrating the institutions of common law,

36 The draft was approved by the Government in January 2004 and entered parliamentary debate. It was approved by the Senate (the higher chamber) in September 2004, but it was later put on hold with the Chamber of Deputies (the lower chamber) until it was rejected in September 2009 when the new Civil Code was approved instead. For the framework of this project, see justifying memo presented by the Government in front of the Parliament. See: Expunere de motive, 2004.

37 See the explanation in the Government justifying memo of March 2009, Expunere de motive, 2009.

38 The end-result of the project was the enactment of Law no. 71/2011 on the implementation of the new Civil Code. This law changed some of the provisions of the 2009 Civil Code as well.

and therefore it was a successful attempt in putting together codes from the two sides of the Atlantic. As such, the decision was made, and the new Romanian Civil Code was to be based on the template of the Quebec Civil Code.

Nonetheless, all the modern European codification projects were considered. Therefore, the Romanian Civil Code that was enforced in 2011 included a collection of modern solutions taken from various European countries as well. Some provisions are from the Italian Civil Code; some ideas are drawn from the German system, for example, the system of land registration; some solutions were from the French Civil Code, for example, the idea of *causa* as an essential condition for the validity of a contract was retained as is.

In terms of general principles, on the quality of parties, the Romanian Civil Code states not only the good faith rule[39] but also the rule *pacta sunt servanda*. In other words, legally concluded contracts are enforceable and have full force and effects against the parties.[40] However, in 2016, the Romanian Constitutional Court[41] 'discovered' that *pacta sunt servanda* rule has an exception: the hardship exception *rebus sic stantibus*. This means that the contract should be obeyed only insofar as the general framework did not change so much that enforcement is no longer possible. This doctrine was also codified in the Civil Code as the doctrine of hardship, which was actually an implementation of the DCFR (Draft Common Frame of Reference suggested at the European level[42]). However, the Constitutional Court 'invented' a fake legal history and stated that the hardship doctrine (while not expressly provided for under old laws) can be traced under Romanian law as an application of the good faith in contracting regulated by the old Civil

39 Art. 14 para (1) NCC: Any natural or legal person shall exercise their rights and perform their civil obligations in good faith, to the extent consistent with the public order and good morals', and art. 1170 NCC: 'The parties must act in good faith both when negotiating and concluding the contract and throughout the execution thereof. They may not remove or limit this obligation.

40 Art. 1270 para (1) NCC: 'A valid contract concluded is binding as the law for the contracting parties'.

41 CCR 623/2016.

42 Section III.–1:110 DCFR: Variation or termination by court on a change of circumstances.

Code.[43] This debate emerged in relation with the consumer mortgage loans that were denominated in Swiss Francs (CHF) instead of local currency (RON). In the context of the various crises over the past 15 years, CHF devalued a lot and doubled the repayment instalments even for nominal amounts.

This hardship was indeed a provocation because the Romanian legal system was keen to address the fact that once the parties agreed on certain terms they should be bound by those terms without having much room to negotiate later. In this system, the hardship opened up an alternative of negotiating, and it was interesting that the Constitutional Court tried to make a difference between a 'debtor which cannot pay', which could receive the benefit of the hardship, and a 'debtor which does not want to pay' even if they have the resources to pay and cannot resort to hardship. This meant that hardship refers to the personal situation of the debtor, which is a little strange considering the general doctrine of hardship.

3. THE CROSSROADS: 'MONISM' VS. 'DUALISM'

3.1. THIS IS THE WAY: THE CONCEPT

Choosing the Quebec blueprint came with a beneficial side effect: merging private law regulations into one single 'monistic' Code. In the first decade of the new millennium, Romanian law had a handful of codes (in the areas associated with private law): a Civil Code, a Family Code, a Commercial Code, a Labor Code,[44] and a Consumer Code. The latter mainly emerged by transposing various EU consumer protection

43 Art. 970 first sentence OCC: 'Contracts should be performed in good faith'.

44 Some authors argue that the labour law is rather a public law area (or, at least, has a significant public law imprint). See: Ștefănescu, 2012; Ștefănescu, 2015; Ștefănescu, 2018; Athanasiu, 2019; Ticlea, 2009; Ticlea, 2012. In fact, these authors are trying to oppose the (neo)liberal approach of the Civil Code in favour of State interventionism that should (in their opinion) continue to govern labour relations. See, to this effect, Dimitriu, 2014.

directives into local law and, as such, was viewed as having a rather dynamic approach. The drafters of the new Civil Code were willing to codify only those areas that are relatively stable in the local legal tradition.[45] Labour relations were seriously considered at first (at least in what concerns the individual labour contract) to be included in the Civil Code.[46] However, since a new Labour Code was adopted in 2003 (after lengthy negotiations with the unions), the Government decided not to undertake a similar task so soon.

The debate concerning the inclusion of the Family Code was easily resolved. In fact, the idea of having a separate law to regulate family relations was considered a 'communist' concept. While back in the '50s it helped modernise a paternalistic-style approach, in the new millennium, the idea was no longer viable. Nobody[47] questioned the fact that family relations belong to the area of the civil law relations. An entirely different proposition was the incorporation of commercial law in the Civil Code.

By 2009, most of the provisions of the Commercial Code (dating back to 1886) were repealed except those regulating obligations and special contracts (including shipping). As such, the Commercial Code remained a mere 'ghost'. Moreover, it was designed to accompany a civil code rather than being an autonomous regulation. Indeed, the first paragraph of its art. 1 stated that the code was meant to be applied in trade relations, the

45 The concern was that the Civil Code should be a stable piece of regulation in order to achieve its purpose. Seen as a 'civil constitution', the Code was meant to include only general use legal institutions and be therefore subject to little changes. Hence, the company law and certain commercial contracts (e.g., the leasing agreement) remained outside the Civil Code. The comparison was always made to the Tax Code, which is changed several times each year, and this was considered an 'illness' against which the Civil Code should be protected. Consequently, the Civil Code suffered very little changes in the past 12 years.

46 The model was the Italian Civil Code. See Nicolae, *cit. supra*. However, critics (see above) attacked the neoliberal construct of the Civil Code as incompatible with labour protectionism, on the one hand, and the fact that the merge was made by Italian fascists, on the other. Again, politics (which continue to view labour relations as needing socialist-style regulation) entered the field of legal theory.

47 There were few exceptions, but they lacked any valid argument. See, for example, the lament of an old-school lawyer: Friedmann-Nicolescu, 2014.

second explained that '[w]here this Code has no rules, the [rules of the] Civil Code shall apply'. As such, the provisions of the Commercial Code in common areas were only stated as the exceptions from the general rules to be found in the Civil Code. For example, in the matter of sales, the Commercial Code had only 14 articles, while the general regulation of sales in the Civil Code comprised 110 articles.

As such, the concept of the new Civil Code was to create a general framework for all (private) legal relations. To this effect, art. 2 para (1) of the Code states that '[t]he provisions of this Code regulate the patrimonial and non-patrimonial relationships between persons, as subjects of civil law'. This broad language encompasses most of the legal relations. The only limitation is brought by the last mention where only those relations where the subjects act as 'civil' persons are considered. This is meant to exclude public law[48] relations where one subject is subordinated to the other.

However, the second paragraph of the same article adds an important twist by stating that '[t]his Code consists of a set of rules that constitute common law for all fields referred to by the letter or the spirit of its legal provisions'. The reference to 'all fields' and more specifically to the 'spirit' of the law goes beyond (traditional) civil law area.

To conclude, the provisions of the Civil Code are considered the basic provisions of the Romanian law because its rules are considered to apply in all other fields including in public law and criminal law fields where specific public law or criminal laws do not provide specific rules. This means that, in Romania, civil law (or private law to be more exact) is considered the backbone of the legal system today.

The structure of the Civil Code starts with several general principles included in a preliminary chapter. Nonetheless, apart from the German BGB, for example, this section regarding the general principles has only 24–25 articles meant only to lay down the core underlying structure of the Code. All the other 2640 articles are divided into 'books' set in a certain specific field. The first book addresses the subjects of law, meaning the natural persons and legal entities; the second book addresses

48 Under Romanian legal theory, criminal law is considered part of the public law realm. See Streteanu, Nițu, 2014, pp. 14–16.

relations within the family; the third book is on goods, especially rights *in rem* over goods; the fourth book is concerned with inheritance; the fifth book is dedicated to the contract (both to the general theory of contracting and to the various types of specific contracts);[49] the sixth book is dedicated to the statutes of limitation; and the seventh book deals with conflict of laws.

As one can see, the new Code continues to follow the French tradition of dividing the legal provisions into certain chapters based on special themes. This tradition goes back the Gaius' *Institutes*[50] (as reprised by the Justinian's own manual), in which he listed the main topics of civil law as persons, assets, and actions. This is a standard definition of a subject matter even today; the 'who', the 'what', and the 'how'. A millennium and a half later, Portalis (explaining the structure of Napoleon's *Code Civil*)[51] restated the same tryptic but with a twist: instead of (legal) actions, he mentions legal relations between persons with reference to the assets. On closer inspection, the difference is more procedural in nature. Indeed, while in Roman law no legal protection was available unless the *praetor* issued an 'action', in modern law any (subjective) right should be protected by a legal action (i.e., remedy). As such, the third term of the enumeration just reflected the new realities of legal theory.

The main purpose behind the 'monistic' approach was to create a common framework meant to unify the general legal regime, especially in the area of general theory of obligations.[52] The drafters were willing to address one of the main problems of the Romanian legal system, that is, the uneven case-law. In order to achieve this goal, it was considered that having a common regulation would improve the quality of the court rulings in terms of their predictability. To achieve this goal, some changes were required to the procedural framework. In the Code of Civil Procedure, new powers were vested in the High Court allowing

49 This is the largest part of the Code, comprising 1336 articles, that is, half of the entire volume of the Code.

50 Gaius, I.8: 'Quod autem ius quo ultimur vel ad personas pertinet, vel ad res, vel ad actiones'.

51 Portalis, 1801: 'Toutes les lois se rapportent aux personnes ou aux biens et aux biens pour utilité des personnes'.

52 See Nicolae, 2015.

it to rule on a general question either when there are different opinions from lower courts on the same point of law[53] or when a lower court encounters a new problem that has a certain degree of generality.[54]

The very idea that a common frame exists in which all legal principles should be referred to seems to be impervious[55] to Romanian case law. The explanation seems linked to the fact that the old Civil Code remained in force for too long a time without a serious revamping. As such, most of its provisions were considered anachronistic (at least in their wording) by the end of the twentieth century. Consequently, the law students (and future practitioners) used to learn the concepts of civil law from legal literature (as explanations to the texts in the Code) than from the Code itself. In the first decades after the fall of communism, the need to adapt the regulations to the new capitalist realities asked for a large production of new laws, most of which were drafted as derogating from the Civil Code eventually subtracting many areas of (business) interest from the domain of the Civil Code. As such, case law preferred to look for the appropriate special law and try to deduct the applicable rule from the general principles found in the Civil Code. For example, in early '90s, when the (heirs of the) owners of real estate confiscated by the communist regime asked for their properties back, the courts hesitated in applying the general theory of restitution claim (*actio in rei vindicatio*). After a controversial public statement of the then-president, Iliescu, saying that restitution should not be granted by the courts due to the

53 The decision issued in appeal on the points of law with the purpose of unifying case-law (*recurs în interesul legii*, in Romanian – hereinafter referred to as 'RIL'; this procedure is regulated under arts. 514–518 of the Romanian Code of Civil Procedure).

54 The decision issued in reply to a preliminary question (*dezlegarea unor chestiuni de drept*, in Romanian – hereinafter referred to as 'HP; this procedure is regulated under arts. 519–521 of the Romanian Code of Civil Procedure). In this chapter, we focus mainly on these general decisions of the Romanian High Court. While they could result from two different procedures, their effect is similar, namely, they are mandatory to the courts (including the Romanian High Court) in all similar cases. The Romanian High Court shall be referred to by its local abbreviation, 'ÎCCJ', from *Înalta Curte de Casație și Justiție*, in Romanian.

55 The courts became used to the (old) dualistic system for so long, that they considered that system as being the only one.

lack of a special law on the subject,[56] the General Prosecutor's Office filed the same year a chain of motions for retrial in all those cases, and the High Court decided banning the admissibility of restitution claims for confiscated assets.[57] Since special restitution laws were enacted only in the period from 1995 to 2001,[58] parties continued to file general scope restitution claims. By a general ruling issued in 2008, the High Court decided that these claims are inadmissible since the restitution of confiscated assets is allowed only under the special conditions provided for by specific restitution laws.[59]

This view (where the general rules are to be ignored in areas where special regulations exist) continues to plague the case law meant to ensure a unitary application of the Civil Code. For example, it was decided[60] that the director of a company continues to fill the role even after its appointment duration expired. In rendering this decision, the court looked at the general rules laid down by the Civil Code in terms of legal representation and agency agreement and considered they shall not apply because this a matter subjected to Company Law. It seemed irrelevant for the court that art. 71 of that law expressly mentioned that the relations between the director and the company (and its shareholders) is subject to the general legal provisions applicable to the agency.[61] Recently, the High Court ruled[62] on the possibility of excluding a shareholder from the company by resorting to a general text in the Civil Code. Considering that the special text in the Company Law is more limited in its scope, the court decided that those hypotheses cannot be extended beyond that limited scope. However, the court added, the parties to the incorporation documents are allowed to add new cases in their by-laws.

56 See the Satu Mare Statement, 1994.

57 See ECHR Brumarescu v Romania.

58 These laws drastically restricted the availability of restitution remedy *per se*.

59 ÎCCJ RIL 33/2008.

60 ÎCCJ RIL 24/2017.

61 For the doctrinal debate, see Chirică, 2018a, p. 843; Sferdian, 2018; Chirică, 2018b; Rizoiu, 2019, pp. 69–134.

62 ÎCCJ HP civ 28/2021.

This last argument effectively meant that the general law cannot apply even where it adds to a suppletive special rule.[63]

3.2. MY WAY (OR THE HIGHWAY): THE QUARREL

As explained above, the new Civil Code was meant to achieve greater unity in the realm of private law. To this end, art. 2 para (1) thereof encompassed all legal relations (regardless their object) where the subjects acted in their civil (i.e., private, rather than public) capacity.[64] However, this reference to 'subjects of civil law' was prone to various readings. There were two main areas of discussion at that time: the commercial argument on traders' specificity and the public character of consumer protection against the professionals.

In order to clarify that both professionals and consumers are subjects of 'civil law', the Code undertook extensive legal proofing. First, art. 3 para (1) states, 'The provisions of this Code also apply to relationships between professionals, as well as to relationships between them and any other subjects of civil law'. This means that the Romanian Civil Code chose to take a common law approach starting from the observation that both civil and commercial relations are so similar that they can be regulated on the same template. Therefore, the Civil Code is considered the general law in Romania by taking to what is called the 'monistic' approach, meaning that there is only one regulation for a series of private relations. These relations include consumer to consumer (C2C), business to business (B2B), and business to consumer (B2C); all these types of relations are now regulated by the Civil Code.

In following this 'monistic' approach, the next two paragraphs of the same art. 3 explain the extent of the term 'professionals'. First, the Code provides a general definition in art. 3 para (2) – 'All those who operate an enterprise are considered professionals'. Then, it clarifies in the next paragraph that

63 For a critique of this decision, see Bercea, 2021.

64 See above no. 3.1.

> *[t]he operation of an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or alienation of goods or in the provision of services, regardless of whether or not it has a lucrative purpose.*

This text is of utmost importance because it gives an objective definition of professionals based on their activity rather than administrative registration. It also settles a long debate on whether NGOs are also professionals by giving an affirmative answer. As opposed to the former Commercial Code, under the new language too, the State and other public enterprises shall fall under the definition of professionals.

In addition, art. 8 of Law no. 71/2011 gave a supplementary explanation by expressly stating that companies and individual entrepreneurs that were until then subjected to the Commercial Code are now considered as professionals under the Civil Code. This text raised a series of objections, with some of the nostalgic supporters of the traditional split between civil and commercial, trying to read it as only changing the terminology from 'merchant' to 'professional'. On closer inspection, this is not the case. Indeed, all former 'merchants' are included in the new category of 'professionals', but they are now joined by many others like professionals of the liberal arts (acting either individually or in corporations – *societati profesionale*), farmers and farming companies (*societati agricole*), as well as the non-profit organisations (associations, foundations, and federations). Hence, one cannot just translate the former doctrines associated with commercial law and obtain the 'law of professionals'.

A big debate arose in the Romanian legal literature (and it continues even now – 12 years after the Civil Code entered into force) on whether it is useful to separate professionals from consumers, that is, should one keep in place a unified set of regulation for all these relations.[65] This remains an open question because, of course, not all civil relations

65 At a conference organised by the Romanian Consumer Protection Agency ('ANPC') to celebrate Consumer Protection Day several years ago, a representative of the consumer protection associations exclaimed: 'God forbid to have the Civil Code applied to consumers!'. See Rizoiu, 2015.

are regulated by the civil law. For example, in Romania, we have a Company Law that is not included in the Civil Code. We also have consumer regulations that implement the European Union directives and are also separate from the Civil Code. In fact, art. 1177 of the Civil Code expressly states that consumer regulations shall take precedence over the common provisions in the Civil Code.

The Romanian High Court was asked this question in several cases. For example, at one point[66] it was asked whether specific divisions of the courts should address litigation between professionals and non-professionals and the answer was in the negative. It seemed that the High Court reached a certain understanding of the concept when it decided that the criterion based on which jurisdiction is to be decided is the object of the case rather the quality of the parties involved. The court stated that the criterion is not whether a professional is part of the relation but if the object of the litigation (i.e., the subject matter of the claim) is professional in nature or is a purely civil one. However, more recently[67] the same High Court also decided that when an insurance company is suing another insurance company because their clients had an accident where some liability was emerging, then the case should be trialled by a special court because the litigation is between two professionals (e.g., insurance companies). This happened despite, as a general rule, this kind of relationship is considered a tort case and torts are generally trialled by the regular courts.

In order to understand the background of all these positional fights, one should understand the general landscape of Romanian judicial organisation of the courts, which have four levels: 188 first instance courts (*judecatoria*), 42 second level courts (*tribunal*), 15 appellate courts (*curte de apel*), and the High Court. Apart from the first instance courts, all the others are divided into specialised chambers based on the type of litigation: civil, professional, administrative, labour, or criminal. This division is a legacy of the former 'dualism' between civil and commercial law, where a special commercial chamber was dedicated to merchants' litigation. While the new Civil Code's 'monism' tried to unify the

66 ÎCCJ RIL 18/2017.
67 ÎCCJ RIL 13/2020.

jurisdictions as well (since there was no basis for a division), the courts were reluctant and resisted the move by only changing the name of the existing chambers into 'first' civil (the former 'pure civil') and 'second' civil (the former 'commercial').[68] Consequently, the problem of awarding the relevant jurisdiction continued to plague the Romanian judiciary.

In this constant battle of jurisdiction awarding, the Hight Court plays a pivotal role. The main issue was created also by a decision[69] of the High Court stating that awarding the right jurisdiction is a matter of public order. For example, it decided[70] that the enforcement of a writ of execution shall go to a specialised chamber depending on the nature of the writ. Further, when it comes to settling consumer protection cases, they are subject to the 'professionals' chamber of the courts since the protection is against professional practices. Even when the claim is lodged by the Consumer Protection Agency (ANPC), the same chamber has jurisdiction.[71] Of course, the specialised chamber shall have jurisdiction over the appeals on the subject matter under its jurisdiction,[72] which creates virtually parallel jurisdictions within the system.

As one can see, the main goal of unification in private law, which the advocates of the 'monistic' approach pursued in drafting the new Civil Code, seems elusive still. However, it looks like the bold move created a tidal wave that reversed the boundaries of the private law itself into the realm of public law.

3.3. THE SMOOTH WAY: LIMITING EXCESS

While the drafters of the new Civil Code embarked on a quest to codify the most relevant case law evolutions that the courts reached in 150 years of applying the old Code, they did not forget they are law

68 The argument used by the courts is that the new regulation allows for 'specialised panels'. However, this text refers to panels of judges that are specialised to deal with certain types of cases and not to the specific jurisdictions.

69 ÎCCJ RIL 17/2018.

70 ÎCCJ RIL 2/2019.

71 ÎCCJ RIL 24/2015.

72 ÎCCJ RIL 4/2023.

professors first. As such, their approach was rather critical, and they selected only the desirable case law developments to be transformed into the black letters of the Code.

Nonetheless, they did not just ignore undesirable lines of jurisprudence. one option was to let them aside from the Code and, as such, banish them into oblivion. The drafters were smarter than that. They noticed that most of these decisions occurred precisely because there was a (perceived) gap in the law. In order to avoid this 'gap-filling' effect of the case law to continue to poise the new system, the drafters preferred to include these areas in the Code as well. The twist is that by regulating case law developed legal doctrines, the drafters drastically limited their scope of application in order not to derail the system as a whole. As it is said, keep your friends close and your enemies even closer...

Maybe the most notorious example is maintaining the *causa* as one of the general conditions for a valid contract.[73] However, under the new system,[74] lack of *causa* will only make the contract voidable unless it can be requalified in a valid agreement based on a different *causa*. Moreover, a contract based on illicit or immoral *causa* shall be null and void only if both parties were aware of the ill-based character.[75] Consequently, under the new system, *causa* is not anymore a tool for the judge to void a contract where at least one party was acting in good faith.

Similar restrains were brought to the *error comunis facit ius* principle. First, it was degraded to a mere exception from the *nemo dat* rule.[76] Then, the conditions for this exemption to operate were drastically

73 Under intense pressure from the German system, the revised French Civil Code dropped it as did the Civil Code of the Republic of Moldova. See Deshayes, Genicon, Laithier, 2017, nr. 4; Cazac, 2020.

74 Art. 1238 para (1) NCC: 'Lack of cause entails the annulment of the contract unless the contract has been wrongly qualified and may produce other legal effects'.

75 Art. 1238 para (2) NCC: 'Unlawful or immoral cause renders the contract absolutely null, if such cause is common or, otherwise, if the other party knew or, according to the circumstances, ought to have known of it'.

76 Art. 17 para (1) NCC: 'No one may transmit or constitute more rights than they themselves have'.

limited,[77] for instance, by excluding its application from areas where public registries are in place.[78] *Laesio* was also provided for in the Code as a negative condition for a valid consent. Its occurrence is however limited by a very short barring time of one year from the date the agreement was concluded.[79] The same philosophy was used in regulating the hardship event. It is conceived as a mere exception from the enforceability of any (valid) contract, and it can be claimed only in exceptional circumstances.[80]

4. THE ROAD SHIFTS: THE (UN)EXPECTED RESULTS

4.1. I DID IT MY WAY: THE APPLICATION

Some of the principles laid down by the Civil Code spilled over its boundaries to influence other areas of law. After decades when the Civil Code was kept in the background (as being old and ill-shaped for modern realities) while all sorts of specific regulations were enacted with lightning

77 Art. 17 para (2) NCC: However, when someone, sharing a common and invincible belief, has considered that a person has a certain right or a certain legal capacity, the court, taking into account the circumstances thereof, may decide that the deed entered into as such shall produce the same effects as if it were valid in respect the person in error, except when termination of such deed would not cause any damage.

78 Art. 17 para (4) NCC: 'The provisions of this Article are not applicable in matters of land register or in other matters in which the law regulates a publicity system'.

79 Art. 1223 para (1) NCC: 'The right to bring an action for annulment or reduction of obligations for lesion lapses within one year as of the date of the conclusion of the contract'.

80 Art. 1271 para (2) NCC: However, if the performance of the contract has become excessively onerous because of an exceptional change in circumstances which would make it manifestly unfair to require the debtor to execute the obligation, the court may order:
(a) adaptation of the contract in order to distribute fairly between the parties the losses and benefits resulting from the changed circumstances;
(b) termination of the contract at such time and under such conditions as it may determine.

speed, a revamping of the civil legislation showed that a civil code is a 'civil constitution' of a nation.[81] This means that it is the foundation of any piece of legislation that uses its principles as raw material for the specific regulation. As such, spectacular developments saw the Civil Code in the forefront of debates around administrative law as well as at the core of criminal law.

These discussions raised an important issue: Is civil law subordinate to public law (as it was clearly under the communist doctrine) or is it that public law should limit its application to allow the maximum of liberties as stated by the liberal doctrine? Civil law professors were pleading for the latter,[82] and the drafters of the Code enshrined this idea in its structure. To this effect, they tackled some of the issues that were considered to belong to the realm of public law in the texts of the Civil Code itself.

Thus started a fierce debate between public and private interests because, for example, the Civil Code stated that it regulates all legal entities[83] (i.e., both public and private). This is because public legal entities are a species of private legal entities that follow a public interest. Therefore, apart from specific provisions in the special law (if any), there will be the general provisions in the Civil Code that will regulate them as well.[84] For example, the ministries or the government as a legal entity should be submitted to the rules of the Civil Code as a basic constitutive regulation. Further, public property is considered a species of property[85] and therefore it is mainly regulated by the Civil Code and not by the Administrative Code, which only makes a reference to the provisions in the Civil Code.[86]

81 See Carbonnier, 1986, p. 309. For a recent retake, see Cabrillac, 2005.

82 For a development of the argument, see Stoica, 2020, no. 2.

83 See Rizoiu, 2016, pp. 266–267.

84 Art. 192 NCC: 'Duly incorporated legal persons are governed by the provisions applicable to the category they belong to and also to those provided herein, unless otherwise provided by law'.

85 See Stoica, 2012, no.1; Vedinaș, 2012, no. 1.

86 Art. 284 of the Administrative Code states that it regulates only the specific rules of public property, being understood that the general rules are those laid down by the Civil Code. Art. 1 para (2) of the Administrative Code generally states that uses the Civil Code as common law.

Therefore, the agreements concluded by the public entities with private companies are subject, for example, to the common rules of statutes of limitation comprised in the Civil Code, as the High Court stated.[87] Moreover, the so-called administrative contract (which includes public procurement contracts, concession agreements, public private partnership agreements, etc.) is also considered as a species of contracts. As such, the general provisions for contracts in the Civil Code shall apply to them. For example, a decision of the High Court[88] stated that indeed the general provisions in the civil law will apply to these contracts as well. The reason is that they are not only administrative decisions but they are contracts in their own right. The High Court also decided[89] that even the relations between public servants and the State are subjected to labour regulation rather than public law.

At the same time, criminal law is also influenced by civil law. A big debate emerged in the past decade in Romania regarding the sequestration of assets because of some criminal conduct, and one may expect it to enter a new phase after the recent decisions of the European Union to freeze some Russian assets within the European Union. The core issue under debate was what would happen if the frozen asset is also subject to some civil contract concluded by the owner with a bona fide third party. First, the Constitutional Court held[90] that the regulation of the criminal precautionary seizure in the Code of Criminal Procedure is not complete, and it should be supplemented by filling it with the general legal regime of the civil seizure. Then, based on the need to refer to the civil regulation, through a series of decisions,[91] the High Court decided that basically the bona fide third party (provided it is not part of the felony) can enforce on its terms over the frozen asset. This means that freezing an asset in a criminal case will not take that asset outside the scope of any (existing) contracts. Rather, the asset remains subject to

87 ÎCCJ RIL 19/2019.
88 ÎCCJ HP 40/2020.
89 ÎCCJ RIL 19/2021.
90 CCR 24/2016.
91 ÎCCJ RIL 2/2018; ÎCCJ HP 1/2020.

dealing by the private parties having an interest in the said asset (under certain circumstances, of course).[92]

The process of interference between civil law and criminal law also went the other way. After the fall of communism, an increasing number of cases where individuals unlawfully accessed an electricity grid raised the problem of 'energy theft'. This led the Parliament to amend in the mid-'90s the legal provisions defining theft in the Criminal Code by including energy as an object of theft. Further, since the theft was dealing with assets, the civil law literature quickly concluded that energy is now a type of asset under civil law as well. This solution was incorporated in the new Civil Code by a special text[93] introduced in 2009 and enforced in 2011.

However, this 'cooperation' between civil and criminal law did not always go smoothly. In a recent case, which created a lot of emotion in the media, a person was trialled for the crime of incest after being discovered that he had sexual intercourse with his natural daughter. The problems arose when the defence claimed that there is no official evidence disclosing a father-daughter relationship between the two. Since this is a matter of civil law (i.e., family law), it needs a civil court to issue a ruling on this based on factual evidence. Called to issue a general ruling on this procedural issue, the High Court stated[94] that the criminal court could itself look into the issue. However, it was conceded that the finds of the criminal court shall not create a (new) civil status for the persons involved but can only establish the (biological) facts.

4.2. IT'S WAY BEYOND US: THE UNEXPECTED RESULTS

As stated above, the ideal pursued by the drafters of the Civil Code was to bring 'peace' to the troubled waters of private law. To some extent,

92 For more details, Rizoiu, 2023, pp. 129–146.

93 Art. 539 para (2) NCC: Electromagnetic waves or assimilated waves, as well as energy of any kind produced, captured and transmitted, in accordance with the law, by any person and harnessed by such person, regardless of the movable or immovable nature of their source, also constitute movable property.

94 ÎCCJ HP 52/2021.

this goal was not achieved because the Code is a living organism that has its own life after it enters into force. Notwithstanding the efforts of the drafters to explain the rationale behind the texts of the Code, the interpreters (and mainly the courts) took their own reading of the normative language. After all, the rules for legislative drafting[95] prohibits the legislator from explaining and justifying the normative solutions they implement. Hence, unexpected results emerged in practice.

For example, the drafters' idea to unify not only the legal regime of business and personal relations was not accepted by the bureaucracy of the State who maintained the *status quo* of parallel jurisdictions. While the official explanation was underlining the need to have a swifter solution in professional matters, this argument has little drive since the (civil) procedure is virtually identical between the two types of cases. As such, the duration of trials is not necessarily influenced by the fact that a certain chamber deals with the case since they will follow the same process (and have identical delays provided by the procedural law). Nonetheless, in practice, it could be identified as a *de facto* difference in handling cases belonging to these types (i.e., professional related versus pure private cases). The specialised chambers (formerly known as 'commercial' chambers) tend to be more pragmatic in applying the procedure while cutting some formalistic corners. They also have the benefit of the fact that most professionals are assisted by (specialised) lawyers and the process could be expedited by letting the lawyers explain to the parties what really happened in the court while the court focuses on providing a ruling. Sometimes, the reasoning contained in these rulings are not so detailed in their explanations, and they tend to avoid conceptual debates in order to focus on the facts at hand.

One can conclude that the specialised chambers tend to base their rulings more on the 'hunch' element[96] than on 'cold' logic, while the civil chambers are more concerned with keeping the system unaltered by explaining how their ruling is placed inside the whole civil law construction. This legal process looks like the famous 'thinking fast and

95 Art. 38 para (1) of Law no. 24/2000 on technical rules for legal drafting.

96 For the meaning of the term, see Hutcheson, 1929, pp. 274–288. For recent approaches, see Modark-Truran, 2001, pp. 55–89; Richards, 2016, pp. 245–260.

slow' paradigm:[97] specialised chambers are more pragmatic and tend to 'think fast', while the civil chambers are more pedantic and tend to 'think slow'. There is no criticism involved in here: both modalities have their advantages and disadvantages. The key is to combine them and to apply each technique where it suits.

5. THIS IS HATTORI HANZO STEEL: CONCLUDING REMARKS

The making of the new Romanian Civil Code was a tremendous enterprise. The main result is that Romania finally has a modern civil regulation. After the failed attempts from 1940 and 1971, this time the project paid off, and the Code is alive and well. It has been in application for twelve years now, and no major flaw has been discovered.[98] However, it has been subject to various critiques, which fall under two main categories: the 'nationalistic' critique and the 'fidelity' critique. While the two are opposite in their tenets, and since the Code is considered flawed by both camps, this might indicate that it has achieved a certain degree of equidistance.

Before addressing these critiques, it is useful to understand the overall (legal) context in which the Code was adopted. The original idea was launched in the mid '90s by Professor Valeriu Stoica, a professor of civil law with the University of Bucharest, specialised in the legal treatment of rights *in rem* (then acting as the minister of justice). He was a conservative (much indebted to the French school of legal thought) with a liberal view.[99] He was one of the first promoters of the study of human rights in Romanian law schools and was the founder of the school for judges

97 See Kahneman, 2013.

98 The main issues under debate are rather political in nature. For example, the fact that any recognition of same-sex relations is banned under the Code comes mainly from the conservative nature of the Romanian Parliament (and the important influence of the Orthodox Church in politics), which changed the more liberal version of the matter proposed by the drafters.

99 He was a member of the National Liberal Party, the president of which he was at the beginning of the 2000s.

as well. A former judge in the '70s and '80s, Professor Stoica knew that it was time to replace the legacy of the Napoleonic Code. He also knew this is no simple task, and that it should be tackled step by step. In the initial phase, a group of professors from the two main law schools in Romania (Bucharest and Cluj) formed a panel of experts to discuss the possibility of 'revamping' the existing Code by mere amendments. The conclusion was that the effort is not worth a thing, but an entirely new Code should be put in place.

The choosing of the Quebec model was 'tested' by first adopting a piece of legislation that was badly needed at the time: the legal regime of security interest in personal property. This draft law was sponsored by the World Bank and embarked experts from Washington, DC, and Canada. This law was enacted in 1999 and was based on art. 9 of the Uniform Commercial Code. The test was successful in showing that a law based in the common law tradition can work in the Romanian legal landscape. It also created a working environment with foreign advisors. The project was brought to a halt in 2001–2004 because of changes in the government (and priorities) but was restarted in 2005 once the liberals returned to power. This time, the World Bank backed the larger project and the drafting committee was chosen by a selective bid. In the new format, only Bucharest law professors were selected. Hence, the Cluj law professors were placed as critics.[100]

Further, the choice to draft a new Code (basically from scratch) was considered troublesome by the legal practitioners. They dreaded the prospect of having to re-learn new rules placed in a novel system. The judges were among the most reluctant category, because they were already overwhelmed by the large number of cases they need to resolve. As such, a general feeling persisted that the new Code was just an academic exercise.[101] This idea was fuelled by the fact that similar attempts

100 One of the reasons was that in the initial round, the Bucharest school approach was more pragmatic, while the Cluj school favoured a long-run project where various doctrines are to be debated in the academia before any drafting could really began.

101 Just days before the new Civil Code was to enter into force, some of the judges still waited for a 'miracle' because the law was under the scrutiny of the Constitutional Court, and many hoped it would be invalidated.

in early 2000s remained futile. In order to deal with this scepticism, in a rhetorical twist, Professor Stoica forged a phrase that became famous: 'The new Civil Code is the old Civil Code'.[102] Years later, Professor Stoica explained[103] why he coined this phrase back then: to defeat the resistance of the sceptical thinking. It was just a manoeuvre to put the war dogs asleep. However, his argument that the new Civil Code builds on the existing tradition of the old Civil Code by integrating the case-law solutions that evolved in 150 years of application of the old Code was only partially true. Several novel institutions are regulated by the new Civil Code.

The 'nationalistic' critiques are gathered around the disadvantages of legal transplants.[104] The main argument is that using the legal solutions developed under a foreign jurisdiction would not fit local traditions. The principal problem with this argument is that the claimed 'tradition' is itself a legal transplant. Further, since Romanians dealt well under a French Civil Code for a century and a half, there was no need to worry they would do worse under a Quebec one. For example, the local tradition was that the youngest son shall continue to live with the parents and take care of them at old age and in return shall receive the parents' house upon their death. Since 1865, this tradition was replaced by the egalitarian split of inheritance imposed under the old Civil Code. Further, the tradition of the old forms of communitarian ownership stated that all decisions should be unanimous. This rule endured under the old Civil Code in terms of managing common assets. The new Civil Code breaks with this tradition and introduces the rule of single action in restitution.[105] This change is not necessarily a legal transplant, but rather an implementation of a ruling from the European Court of Human Rights.[106]

102 The catchphrase was included in the Foreword to his textbook on rights in rem published after the Civil Code entered into force. See Stoica, 2017, pp. XIII–XIV.

103 See Stoica, 2021, nos. 3–4.

104 See Danil, 2023.

105 Art. 643 NCC: 'Each co-owner may appear before the court alone, regardless of their legal standing, in any action regarding co-ownership, including legal actions'.

106 ECHR Lupas v Romania.

The second line of attack comes from 'purists'.[107] Their arguments stem from the idea that a legal transplant should be an exact copy of the model. Therefore, they criticise all alterations from the original model. Most of these critiques are rather formal in nature. For example, when the Code chooses to define the object of the agreement as being the transaction itself, this was a departure from the existing knowledge for Romanian legal practitioners. Therefore, the Romanian version of Quebec text included some examples to illustrate the new concept.[108] The critics saw in this alteration an inadmissible lack of rigour.[109] Other critics wept over the lack of courage of the drafters in adopting transplanted solutions entirely. The basic example is the legal regime of the land registrations.[110] While the new Code departed from the French recordation for opposability only and created a system more closely related to the German one, it did not implement the *Abstractionprinzip* as such.[111] The choice was intended so because the current status of cadastral documentation in Romania is not yet ready. While the central and northern parts of the country benefited from some measurements made in the 19th century by the Austrian Empire's authorities, the south and east had no such measurements. Therefore, implementing a very rigid system over an uncertain infrastructure risked creating a lot of litigation.

A special version of critics consists of those that are using the 'purist' argument but related to the old model of the French Civil Code.[112] Their main tenet is that civil legislation should have continued to develop based on the evolution of the French Code. As such, their critique mainly involves comparing the legal solutions in the Code against the French legal literature. The problem with this argument is that it is

107 See Neculaescu, 2014.

108 Art. 1225 (1) NCC: 'The object of the contract is the juridical transaction, such as sale, lease, loan and the like, agreed by the parties, as it appears from all the contractual rights and obligations'.

109 See Neculaescu, *supra* 106.

110 See Nemeti, 2019, no. 2.

111 See Mircioiu, 2014.

112 This line of argument is generally associated with professors from Cluj. See Chirică, 2017.

counterfactual. One cannot reproach a law that fails to implement a model that it specifically departed from.

Of the four main codes[113] adopted by Romania in 2009–2014, the Civil Code saw the least of changes in the past 12 years of its application. Apart from a narrow decision[114] imposing unanimous decisions in matters dealing with condominiums, the only material change came in 2022[115] in the area of protection of impaired persons. This change was triggered by a decision[116] of the Constitutional Court and was meant to implement the mechanisms laid down by UN Convention on the Rights of Persons with Disabilities.

6. ALL DIFFERENT ALL EQUAL: SOME FINAL THOUGHTS

The Romanian Civil Code that entered into force in 2011 was a scholarly exercise undertaken by law professors. As such, it is a code drafted by lawyers, where politicians[117] and civic society[118] had little say. However, since its provisions are mainly used by lawyers as well, few conceptual critics emerged since its adoption. It is mostly for the judges to fully implement all novel institutions brought by the Code. As always, the judiciary has a certain inertia in implementing new legal solutions, and they tend to apply the traditional case law to the new texts.

113 They are, in chronological order: Civil Code, Civil Procedure Code, Criminal Code, and Criminal Procedure Code.

114 CCR 1514/2011.

115 Law no. 140/2022 on guardianship for persons with disabilities.

116 CCR 601/2020.

117 Political interventions, where present, throughout the Code. Most of them, however, are merely corporate claims meant to secure some monopolies. For example, a high number of contracts are required to be concluded in authentic, notarised form. Others deal with the more sensitive matters like total prohibition of same-sex marriages.

118 The main areas where the civil society intervened was the section dealing with the right of free speech versus the protection of private life and the area of common custody for children after divorce of their parents.

The backbone of the Romanian Civil Code was the structure of the Quebec Civil Code. However, its provisions were greatly adapted to the local realities either by incorporating some local traditions[119] or by resorting to geographically (and culturally) closer models.[120] In addition, for some novel ideas, the European models of codification[121] were used as a starting point. As such, the original model was used merely as a template, which was then altered based on a functional design. The current Code is a sort of *mixtum compositum* reflecting to a greater extent the experience of the drafters as professors of civil law. It is filled with definitions and classifications to the point where it is very easy for the law students to read it.[122]

In the '70s there was a 'battle' for the best colour television system. The US system, dubbed NTSC, was said to mean *'Never Twice the Same Color'*, while the concurrent French one, dubbed SECAM, was mocked as *'System Entirely Contrary to the American Method'*. Both systems had their flaws, and then the German system came, dubbed PAL, in order to remedy these flaws. As such, it was said to have achieved *'Peace At Last'*.[123] Since Romania introduced colour television only in the '80s, it took the last (and best) system available. Well, the Romanian Civil Code of 2011 tried to achieve the same kind of result: it looked to the legal landscape in the Western civilization and chose the best pieces.

119 For example, a big debate among the drafters was whether to keep in place the 'reserved quota' for close relatives in case of inheritance. Finally, the debate was won (but only by resorting to a vote) by the 'traditionalists' who favoured retaining it. Also, some texts were taken from the 1940 and 1971 Romanian draft Civil Codes.

120 Quite a handful of texts are inspired from the Italian Civil Code or the French Civil Code.

121 There are entire sections inspired from the Draft Common Frame of Reference (DCFR), Principles of European Contract Law (PECL), and UNIDROIT Principles for International Commercial Contracts.

122 The author's personal experience as a first-year civil law professor showed that it is easier for the students to understand the lectures once they grasp the system of the Civil Code.

123 It is true that critics mocked it as 'Picture Always Lousy'.

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CODIFICATION IN THE NETHERLANDS. PROFESSOR MEIJERS' SUCCESSFUL CAMPAIGN FOR A COMPLETE REVISION OF THE DUTCH CIVIL CODE (1838)

HARRY RUNIA

ABSTRACT

This contribution focuses on the codification of civil law in the Netherlands, particularly on the successful campaign of Professor Eduard Maurits Meijers (1880–1954), without which the current civil code would not exist.[1] *The first part of the chapter (1) provides a brief historical overview of the codification of civil law in the Netherlands, where the Dutch realised that the success of any codification effort depends on the nation's constitution. Professor Paul Scholten, Meijers' main opponent in his campaign for a new civil code,*[2] *famously said, 'a new civil*

1 A more detailed historical oversight of the history of codification in the Netherlands (in Dutch) is found in chapter VII of Lokin and Zwalve and Jansen, 2020. An English translation of this book, under the working title *Chapters of the history of European Codifications*, is currently forthcoming.

2 This point of view is nuanced in: Runia, 2022, pp. 95-109. See about Scholten also n. 49.

Runia, H. (2024) 'Codification in the Netherlands. Professor Meijers' successful campaign for a complete revision of the Dutch Civil Code (1838)' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 439–467.. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_16

code originates only out of political pressure'.[3] *This is demonstrated by starting with the Dutch republic (1.1), where codification of civil law was not even proposed owing to the lack of political pressure. It became necessary only after the Netherlands became a unitary state in 1798. Since then, three civil codes have preceded the current one: the Napoleonic Code adapted for the Kingdom of Holland (1.2), the Code civil des français, also known as the Code Napoleon (1.3), and the Old Dutch Civil Code (1.4). The second part of this chapter (2) addresses how the choice for a complete revision of the code originated. Since the focus is on Meijers' campaign in the 20th century, limited attention is paid to developments in the 19th century (2.1).*[4] *Subsequently, developments that led to the establishment of the State Committee 1919 are discussed (2.2), and Meijers' relation with this Committee (2.3). The origin and motives for Meijers' campaign for a complete revision of the old code is discussed next (2.4), followed by the developments after the 100th anniversary of the Old Civil Code in 1938. leading up to Meijers' official appointment by Royal Decree to draft a new civil code in 1947 (2.5).*
Keywords: *civil law, Dutch Civil Code, codification, reform, Eduard Maurits Meijers.*

1. HISTORICAL OVERVIEW

1.1. THE UNCODIFIED DUTCH REPUBLIC (1579–1795)

In the year 1579, the Dutch republic was established, also known as the Republic of the Seven United Netherlands, as it comprised seven individual countries: the Duchy of Guelders, the Lordship of Frisia, the County of Holland, the County of Zeeland, the Lordship of Utrecht, the Lordship of Overijssel, and the Lordship of Groningen. Previously, these

3 Scholten, 1938, p. 30: 'Een nieuw Burgerlijk Wetboek ontstaat alleen uit politieken drang.'

4 Florijn, 1994, is the standard study on the origin and development of the new Civil Code in this period, and in general.

countries were combined in a personal union as each of them had the same sovereign: Philip II of Spain.

Philip II was the Count of Holland, the Duke of Guelders, the Lord of Frisia, etc. However, he became increasingly unpopular for introducing centralising policies from Brussels, which threatened the autonomy of the individual countries. His religious and taxation policies also contributed to his unpopularity.

Consequently, in 1579, several rebel countries concluded a treaty that created a military alliance between them: 'the Union of Utrecht'.[5] Two years later, in 1581, the 'Act of Abjuration' was enacted, dismissing the sovereign. This act significantly changed the nature of the Dutch republic's constitution, because, after some deliberation, the rebel countries accepted the doctrine that sovereignty no longer resided in one ruler, but instead lay with the States of the individual countries.[6]

This observation raises the question of whether codification was feasible in the Dutch republic. The answer is straightforward: it was not. First, there was a great diversity of legal sources, not only among the countries within the confederation, but also within each country. The legal system used in the Dutch republic resembled that of many other continental European countries, distinguishing between primary sources of law and subsidiary sources of law. Primary sources of law, when available, had to be consulted first, and if not available, subsidiary sources could be used in order to resolve legal questions. Three primary sources of law and three subsidiary sources of law are discussed here, starting with the first category.

Regarding primary legislative power, originally, Philip II held such power, based on the maxim *quod principi placuit legis habet vigorem* (what pleases the prince has the force of law). After his abjuration, this power was transferred to the States of the individual countries, as mentioned earlier. Thus, the States were competent to enact legislation that applied throughout their respective countries. Next, cities were competent to

5 It should be noted that there were more signatories to the Union of Utrecht than the seven united Netherlands that would make up the Dutch republic, but the author will not pursue this point further.

6 These States or popular assemblies were made up of the landed nobility and urban patriciate.

legislate within their city limits. Finally, customary law was recognised as a primary source of law. As for subsidiary sources of law, Roman law, Canon law, and Feudal law were distinguished.

Significant differences existed among the countries in their use of primary and subsidiary sources of law. For instance, Frisia (Friesland) was known for extensively adopting Roman law; Kooiker even speaks of a reception 'in complexu'.[7] Such variations in legal systems made any attempt to establish a unified civil code in the Dutch Republic hypothetical.[8] Further, at the level of individual countries, too great legal diversity existed. For example, the relatively small territory of the City and Ommelanden of Groningen had five distinct legal systems, each differing in principle from the others.

Therefore, it is not surprising that proposals for codification were never suggested in the Dutch republic. A significant change was required, and that change came about 219 years after the Union of Utrecht and three years after the end of the Dutch Republic, in the year 1798.

1.2. THE NAPOLEONIC CODE ADAPTED FOR THE KINGDOM OF HOLLAND (1809)

The Dutch republic ended in 1795. The years leading up to this saw growing discontentment, particularly with the government and its confederal nature, as established in the Union of Utrecht.[9] Baron Van der Cappellen tot den Pol launched a direct attack on both in 1781. As a result, he may be regarded as 'the father of the Dutch revolution':

> *In 1781 a pamphlet appeared throughout the Republic setting out the following basis for a civil war: the 'democratic manifesto' of the Gelderland Baron Derk van der Capellen tot den Pol, who may rightly be called the*

7 Kooiker, 1996, p. 62-63. For a detailed analysis of the civil law practice of the Court of Frisia: Lokin and Brandsma and Jansen, 2003.

8 Cf. also below, Van Hogendorp's conclusion in n. 25.

9 The government of the republic can be characterized as an oligarchy, as the supreme power was distributed only over a small group of people: the Prince of Orange, regents and the States of individual countries.

father of the Dutch revolution, entitled Aan het volk van Nederland ('To the people of the Netherlands'). The Baron's pamphlet, now famous, is extraordinarily important for a number of reasons: in it, he is one of the first to go beyond the provincial borders and address the entire nation of the Netherlands, advocating in the process what amounts to popular sovereignty. The supreme power should not, he says, rest with the Prince, the regents or even the States of the individual countries, but be jointly vested in the entire population of all the countries.[10]

After a series of confrontations, the revolutionaries gained the upper hand when the French general Pichegru conquered the Netherlands in 1795. The Dutch republic was then replaced by the Batavian republic, which introduced a new polity in its Constitution (1798): a unitary state.[11] Furthermore, the Constitution explicitly called for a codification of civil law within two years.

Art. 28 Constitution 1798

A codification shall be enacted; laying down the civil laws and (...).
It shall be introduced no later than two years after the introduction of the Constitution.'

However, the Constitutional deadline was not met as the drafting committee aimed to create a *'perfect'* code, rather than a practical and concise one, seeking substantive completeness. The drafting process took

10 Lokin and Zwalve and Jansen, 2020, p. 357. They cite from the pamphlet *Aan het volk van Nederland*, Weesp 1981, p. 83: 'O my fellow countrymen! Arm yourselves all together and take care of the affairs of this whole country, that is: of YOUR OWN affairs. The country belongs to all of you together, not only to the Prince and his great men, who consider and treat you, all of us, the whole Dutch population, the descendants of the free Batavians, as their hereditary property, as their oxen and sheep, which they can and may shear or slaughter as they think fit to do. The people who live in a country, the inhabitants, townsfolk and countrymen, poor and rich, the great and the small all together they are the true proprietors, the lords and masters of the country and can say how the country's affairs should be managed, in what manner and by whom they wish to be governed.'

11 Art. 1 Constitution 1798 reads: The Batavian republic is one and indivisible.

long and became irrelevant after a new development occurred in 1806: the Batavian republic became a monarchy!

This change took place on 27 May 1806, following a treaty between the Batavian republic and Napoleon's Minister for Foreign Affairs, Charles Maurice de Talleyrand-Périgord. The first King of the Netherlands was Napoleon's brother, Louis Napoleon.[12]

One might assume that Napoleon's code, which had already been introduced in France in 1804, would also be introduced in the Netherlands. However, this did not happen – at least not yet. The newly appointed King held great respect for the Dutch legal tradition and believed that the French code should not be rigidly imposed, but rather adapted to the traditions of his new country. Therefore, the first codification of civil law in the Netherlands was an adaptation of the French code, known as the Napoleonic Code, adapted for the Kingdom of Holland.[13]

This code came into force on 1 May 1809. Its name already indicates that it is not a mere copy of the French code. One significant difference, for instance, is the additional requirement for the transfer of ownership: the Dutch code also required delivery (*traditio*).

1.3. THE CODE CIVIL DES FRANÇAIS (CODE NAPOLÉON) 1811

The first civil code of the Netherlands could not take root.[14] It was replaced in less than two years by the Code Napoléon. This code came into effect on 1 March 1811,[15] following yet another constitutional

12 About him and his efforts: Van den Berg, 2010, pp. 81–100.

13 Brandsma, 2006, pp. 221–247, provides a detailed discussion of this code.

14 Brandsma, 2006, p. 244, mentions a rumor that the copy of the code that was sent to the Groningen local court lies yet unopened in the archive.

15 On the basis of an Imperial decree dated January 6, 1811. It was not limited to the Code civil, all French laws were to become enforceable in the territory of the former Kingdom of Holland.

change: the forced abdication of King Louis Napoléon in 1810. Louis had fallen out of favour for 'going native' and forgetting his origin.[16]

Soon after his abdication, Emperor Napoleon annexed the former 'Kingdom of Holland'[17] and ordered its 'reunion with the Empire'. The annexation naturally led to the abolition of all civil law other than the ones applicable in France. The French civil code would remain in force in the Netherlands until 1838.

1.4. THE OLD DUTCH CIVIL CODE (OUD BURGERLIJK WETBOEK; OBW) 1838

After Napoleon's downfall, the Netherlands regained their independence in 1813. The hereditary governor ('Erfstadhouder'), Prince William, returned from England on 30 November 1813 and was proclaimed Sovereign Prince William I.[18] He accepted his office under the guarantee of 'a wise constitution'. Therefore, a new constitution was required and was approved on 29 March 1814. The following day, on 30 March 1814, William I was officially sworn in as sovereign prince of the Principality of the Netherlands. It is important to note that the Netherlands remained a unitary state and did not revert to the old system of confederalism.

Regarding civil law, the 1814 Constitution ordered as follows:

> *Art. 100 Constitution 1814*
>
> *There shall be introduced a General Code encompassing civil law, criminal law, commerce, the composition of the judiciary and procedural law.*

16 Lokin and Zwalve and Jansen, 2020, p. 365, n. 53: 'Upon bestowing the Dutch crown on his brother, Napoleon had expressly enjoined him never to lose sight of the fact that he was, and was obliged to remain, first and foremost a Frenchman. See Louis Napoléon, Documents historiques et réflexions sur le gouvernement de la Hollande, Vol. 1, Brussels, 1820, p. 69.'

17 Lokin and Zwalve and Jansen, 2020, p. 366, n. 56: 'Article 1 of the Imperial Decree of July 9, 1810: 'La Hollande est réunie à l'Empire.' ('Holland is reunited with the Empire'). (Fortuijn, Wetten en besluiten van Franschen oorsprong I, Amsterdam, 1839, p. 11).

18 Van der Pot-Donner, 1989, p. 116.

A new Civil Code was needed to replace the French Code civil. The drafting committee immediately faced the question of whether it was possible to use the Napoleonic Code adapted for the Kingdom of Holland (NCKH) as a basis or whether such a revision would clash with the spirit of the Constitution, which required an original Dutch code.[19] Answering this question was particularly relevant, because the introduction of the NCKH had eliminated the previously existing legal diversity, which stemmed from the autonomy of the various countries comprising the Dutch republic. Therefore, choosing a completely new code would encounter several obstacles, as such a code would have to be created from the scratch.

Not surprisingly, the majority of the drafting committee initially favoured using the NCKH as the basis for the new code. However, this position was reconsidered and abandoned upon receiving a Royal Decree. According to Voorduin, the committee interpreted the wording of the decree as an indication that the prince desired an *original* Dutch civil code.[20] In response, the committee requested member Kemper to prepare a draft for a civil code. Kemper complied and prepared a draft known as the *Draft 1816*. He primarily drew upon the old and respectable tradition of the Roman-Holland law (also known as Roman-Dutch law), which encompassed the primary and subsidiary sources of law from the former County of Holland.[21]

19 Voorduin, 1837, pp. 15-16.

20 Voorduin, 1837, p. 28.

21 Lokin and Zwalve, 2014, p. 372. Cf. Voorduin, 1837, especially p. 32 (from Kempers letter to the sovereign prince on 22 December 1814). Lokin and Zwalve evaluate the draft as follows (p. 372): 'The 1816 Draft represents the conclusion of an important chapter in the history of Dutch law. Kemper had succeeded in producing a codification within a short time, based on the old and highly respected tradition of 'Roman-Dutch' law, which incorporated the specifically Dutch variant of the continental West European tradition of civil law. In the seventeenth and eighteenth centuries, Roman-Dutch law had dominated private law jurisprudence in Western Europe. Thus, the Kemper Draft, which was based on it, contained a legal legacy that was superior in many respects to the French codification, the latter being based primarily on the writings of the prolific author Pothier. However, the 1816 Draft differed unfavorably from it predecessor in the very extended – it contained over 4,000 articles – and detailed way in which it set out the law.'

Meanwhile, a new constitution was required due to one of the outcomes of the Vienna Congress, namely the union of the North and South Netherlands ('the Netherlands' and 'Belgium') into a new country: the Kingdom of the Netherlands. On 1 August 1814, William I had already accepted sovereignty over the former Austrian Netherlands, thus creating a personal union. On 16 March 1815, he also accepted the royal title and became King William I. The new Constitution entered into force on 24 August 1815.

These significant political changes also affected the Draft 1816, preventing it from being implemented. The unification of the Netherlands posed a major obstacle. From the southern provinces, a three-headed committee was appointed in order to evaluate the draft.[22] In their report to the King, the committee strongly objected to the draft, considering it too focused on legal rules that were foreign to their provinces.[23] Van Hogendorp, who drafted the new Constitution in 1815, also acknowledged this issue, stating:

> *when searching for the old Dutch Law, for ancestral manners and customs, one does not encounter a single Law, but various and completely different Laws. In Frisia, in Guelders, in Holland, not to mention Brabant, Flanders, Liege, not only very important Laws differed significantly, but also the spirit of the law was hard to reconcile.*[24]

22 The committee consisted of the legal scholars Nicolaï, Lammens and De Guchtenaere.

23 Voorduin, 1837, p. 81: 'Depuis l'avénement de Votre Majesté au trône du Royaume des Pays-Bas, l'objet constant de Votre sollicitude paternelle a été de procurer aux peuples, dont la destinée a été remise entre Vos mains royales, le repos et la tranquillité; mais nous croyons, Sire, ne pouvoir nous dispenser de dire à Votre Majesté, que la mise à exécution du projet de code civil, n'attendrait point ce but tant désiré; sa publication serait l'introduction d'un droit nouveau, car il a été conçu et rédigé pour les provinces *septentrionales*.´

24 Van Hogendorp 1824, p. 3: 'Zoekende naar het oude Nederlandsche Regt, naar voorvaderlijke zeden en gewoonten, ontmoette men niet een enkel Regt, maar verscheidene en zeer verschillende Regten. In Vriesland, in Gelderland, in Holland, zonder nog te spreken van Baband, van Vlaanderen, van Luik, liepen niet alleen zeer gewigtige Wetten uit elkaar, maar ook de geest van het Regt was moeilijk overeen te brengen.'

The southern committee proposed a completely different approach, suggesting the use of the French Code civil as the basis for the draft. However, King William I firmly refused to honour this request.[25] Deliberations on *Draft 1816* in the Council of State began on 6 July 1818, and lasted several months. During this time, the *Draft 1816* was modified to some extent, and the result was presented to Parliament as *Draft 1820*.

The House of Representatives (Tweede Kamer) did not adopt the Draft 1820. The southern Netherlands persisted in their desire to base the new civil code on the Code civil. Moreover, during the deliberations on the *Draft 1820*, it became apparent that a majority of the representatives actually preferred an adaptation of the Code civil. As a result, a seven-headed editorial committee was established to prepare the draft legislation before it was sent to the House. Kemper was one of its members, but the majority of the members consisted of moderate opponents of *Draft 1820*. Within a short period, the Belgian members took control of the committee.[26] The subsequent legislative process can be summarised as follows:

> *In the years following the presentation of the draft legislation, the Lower House itself acted as codifier. Thus, between 1820 and 1829, a whole new code was produced bit by bit, with the Belgians, and especially Nicolaï, holding sway. The new civil code responded to the wishes that the Belgians had previously made known in 1816, in their recommendation to the King concerning the 1816 Draft: it was a reworking of the Code civil, which included within it a certain amount of North and South Netherlands customary law.*[27]

In July 1830, King William ordered the printing of the new civil code, which was intended to enter into force on 1 February 1831. However, due to the Belgian uprising in August 1830, it never took effect. When the Belgian secession became a reality, Code 1830 underwent some revisions to remove 'foreign influences',[28] although it still remained a derivative Code civil. It

25 Voorduin, 1837, pp. 123-124.
26 Meijers, 1935, pp. VI-VII.
27 Lokin and Zwalve and Jansen, 2020, p. 370.
28 See Florijn, 1994, p. 23 seq.

came into force in October 1838, after the completion of the other civil law codes, such as the Code of Civil Procedure and the Commercial Code.

2. OPTING FOR A COMPLETE REVISION OF THE CIVIL CODE

Given the history of its genesis, the Old Civil Code (OBW) of 1838 has never been valued as a 'home-grown' product: the obviously French origin of large parts of its contents precludes that.[29]

2.1. DEVELOPMENTS IN THE 19TH CENTURY

Initial criticism of the new legislation was sharp and centred mainly around linguistic and systematic imperfections, while more serious flaws were known only later.[30] The need for revising the civil code was recognised early on, but various factors hindered the revision process. Florijn discusses, among others, the constitutional assignment to produce a penal code, which would consume a great deal of legislative energy,[31] the use of State Committees (which based on Dutch experience often failed to produce optimal results due to issues such as composition, lack of consensus, time-constraints, and inter-relatedness of many provisions),[32] and the fundamental question of whether to pursue a partial or complete revision of the code.[33] The preference for a complete overhaul existed, but such a project never materialised.

29 Lokin and Zwalve and Jansen, 2020, p. 372: 'Het OBW 1838 is, gelet op zijn ontstaansgeschiedenis, nimmer gekoesterd als een product van eigen bodem: daarvoor was de Franse herkomst van grote gedeelten ervan te duidelijk.'

30 Florijn, 1994, p. 28 seq.

31 Florijn, 1994, p. 31.

32 Florijn,1994, pp. 54-55. Cf. Heirbaut, 2012, p. 62: 'By way of example, after their own bad experiences with commissions and 'troikas' of distinguished jurists, the Dutch came to the conclusion that commissions lead to disaster and that it is better to have one person in charge;'.

33 Florijn, 1994, p. 29 seq.

Lokin and Zwalve, too, point out that any attempt to achieve a complete revision in this century was illusionary.

> *It comes as no surprise, therefore, that attempts were already made in the nineteenth century to replace the 1838 Civil Code with a new one. However, none of these attempts bore fruit. Now that the Kingdom of the Netherlands had its own codification, there was no longer any political need for further measures, and interest in a recodification of private law was confined to the small, and in political terms, totally irrelevant, circle of practitioners of private law.*[34]

Florijn concludes that the problems he identified led to a different approach in legislation, namely, to place new legislation outside the civil code.[35] That resulted in an unsatisfactory development of the general doctrines that were found in the non-revised areas of the civil code. Over time, the failure to adequately address the existing civil law needs shifted the focus towards seeking solutions from the judiciary rather than the legislator.

2.2. DEVELOPMENTS THAT LED TO THE ESTABLISHMENT OF THE STATE COMMITTEE 1919

On 31 January 1919, the Supreme Court of the Netherlands delivered its ruling in the case of Lindenbaum v Cohen.[36] This judgement is generally

34 Lokin and Zwalve, 2014, p. 377: 'Het behoeft daarom geen verbazing te wekken, dat al in de laatste jaren van de negentiende eeuw pogingen zijn ondernomen het BW van 1838 te vervangen door een nieuw burgerlijk wetboek. Deze pogingen zijn echter alle op niets uitgelopen. Nu het Nederlandse koninkrijk zijn eigen codificatie had, ontbrak de politieke noodzaak en leefde de belangstelling voor een hercodificatie van het privaatrecht slechts binnen de kleine en politiek volslagen irrelevante kring van de beoefenaren van het privaatrecht.'

35 Florijn, 1994, p. 89.

36 Hoge Raad 31 januari 1919, NJ 1919, p. 161 (Lindenbaum-Cohen), ECLI:NL:HR:1919:AG1776

considered *'the'* landmark case of the 20th century,[37] due to the value the Court attributed to the source of *unwritten* law.

The decision quickly garnered annotations in legal publications, including one by Professor Meijers, who was one of the editors of the esteemed Weekblad voor Privaatrecht, Notaris-ambt en Registratie (WPNR; Weekly magazine for Private law, the Notary office and Registration). Meijers began his annotation with the following sentences:

> *The Supreme Court changed its position with regard to its interpretation of the unlawful act of art. 1401 B.W.! The importance of this decision corresponds with the introduction of an entire new book in the civil code.*[38]

In his annotation, Meijers also explained the motives behind the Supreme Court's decision, which deviated significantly from its earlier rulings. The chosen definition of 'unlawful' by the Supreme Court indicated their frustration with the slow pace of legislative work:

> *Remarkable is the definition of the unlawful act that is given in this judgment. Not Molengraaff's definition, neither Vernède's one is followed, but literally the one of the amended bill of 1913 is copied (see W. 9459 and*

37 In its yearly report of 2019, the Supreme Court itself mentions that the 100 year anniversary of this landmark judgement was marked by a joint symposium organized between by Leiden University, the University of Amsterdam and the Supreme Court. It reports: 'The symposium concluded at the Supreme Court. In honour of the anniversary, the employees of the Supreme Court performed an operetta entitled 'NJ 1919, p. 161' (page 161 is the page on which the decision was first published in the *Nederlandse Jurisprudentie, HHR*), which was composed especially for the occasion. The celebration garnered extensive news coverage. The Dutch daily newspaper De Volkskrant attended a rehearsal by the chorus and published an article about it, and the television programme Buitenhof interviewed President Maarten Feteris, who composed the operetta.' https://2019.jaarverslaghogeraad.nl/2019-highlighted/brief-review-of-2019/.

38 Meijers, 1919, p. 66: '(1). De Hooge Raad om ten aanzien der uitlegging van de onrechtmatige daad van art. 1401 B.W.! Het is een beslissing, die in belangrijkheid tegen de invoering van een geheel nieuw boek in het Burgerlijk Wetboek opweegt.'

Scholten in this Weekbl. 2264).[39] *There is something tragic-comic about it. It cannot have been chosen for its inherent excellence; the definition also has the same fundamental flaw of placing the required carefulness alongside the legal duty, thus equating legal duty with statutory duty. However, the fact that this cumbersome definition is copied verbatim demonstrates resentment towards the slow working pace of the legislator. The Netherlands has been waiting for over 5 years for the draft to be dealt with. There is no sign of progress. The Supreme Court is now doing what the legislator neglects to do.*[40]

In order to understand Meijers' explanation, it should be noted that one of the many flaws of the Old Dutch Civil Code was the lack of a definition of what was considered 'unlawful'. Of course, this posed a problem in the application of the unlawful act. The relevant provision, in translation, reads:

Art. 1401 Old Dutch Civil Code

39 The abbreviation W. stands voor *Weekblad van het recht*, and Meijers refers to the section 'Legislation' in the issue of Friday May 9, 1913, numbered 9459, p. 1 seq. Professor Scholten (see about him also n. 49) was one of the other editors of the *WPNR* and he had written a chronicle about the bill regarding the unlawful act in the weekly of 17 May 1913 (p. 237-238). See about its origin also De Vrey, 2005, p. 84.

40 Meijers, 1919, p. 66: 'Merkwaardig is in het arrest de definitie die van onrechtmatige daad wordt gegeven. Niet de omschrijving van Molengraaff, noch die van Vernède wordt gevolgd, maar letterlijk is die van het gewijzigd wetsontwerp van 1913 overgenomen (zie W. 9459 en Scholten in dit Weekbl. 2264). Er zit daarin iets tragisch-comisch. Want niet om haar innerlijke voortreffelijkheid kan zij gekozen zijn; de definitie heeft ook weer deze principiële fout, dat zij de vereischte zorgvuldigheid naast den rechtsplicht plaatst en derhalve rechtsplicht = wetsplicht beschouwt. Maar uit het letterlijk overnemen van deze omslachtige omschrijving spreekt een wrevel over het trage werken van den wetgever. Meer dan 5 jaar wacht Nederland op het in behandeling nemen van het ontwerp. Niets echter wat op eenigen voortgang wijst. De Hooge Raad doet thans dat, wat de wetgever nalaat.'

> *Any unlawful act, which causes damage to another person, obliges the one, by whose fault this damage has been caused, to compensate the other.*[41]

Previously, the Supreme Court had always adopted a cautious and somewhat legistic approach.[42] It interpreted 'unlawful act' very narrowly, considering only acts that violated *statutory* law as 'unlawful'. This meant that the Court recognised only two unlawful acts: the violation of a right, and the violation of a statutory duty. This approach was known as the 'narrow interpretation', because it excluded the source of unwritten law, specifically, 'the good morals or the standard of due care, which must be observed in society with respect to a person or the person's property'.[43]

However, in 1910, the Supreme Court's application of this narrow interpretation caused public outcry when a merchant who had suffered significant losses could not claim compensation based on an unlawful act. This was because there was neither a violation of his right nor a violation of a statutory duty, but rather a gross breach of a duty of care.[44]

The Court's decision prompted action in both the political and legal spheres. On 11 January 1911, the minister of justice, Robert Regout, introduced a bill before Parliament to expand liability under art. 1401 of the Dutch Civil Code by adding the elements 'contrary to morality' and

41 Art. 1401 OBW. Elke onregtmatige daad, waardoor aan een ander schade wordt toegebragt, stelt dengenen door wiens schuld die schade veroorzaakt is in de verplichting om derzelve te vergoeden. English translation taken from: De Vrey, 2005, p. 82.

42 In this respect, too, it was based on the French Code civil. See for a detailed analysis: De Vrey, 2005, p. 80 seq.

43 '(...) hetzij de tegen de goede zeden, hetzij tegen de zorgvuldigheid, welke in het maatschappelijke verkeer betaamt ten aanzien van eens anders persoon of goed.'

44 HR 10 June 1910, W. 9038. Somewhat simplified, the case was as follows: a merchant stored leather in a warehouse. Strong frost caused a waterpipe to burst, and the water started to damage his goods. Fortunately, he was alerted. However, he could not shut off the main valve, because it was located in a house above the warehouse. Its inhabitant refused to comply with his urgent request to close it and the leather stored in the warehouse was irreparably damaged. The Supreme Court ruled that there had been no statutory duty to comply with the merchant's request, nor a violation of his property right. So, it based its decision on the narrow interpretation of 'unlawfulness'.

'contrary to the duty of care of the bonus pater familias'.[45] However, even though it was amended in 1913, it still had not been approved by 1919. The legal community also criticised the decision, which likely contributed to the organisation of a meeting by the Nederlandse Juristen-Vereeniging (Dutch Lawyers Association) in 1912,[46] to discuss a pre-recommendation with regard to the question of re-codification.[47] The main question was as follows:

> *Which method ought to be followed in the revision of our Civil Law (design and division of the Code; revision at once or in parts; manner of preparation and treatment)?*[48]

After extensive discussion, with conservative figure Paul Scholten playing a significant role,[49] the members in attendance voted on whether the Code should be completely or partially revised. The majority favoured the latter option (57 against 28).[50] Meijers, although a member, was absent from this meeting and did not participate in the voting process.[51]

45 De Vrey, 2005, p. 85.

46 The main question was formulated neutrally, and pertained to the revision of civil law in general (see main text below), but the problem of the unlawful act of art. 1401, more specifically the way it had been interpreted by the Supreme Court 1910, was already mentioned twice as an example in the contribution of the first speaker, Paul Scholten. Handelingen 1912, p. 107-108. It was further adressed by two other speakers: Nolst Trenité, p. 144 seq. and Seerp Gratama, p. 145.

47 This was actually the second time the Dutch Lawyers Association addressed this question, the first time was in 1870, see Florijn, 1994, p. 48 seq.

48 Handelingen 1912, p. LXI seq. See also: Florijn, 1994, p. 67 seq.

49 Paul Scholten was not only a civil law and philosophy of law professor in the Municipal University of Amsterdam (1910-1945), he was also a substitute judge in the Amsterdam Court of Appeal (1915-1935). Scholten was the first speaker in the discussion about the pre-recommendations of J.P. Fockema Andreæ and E.E. van Raalte. In his contribution to the discussion he pointed out that he believed that a complete revision was not only unnecessary, but undesirable, as well. Handelingen, 1912, p. 102 seq. About Scholten and the revision of the Dutch Code, Runia, 2022, p. 95 seq.

50 Handelingen 1912, pp. 180-181; Florijn, 1994, p. 28.

51 Handelingen 1912, p. LVIII and 99.

The fact that on 31 January 1919 the Supreme Court 'had done that, what the legislator had neglected to do for years', did not go unnoticed in Parliament. Only a few months later, on 7 June 1919, a member of the First Chamber, Kappeyne van de Coppello, who was a practising lawyer himself, referred to Meijers' annotation and used the decision as an example of 'a very questionable practice': the application of the law outside the law itself.[52] He urged the minister of justice, Van Heemskerck, to appoint a new State Committee with the following task:

> *to indicate where practice generally recognises flaws and gaps in the current Dutch civil legislation (the Civil Code, the Code of Commerce and the Code of Civil Procedure), which stand in the way to a good distribution of justice, and can be repaired and complemented by simple, partial revisions of the law.*[53]

This proposal is probably based on a strategy Paul Scholten already suggested during the 1912 meeting of the Dutch Lawyers Association.[54] It should be emphasised, however, that the said strategy was based on the system of *partial* revision, a requirement that the minister of justice did not fail to mention when he actually established the requested State Committee:

52 Handelingen 1919, p. 527. Kappeyne wondered whether such a decision of the Supreme Court did not violate art. 11 of the Law, containing the general provisions, which prescribes that the judge will administer justice according to the law, pp. 527–528: 'Men zou kunnen vragen, en ik doe het met alle bescheidenheid, waar ik hier speciaal het oog heb op de jurisprudentie van den Hoogen Raad, of een dergelijke wetstoepassing niet in strijd is met art. 11 van de wet, houdende algemeene bepalingen, waarin voorgeschreven wordt, dat de rechter zal rechtspreken volgens de wet.'

53 Handelingen 1919, p. 526 (under VI): 'aan te geven in en door de praktijk algemeen erkende onjuistheden en leemten in de huidige Nederlandsche burgerlijke wetgeving (het Burgerlijk Wetboek, het Wetboek van Koophandel en het Wetboek van Burgerlijke Rechtsvordering), die aan een goede rechtsbedeeling in den weg staan, en door eenvoudige partieele wetswijziging verbeterd en aangevuld kunnen worden.'

54 Beekhuis, 1950, p. 256.

> *This task (…) leaves the overall revision, fundamental reworking of the Codes untouched and does not intend to replace them. It aims to remedy deficiencies, not to establish a new legal framework, but to meet specific practical needs. Its purpose is to gradually provide what our civil codification requires in terms of changes and additions, as recognized by common experience, with the hope that this can be accomplished soon.*[55]

Neither Meijers nor Scholten was appointed as an initial member of the State Committee 1919.[56]

2.3. MEIJERS' RELATION WITH THE STATE COMMITTEE 1919

While it remains unknown whether Meijers was disappointed at not having been appointed to the State Committee, it can be inferred that such a prestigious position would have been desirable for an ambitious and relatively young professor like Meijers, who had been appointed in Leiden in 1910 at the age of 30. Perhaps a clue to his sentiments can be found in a remark he made in 1922 as chairman of the Dutch Lawyers Association, expressing 'that major legal reforms are best accomplished (…) by exerting influence on a reform of the Dutch legislation'.[57] Furthermore, many years after Meijers' death in 1954, an interview was published with law professor Isaak Kisch, who also had been persecuted

55 Van Heemskerck, 1919, p. 4: 'Deze opdracht (…) laat algeheele herziening, fundamenteele omwerking van de Wetboeken ongemoeid, en bedoelt geenszins in de plaats daarvan te treden. Zij strekt tot wegneming van gebreken, niet om een nieuwe stelsel aan de wetgeving ten grondslag te leggen, maar om te voldoen aan op bepaalde punten gevoelde eischen der practijk. Zij beoogt stuksgewijs te voorzien in wat naar algemeen erkende ondervinding verandering en aanvulling behoeft in onze burgerlijke codificatie, met de hoop dat dit spoedig kunnen geschieden.'

56 Its official name is actually: *Staatscommissie tot wegneming van onjuistheden en aanvulling van leemten in de Nederlandsche burgerlijke wetgeving*; State Committee for the removal of flaws and the filling of gaps in the civil legislation of the Netherlands.

57 '[Dat] groote rechtshervormingen het best te verwezenlijken zijn (…) door invloed uit te oefenen op een hervorming van de Nederlandsche wetgeving.' *Handelingen* 1922, p. 8-9; Florijn 1994, p. 83, n. 303.

during the war because of his Jewish origin and had spent time with Meijers in concentration camp Theresienstadt (Terezin). He revealed that during their internment, Meijers expressed regret on multiple occasions about not being involved in political and legislative work.[58]

However, it is evident that Meijers was highly dissatisfied with the work and the pace of the State Committee.[59] He expressed his discontent in a famous contribution to the WPNR in 1928, titled: *Het feillooze deel van ons Burgerlijk Wetboek*; The flawless part of our Civil Code.[60] This essay, characterised by its rhetorical and sarcastic tone, concluded with the question of whether it was time 'to revise the method of revision'?[61] Publishing such a strongly negative review certainly did not improve Meijers' prospects of being selected as a future member of the State Committee.

2.4. MEIJERS' CAMPAIGN FOR A COMPLETE REVISION OF THE OLD CODE

The exact moment when Meijers became an advocate for a complete revision of the Old Dutch Civil Code is still a subject of discussion. While it is difficult to pinpoint the precise date, we can assume that by January 1928, when he published his critique of the State Committee and called for a 'revision of the revision', he had already embraced the idea of a complete overhaul.

There have been different interpretations from when Meijers first expressed support for recodification. Van Oven suggests that Meijers had plans for recodification as early as 1905, based on the fact that he carried a notebook to jot down imperfections of the old code.[62] However, this interpretation seems retrospective, as Meijers did not

58 Van Dunné and Boeles and Heerma van Voss, 1977, p. 121.

59 Meijers certainly was not the only one who had reason to be disappointed, see about the failure of the State Committee in detail Florijn, 1994, p. 77 seq.

60 Meijers 1928 (WPNR # 3031), p. 49 seq. See also: Chavannes, 1997, p. 3-4; Florijn, 1994, pp. 83-84.

61 'Zou men niet beginnen met de wijze van herziening te herzien?'

62 Van Oven, 1950, pp. 110-111.

focus on recodification in the following years.[63] Florijn, on the other hand, if I understand him correctly, considers a remark made by Meijers during the 1922 meeting of the Dutch Lawyers Association as the starting point.[64] However, this date may be too early and open to multiple interpretations, such as a desire to contribute to the partial revision at that time.

I propose an alternative scenario. In 1927, Meijers published a critical essay in the WPNR about draft legislation on inheritance law, known as the 'Erfrechtnovelle'.[65] This essay sparked a heated debate between Meijers and notary Philip Bernard Libourel, a respected authority in inheritance law.[66] Surprisingly, this debate has received little attention in the literature.[67] However, it is significant because it led to an extraordinary appeal by the Main Board of the Brotherhood of Notaries, *nota bene* published in the same weekly where Meijers was an editor. The appeal urged members of the Second Chamber of Parliament to disregard Meijers' criticism of the draft legislation.[68]

In my view, Meijers articulated his motives for the necessity of 'a revision of the method of revision' in his essay on the 'Erfrechtnovelle': nothing but a *complete* revision would suffice.

> *However, I consider this draft to be one of the most questionable symptoms of the method, with which one nowadays attempts to keep our legislation up to par. All these so-called technical and detail revisions are disrupting our civil law, rather than advancing it. Form and content of provisions are not two magnitudes, which can be completely separated; a revision of one certain subject, in which it is not allowed to change its content or to involve*

63 Cf. Schoordijk, 1975, p. 566. A clue, nothing more, can maybe be found in Meijers' absence in the meeting of the Dutch Lawyers Association in 1912.

64 Florijn, 1994, p. 83 seq.

65 Meijers, 1927a, pp. 13-15.

66 Cf. Libourels extensive reply in *WPNR* #2987 (p. 190 seq.) and *WPNR* #2988 (p. 212 seq.), with a reaction from Meijers in *WPNR* #2989 (p. 228 seq.); Libourel responded in *WPNR* #2992 (p. 292 seq.), which led to a swift and rather indignant reply from Meijers in the same issue.

67 So far, the only author I found who referred to the controversy is De Hondt, 1980, p. 109.

68 Main Board of the Brotherhood of Notaries, 1927, p. 296. *WPNR* 2992 (1927), p. 296.

> *other subjects is already wrong in itself. Civil law forms one comprehensive unity; the more one revises only technically, the more cluttered the whole will become.*[69]

An alternative to legal progress through legislation is, of course, a switch to a system of precedents. However, Meijers did not believe in such a system for the Netherlands, as is exemplified by his statement that 'the experience that we have gained in practice with our codes has not been such as to indicate that the idea of abandoning the notion of codification would be met with indifference on the part of the legislature or the world of legal academia.'[70]

Meijers particularly disliked the legal concept of fiduciary transfer of ownership (*fiducia cum creditore*). In the Netherlands, such transfers had no legal basis in the civil code, but they were nevertheless approved

69 Meijers, 1927b, p. 229: 'Ik beschouw dit ontwerp echter als een der bedenkelijkste symptomen van de methode, waarop men tegenwoordig beproeft onze wetgeving op peil te houden. Al deze zoogenaamde technische en detailherzieningen zijn bezig ons burgerlijk recht te ontwrichten, in plaats van vooruit te helpen. Vorm en inhoud van de wetsartikelen zijn niet twee grootheden, die absoluut gescheiden kunnen worden; een herziening van één bepaald onderwerp, waarbij het verboden is den inhoud te wijzigen of andere onderwerpen aan te roeren is reeds op zich zelf verkeerd. Het burgerlijk recht vormt één samenhangend geheel; hoe meer men details slechts technisch herziet, hoe onoverzichtelijker het geheel zal worden.'

70 Van Zeben, 1961, p. 122: 'Ongetwijfeld is een uit precedenten opgebouwd burgerlijk recht even goed bestaanbaar als een dat zijn middelpunt in een wetboek vindt. Het burgerlijk recht, zoals het in Engeland en de Verenigde Staten zich heeft gevormd, toont dit voldoende aan. Maar de ervaringen, die wij met onze wetboeken in de praktijk hebben opgedaan, zijn toch niet zo gewest, dat de wetgever of de rechtsgeleerde wereld het onverschillig is, wanneer de codificatiegedachte zou worden prijsgegeven.'

by the Dutch Supreme Court in 1929 'for practical reasons'.[71] Meijers pointed out in 1936 that he had already identified this practice as 'dangerous' back in 1908:

> *44. I doubt whether the legal scholars in the Netherlands are sufficiently convinced of the extent to which legal life is undermined by fiduciary transfers of ownership combined with a declaration of retaining possession on behalf of the transferee. Already thirty years ago I pointed out this danger, but then it was only emerging.*[72] *In order to be able to prove the scope of the evil, I have approached with a series of questions all process servers, who are members of the Association of Judicial Officers. Their answers form a monotonous reading, but they offer irrefutable proof of how deep this evil has eroded and of how much legal intervention is needed.*[73]

In summary, Meijers campaign was based on the belief that the balance of law, administration of justice, and legal science had been disrupted.[74]

71 HR 25 januari 1929, *NJ* 1929, p. 616 seq., annotated by Paul Scholten (De Haan/Heineken) and HR 21 juni 1929, NJ 1929, p. 1096 seq. (Hakkers/Van Tilburg). Meijers 1936a, p. 251, points out that the Dutch lawyers copied German case law and refers in his note 1, p. 251 especially to: Weinhausen, *Die Sicherungsübereignung*, 4e ed., 1912, Siebert, *Das rechtsgeschäftliche Treuhänderverhältniss*, 1935, Oertmann, *In welcher Form soll die Sicherungsübereignung durch das künftige Bürgerliche Gesetzbuch geregelt werden?* Gutachten für den dritten deutschen Juristentag in der Tschehoslowakei, 1927, p. 12 and the paper of Von Liebig and Bechert, D*ie Sicherungsübereignung und ihre Zukunft*, Kritische Vierteljarhresschrift für Gesetzgebung und Rechtswissenschaft 1935, Bnd. 63, p. 151 seq.

72 Meijers, 1908. Instead, he proposed as a practical solution the recognition of a non-possessory pledge on commercial movables. (*WPNR* #1999, p. 183: 'Mijns inziens is dan ook de erkenning van een pandrecht op handelszaken een noodzakelijke aanvulling van een betere regeling van den eigendomsovergang zonder terhandstelling'.)

73 Meijers, 1936a, pp. 272-273: '44. Ik betwijfel of het rechtsgeleerde Nederland wel voldoende overtuigd is van de mate, waarin het rechtsleven door eigendomsoverdrachten met verklaring van houderschap ondermijnd wordt. Reeds dertig jaar geleden heb ik mij met een reeks vragen tot alle deurwaarders in Nederland, die lid zijn van de Vereeniging van Gerechts-Deurwaarders, gewend. Hun antwoorden vormen een eentonige lectuur, maar zij toonen onweerlegbaar aan hoever het kwaad ingevreten heeft en hoezeer hier wettelijk ingrijpen noodzakelijk is.'

74 Cf. Lokin, 2022, p. 646.

The detail revisions and the introduction of new laws outside the code had cluttered the overall picture of the law for legal students and legal science in general. The legislature had failed in providing adequate civil legislation, resulting in legal uncertainty. According to Meijers, the judiciary could intervene only sporadically and provide fragmented answers, so it was unable to fill the gaps. A new balance was to be found, which could only be achieved through a complete revision of the law. This was crucial for the Dutch to continue benefitting from codification and maintain their trust in it.

> *The existence of many uncertainties in fundamental legal issues and their only slow and occasional resolution through the judiciary makes it necessary to occasionally subject civil legislation to a thorough technical revision if we want to continue benefiting from codification and maintain its trust among the people.*[75]

In 1938, during the festivities marking the 100th anniversary of the (third) civil code, a Fest-schrift ('Gedenkboek 1838–1938') was presented. Edited by Meijers and Scholten, it featured contributions from 29 leading Dutch scholars in various fields of civil law. Meijers was the only contributor advocating a complete overhaul of the old code,[76] while Scholten began his essay by stating that 'our code is a quiet possession'.[77]

2.5. DEVELOPMENTS UNTIL MEIJERS' OFFICIAL COMMISSION IN 1947

Following the anniversary celebration, Meijers continued his campaign for the complete revision of the code. On 20 May 1939 the WPNR

75 Meijers, 1939, p. 25: 'Het bestaan van vele onzekerheden bij principieele rechtsvragen en hun slechts langzame en incidenteele opruiming door de rechtspraak, maakt het noodig, dat de burgerlijke wetgeving nu en dan op de helling gebracht wordt voor een grondige technische herziening, willen wij het voordeel der codificatie deelachtig blijven en wil deze het vertrouwen van het volk blijven dragen.'

76 Meijers, 1938, p. 33 seq.

77 Paul Scholten, 1938, p. 1.

published the final part of an essay by Meijers in which he reiterated the failure of partial revision as a method.[78] Interestingly, two weeks before its publication, Meijers had become a member of the State Committee 1919.[79] This raises the question of how his appointment aligned with the committee's aim of *partial* revision.[80] While I will not delve into that question here, it is worth noting that Meijers seemed to have considerable influence within the committee and was able to revive it briefly before the German occupation of the Netherlands in 1940.

The revival of the State Committee can be deduced from the frequency of its meetings since Meijers' membership. Meetings were now scheduled once or twice a month, with the 59th meeting taking place on 18 November 1939, and the 64th meeting on 24 February 1940.[81] This was a significant increase compared to the previous two meetings: the 57th meeting took place on 9 June 1934, and the 58th meeting on 27 February 1937. It is evident that Meijers' influence on the committee can be inferred from the topic discussed, as each meeting dealt with draft legislation regarding the fiduciary transfer of ownership (*fiducia cum creditore*). However, with the German occupation, the State Committee ceased to meet.[82]

78 Meijers, 1936b, p. 3621. See also: Lokin, 1992, p. 31 and Lokin 1994, p. 164.

79 Meijers was appointed by Royal Decree no. 71, dated May 4, 1939, *Nederlandsche Staatscourant* nr. 88, p. 1. Paul Scholten had already been appointed in 1930, by Royal Decree no. 26, dated December 1, 1930, *Nederlandsche Staatscourant*, nr. 23, p. 1

80 Meijers' membership of the State Committee before the occupation has received remarkably little attention in Dutch literature, even Florijn does not mention it in his thesis.

81 I made use of the minutes of the meetings of the Subcommittee Civil Law of the State Committee for the removal of flaws and the filling of gaps in the Dutch Civil legislation (Subcommissie Burgerlijk Recht van de Staatscommissie tot wegneming van onjuistheden en aanvulling van leemten in de Nederlandsche burgerlijke wetgeving), Nationaal Archief, Den Haag, Ministerie van Justitie, Directie Wetgeving, Nieuw Burgerlijk Wetboek, nummer toegang 2.09.75, inventarisnummer 180.

82 The 65th meeting would only take place on January 24, 1948, under presidency of Meijers, who had by then transformed the State Committee to one of his instruments for the revision of the civil code.

During the war, Meijers and his family faced the anti-Jewish measures deployed by the Nazis. Meijers was forced to resign from his position at Leiden University, and he and part of his family were interned in Westerbork, Barneveld, and Theresienstadt. It is well-known known that during that during his stay in Westerbork he continued to work on the revision of the civil code.[83]

In 2004, a significant revelation was made regarding Meijers' work in Westerbork, when the Memorial Centre of Camp Westerbork published a book written by Aad van As.[84] During the war, Van As was stationed in Camp Westerbork, where officially he supervised the food distribution. Unofficially, he was a member of the resistance and he kept a diary of his time 'in the lion's den'. He recalls:

> *Shortly after the arrival of the Barneveld transport in Camp Westerbork, I received a message from Professor Oranje, requesting that efforts were made to find a hiding place in Frisia for Professor Meyers, because he had been selected by the Dutch government-in-exile to rewrite the Civil Code for the Netherlands. So I transmitted this message to Meyers.*[85]

There is no reason to doubt Van As' account, which suggests that the decision to recodify Dutch law was made much earlier than generally assumed. It also means that the decision did not originate as a result of a discussion in Parliament on 5 March 1947.[86] However, it is certain that Meijers was *officially* appointed to draft a new Dutch Civil Code by

83 Florijn, 1994, pp. 108-109; Chavannes, 1997, pp. 9-10.

84 Florijn, 1994, pp. 108-109; Chavannes, 1997, pp. 9-10.

85 Van As, 2004, pp. 55-56: 'Kort na de aankomst van het transport van Barneveld kreeg ik via professor Oranje het bericht dat er pogingen in het werk moesten worden gesteld om een onderduikadres te verzorgen in Friesland voor professor Meyers, aangezien hij door de Nederlandse regering in ballingschap was uitgezocht om na de oorlog het nieuwe Nederlands Burgerlijk Wetboek samen te stellen. Deze boodschap bracht ik dus over aan Meyers'. See also Heirbaut, 2012, p. 64, n. 11 & 12.

86 Florijn 1994, p. 91.

Royal Decree on 25 April 1947.[87] His campaign for a fourth Dutch Civil Code had ultimately proved successful...

87 Royal Decree nr. 20, dated April 25, 1947 published in the *Staatscourant* of 6 mei 1947, nr. 86.

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CODIFICATION OF CIVIL LAW IN AUSTRIA

MARTIN SCHAUER

ABSTRACT

The codification of Austrian civil law is counted among the first such endeavours in European history. Therefore, the lessons of that codification, as well as its characteristics, are significant. This chapter presents not only the history of the ABGB from its adoption, through various reforms, but also the possible future direction of development of this code. Austrian civil law specifically sets forth general rules and principles instead of particularly detailed norms, granting the ABGB the ability to regulate a wide swathe of civil law relationships, including those between professionals and non-professionals in the economic sphere. The chapter documents the erosion of codified Austrian civil law through fragmentation (when various civil laws and related domains become regulated in separate acts of statutory law) and the need for reform of the ABGB.

Keywords: *Austria, ABGB, civil code, civil law, codification.*

Schauer, M. (2024) 'Codification of Civil Law in Austria' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 469–490. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_17

1. INTRODUCTION: CHARACTERISTIC FEATURES OF THE ABGB

1.1. ABGB AS PART OF THE FIRST GENERATION OF CODIFICATIONS IN EUROPE

The codification of civil law in Austria is called *Allgemeines Bürgerliches Gesetzbuch* (General code on civil law). In general, the abbreviation ABGB is used. Together with the Prussian *Allgemeines Landrecht* (ALR; General Land Law) of 1794[1] and the French Code Civil of 1804,[2] it belongs to the first generation of codifications in Europe. Just like the Civil Code, it is still essentially in force today. In Hungary it was applicable only for a limited period of time, from 1852 to 1861.[3]

Its defining characteristics include the influence of natural law,[4] especially based on the ideas of Immanuel Kant. An example of this is § 16 ABGB:[5]

> *Every individual has inherent rights, already evident by common sense and has thus to be considered as a person.*

Franz von Zeiller, the most influential author of the ABGB held that man exists for his own sake, as an end in himself.[6]

1 For the influence of the Allgemeines Landrecht on the Austrian Civil Code, see Brauneder, 2011, pp. 3 *et seq.*
2 For the influence of the Code Civil on the Austrian Civil Code, see Rainer, 2011, pp. 17 *et seq.*
3 See Vékás, 2011, 307 et seq.
4 For additions see also Schmidlin, 2011, pp. 59, 65 et seq.
5 See Fenyves, Kerschner, Vonkilch, 2014, § 16 n. 2.
6 Zeiller, 1811, p. 102.

1.2. PRINCIPLES VERSUS RULES

The ABGB is a relatively short codification. Making a comparison, the Prussian ALR has 19,000 articles. The ABGB in its original version consisted of just 1502[7] articles. It is much less casuistic, and to a certain degree its provisions can be seen more as principles than rules. Judges are encouraged to further develop the law as laid down in § 7:

> *If a case can be determined neither by the wording, nor by the natural meaning of a law, similar cases which have been regulated by law and other related laws have to be considered. If the case still remains ambiguous, it has to be decided based on the diligently gathered and thoroughly considered facts in line with the natural principles of law.*

1.3. ABGB AS A GENERAL CIVIL CODE

The ABGB is – as expressed in its name – a general civil code. At the time of its creation, this was not a matter of course. However, the ABGB did not have any special rules providing privileges for nobility or other social classes. In addition to § 16 ABGB, in § 18 ABGB, it is laid down that

> *everyone is capable of acquiring rights subject to the conditions provided by law.*

'Everyone' in fact means everyone and rejects the idea of a distinction between social classes. The provision can be considered as a private law based on freedom of acquisition.[8]

7 In 2013 § 1503 was added to the ABGB. The provision regulates the entry into force and the transitional framework of subsequent amendments to the ABGB.

8 Schauer, 2017, § 18 n. 1.

1.4. DUALISTIC VERSUS MONISTIC SYSTEM

Since the ABGB is a general civil code, it applies to everyone in the same way. However, it contains a small number of provisions that refer to businesses or are specifically addressed to them. One example is § 367:

> *The claim of ownership against a lawful possessor of a movable asset must be dismissed, if he provides evidence that he has acquired the asset* (…) *from an entrepreneur in the ordinary course of his business* (…).

Another example is § 1030:

> *If the owner of a shop or a trade allows his employee or trainee to sell goods in or outside of such shop, it is assumed that they have been granted the power of attorney to receive payment and issue receipts.*

Furthermore, the ABGB has a chapter on partnership (§ 1175–§ 1216e). When the ABGB came into force, this chapter was the legal basis for most business companies.[9] Presently too, when most types of companies and corporations are regulated by special law, §§ 1175 et seq. serve as a gap-filling instrument for those other legal forms.[10]

However, right from the beginning, it was clear that a commercial code should be added to the general civil code. Efforts to adopt such a code failed in the early 19th century.[11] In 1862, Austria adopted the *Allgemeines Deutsches Handelsgesetzbuch* (AHGB, General German Commercial Code). In 1938, after the annexation of Austria to Germany, the German Commercial Code (*Handelsgesetzbuch*, HGB) from 1900 was introduced, and it replaced the AHGB immediately. Since the HGB remained in force even after the restoration of Austria's independence in 1945, the dualistic system continues into the present.

9 Fenyves, Kerschner, Vonkilch, 2017, § 1175 Rz 2.

10 See § 1175 para. 4: 'The provisions of this section shall also apply to other companies insofar as no special provisions exist for these companies, and the application of these provisions is also appropriate considering the principles applicable to the respective company'.

11 See Weigand, 1997, pp. 246 et seq.; Schauer, 2011, pp. 617, 620.

1.5. THE SYSTEM OF ABGB

The system of ABGB is related to the *Institutiones Gaii*. Its major feature is the distinction between persons (legal subjects) and objects. A closer look reveals that the code starts with a short introduction (§ 1–§ 14). Then it continues with the first part on persons (§ 15–§ 284). In this part, the code deals with 'rights relating to personal qualities and relationships', marriage, and the legal relation between parents and children and with curators. The second part (§ 285–§ 1341) deals with objects. In the original language, it is called 'Sachenrecht', which must not be understood in the same way as in the pandectistic system. The second part has two subdivisions. The first is about *rights in rem* (*dingliche Sachenrechte*). There is an enumeration of rights in rem in § 308. In its original version, this provision reads as follows:

> *Rights in rem are the rights of possession, ownership, pledge, servitude (easement) and the right to inheritance.*

From the perspective of modern legal doctrine, this list is discussed in a controversial way.[12] No doubt ownership, pledge, and servitude are seen as rights in rem. Whether possession is a right in rem is unclear.[13] The right to inheritance is an absolute right to acquire the estate, which can be enforced against anybody, but is not a right in rem. This is why, in 2015, as part of the major reform of succession law, the right to inheritance was deleted from the wording in § 308.[14]

The second subdivision in the second part of the ABGB is about personal rights (*persönliche Sachenrechte*). This is what in the pandetictistic system would be called law of obligations. There is a section on contracts and legal acts in general. Next, there are specific provisions on a number of contracts, such as purchase, rent, employment, and service and also

12 See Fenyves, Kerschner, Vonkilch, 2011, § 308 n. 6 et seq.; Kletečka, Schauer, 2024, 1.06 § 308 n. 3 et seq.

13 Fenyves, Kerschner, Vonkilch, 2011, § 309 n. 9 et seq.

14 Kindschafts- und Namensrechts-Änderungsgesetz 2013, BGBl I 20 13/15.

on joint property of spouses (marital property). A section on the right to damages and compensation is also found.

The third and final part of the ABGB provides for the 'Common provisions for personal rights and rights in rem' (§ 1342–§ 1503), which contain provisions on guarantee (*Bürgschaft*), modification of rights and obligations (assignment of claims, exchange of debtor), cancellation of rights and obligations, and prescription and acquisitive prescription.

It could be shown that the ABGB, contrary to many newer codifications, is not based on the pandectistic system. This does not come as a surprise because the pandectistic system was first based on textbooks by Georg Arnold Heise, which, despite being published in 1807[15] for the first time, came too late to have any influence on the system of the ABGB. However, the pandectist movement of the 19th century had a strong influence on academic discussions and legal doctrine.[16] This is why in legal education, civil law is taught based on the pandectistic system, and all textbooks used for students are based on this system as well.[17] As a result of this, legal thinking in the field of civil law follows a different system than the one on which the ABGB is based.

1.6. ADDITIONAL REMARKS

1.6.1. Liability for damages

As mentioned above, the provisions about liability for damages can be found in a subdivision of the second part about personal rights. Contrary to the system laid down in most of the more modern codifications, no distinction is seen between liability for breach of contract and non-contractual liability. The entire liability for fault is based on a general clause, which is regulated in § 1295 par. 1:

15 Heise, 1819.
16 See Wendehorst, 2011, p. 75, p. 79 et seq.
17 For example, see Bydlinski et al., 2023.

Everyone is entitled to claim compensation from the damaging party who caused the damage to him at his fault; the damage may have been caused by breach of a contractual obligation or without reference to a contract.

1.6.2. Unjust enrichment

There is no specific chapter on unjust enrichment in the ABGB, merely some provisions, which, if summarised, can be regarded as law of unjust enrichment. Claims for unjust enrichment can be based on a failed performance or can exist non-related to a performance. Special provisions for both groups of claims can be found in the ABGB, as illustrated by a few examples. First, let us examine two examples of claims for unjust enrichment based on a failed performance:

§ 877. Whoever demands the avoidance of a contract due to the lack of consent [error etc.] has to return everything he has received to his benefit from the contract.

§ 1431. If someone has received a good (asset) or a service by mistake, even by a legal mistake, to which he has not right against the transferor, in the first case the good can be re-claimed, in the second however, a reasonable remuneration with respect to the benefit granted can be claimed.

The most important provision dealing with unjust enrichment non-related to a performance is § 1041:[18]

If a good (asset) has been used for benefit of someone else without agency, the owner can demand the good (asset) in kind or, if this is no longer possible, the value which it had at the time of the use even though the benefit had been frustrated subsequently.

18 For example, see Kletečka, Schauer, 2024, 1.09 § 1041 n. 1; contrary to the prevailing opinion, Fenyves, Kerschner, Vonkilch, 2019, §§ 1041–1044 Rz 8 et seq.

2. THE DEVELOPMENT OF CIVIL LAW IN AUSTRIA OVER THE CENTURIES

2.1. 19TH CENTURY

Looking at the development of civil law in Austria, it can be said that the 19th century was characterised by an almost Biedermeier-like calm and tranquillity. There were almost no changes to the ABGB. However, numerous so-called 'imperial decrees' (*Hofdekrete*) were passed. The purpose of these decrees, which were adopted by the emperor, was not to change the law, but to interpret it in a binding manner and thus ensure legal clarity. The imperial decree of 1844/781, for example, particularly important because it clarified that the compulsory portion was not to be understood as a substantive right of inheritance but merely constituted a monetary claim.

One provision in the ABGB even refers to this practice. § 8 deals with what is called 'authentic interpretation':

> *Only the legislator has the power to interpret a law in a generally binding way. Such interpretations must be applied to all pending matters, provided that the legislator has not stated that its interpretation shall not be applied to any matters relating to actions undertaken and rights alleged prior to such interpretation.*

It is remarkable that the industrial revolution left the ABGB largely unaffected. There were first attempts for a strict liability for railways, but these were not provided for in the ABGB.[19]

However, the lack of legislation does not reflect the enormous developments in the field of academic research. As has been mentioned before, the pandectist movement had a huge impact on the legal doctrine in Austria. This strong influence became effective on legislation at the beginning of the 20th century.

19 Eisenbahnhaftungsgesetz, RGBl 1869/27; see Bernat, 2022, p. 45, 49 et seq.

2.2. 20th CENTURY

In contrast to the 19th century, the 20th century can be characterised as the era of change in Austrian civil law. This period can best be characterised by two lines of development. On the one hand, there were substantive reforms. On the other hand, there was a permanent erosion of the ABGB, which considerably weakened its function as a codification of Austrian civil law.

2.2.1. REFORM

The entry into force of the German Civil Code (BGB) in 1900 was a decisive event, and by this time at the latest it was clear that the ABGB – even if it had set standards at the time of its creation – could by no means be regarded as cutting edge. It is remarkable that the monarchy found the strength for a comprehensive reform programme in the years of World War I and thus shortly before its end. The reforms took place through the three partial amendments ('Teilnovellen') of the years 1914–1916,[20] which affected almost all areas of civil law. Particularly in the law of obligations, they were in part strongly influenced by the corresponding provisions of the German Civil Code. Examples of this are the introduction of the contract in favour of third parties and the assignation (Anweisung).

In the years after 1938 when Austria had been annexed to Germany, the ABGB remained in force. The reason was not that the regime appreciated the ABGB. Quite the opposite: the plan was to replace both the BGB and the ABGB with a new *'Code of the People'* (Volksgesetzbuch). This project was initiated under the auspices of the Academy of German Law, but was never completed due to the collapse of the Third Reich.[21] This is why the ABGB survived the Nazi regime essentially untouched.

20 Kaiserliche Verordnungen RGBl 1914/276, RGBl 1915/208, RGBl 1916/69.

21 See Meissel, Bukor, 2011, pp. 17, 22 et seq.

2.2.2. Erosion

However, the 20th century can also be described as the period when the ABGB, as the codification of the Austrian Civil Law, lost its power significantly due to erosion. Today, many parts of civil law are regulated outside the ABGB in special legal acts; even those which mostly affect people's everyday life. This can be illustrated by some examples.

Marriage

The law of marriage was regulated in the ABGB. In 1938, a large part of the provisions in the ABGB was replaced by the German marriage act (*Ehegesetz*). One of the reasons for this development was the introduction of compulsory civil marriage and divorce irrespective of religious affiliation, which was intended to overcome the previously denominational marriage law.[22] Among the many laws introduced by the Nazi regime between 1938 and 1945, the marriage act remained in force even after the restitution of Austria's independence in 1945. However, the Marriage Act only regulates the conclusion of marriage and divorce. It does not regulate egal relations between spouses, such as maintenance and other obligations arising from the personal relationship, which are still regulated in the ABGB. As a result, the law of marriage is fragmented between the Marriage Act and the ABGB.

It should also be mentioned that in Germany the Marriage Act had been replaced by a more modern legal framework in 1977, especially in the field of divorce,[23] which now is based on the principle of disintegration (*Zerrüttungsprinzip*). In Austria, the old system of divorce, although having been amended in parts, still applies. It is based on a combination of the principle of fault (*Verschuldensprinzip*) and the principle of disintegration. In court practice, the principle of fault predominates. This means that courts have to investigate whether one of the spouses or both of have committed a grave marital misconduct (*schwere Eheverfehlung*)

22 Verschraegen, 2011, pp. 667, 674 et seq.

23 Erstes Gesetz zur Reform des Ehe- und Familienrechts (1. EheRG), BGBl I 1976, 1421.

at any point in the past. Despite heavy criticism,[24] legislation has so far seen no reason to change this unsatisfactory legal situation.

Labour law

There is a chapter on service contracts (*Dienstvertrag*) in the ABGB (§ 1151 et seq.). Most of them are restricted to freelance contracts (*freier Dienstvertrag*). Very few of the provisions found there are applicable to labour contracts (*Arbeitsvertrag*). The vast majority of labour law is laid down in a great number of special acts that do not leave too much application for provisions in ABGB.

Housing law

General provisions on lease can be found in the ABGB (§ 1090 et seq.). In practice, the scope of their application is restricted to movable goods and real estate without buildings. For most of what may be called housing law, there are special laws. Two of them are the most important ones:

- The Lease Act (*Mietrechtsgesetz*)[25] provides for the protection of the tenant. With a few exceptions, the scope of application covers both the lease of apartments and the lease of business premises. As a result, not only is the tenant of an apartment protected by the law, but also protected is a chain of supermarkets that rents an object on the ground floor of a building to operate an outlet there, or a law firm that rents office space.
- The Condominium Act (*Wohnungseigentumsgesetz*)[26] provides for internal organisation of owners of condominiums and their protection against the property developer.

Consumer law

There is no specific consumer law in the ABGB. However, two important provisions on the control of general terms and conditions are laid down in the ABGB. The first one is § 864a:

24 See Hofmair, 2016, p. 340; Wucherer, 2022, p. 1173.

25 BGBl 1981/520; latest amendment in BGBl I 2021/59.

26 Wohnungseigentumsgesetz 2002, BGBl I 2002/70; latest amendment in BGBl I 2021/222.

> *Unusual provisions used by a contractual party in general terms and conditions or standard forms do not become part of the contract if they are detrimental for the other party and he would not have to expect these provisions due to the circumstances, in particular due to the formal appearance of the contract; unless one contractual party has expressly made the other aware of it.*

The second provision is § 879 par. 3, which is based on the Directive on unfair terms in consumer contracts[27] and reads as follows:

> *A contractual provision contained in general terms and conditions or contractual forms, which does not determine either of the mutual obligations, is void in any event if it is materially detrimental to one party when considering all circumstances of the case.*

Although these provisions, being general clauses, have a strong impact on the control of general terms and conditions, they are not restricted to consumer contracts. They can be applied in B2B-relations as well, even though their practical application is primarily in the area of consumer protection.

Apart from this, there are no provisions with specific relevance for consumers in the ABGB. The consumer is regulated in a growing number of special legal acts. The oldest one, the original version that dates to 1979, is the Consumer Protection Act (Konsumentenschutzgesetz),[28] which has been amended more than 30 times. In the last two decades, a number of special laws in the field of consumer law have been added. As a result, consumer law now is fragmented to a high degree and has increasingly become an area for specialists. Many of these special laws are based on European directives and serve to transpose them into national law. To name a few, among the most important ones are

27 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 05, 21/04/1993, p. 29; see Fenyves, Kerschner, Vonkilch, 2022, § 879 n. 253.

28 Konsumentenschutzgesetz, BGBl 1979/140; latest amendment in BGBl I 2022/109.

- law on distance contracts and off-premises contracts (*Fern – und Auswärtsgeschäfte-Gesetz*),[29]
- law on guarantee (warranty) for consumers (*Verbrauchergewährleistungsgesetz*),[30]
- law on distance marketing of financial services (*Fern-Finanzdienstleistungs-Gesetz)*,[31]
- law on consumer credits *(Verbraucherkreditgesetz)*.[32]

When the European directive on consumer rights[33] had to be transposed into national law, the idea of consumer code (*Verbrauchergesetzbuch*) was discussed briefly. Such a law was intended to summarise consumer law, which had already been highly fragmented at that time, in a consolidated version.[34] Unfortunately, this plan has never been realised.

Strict liability

When the ABGB was adopted more than 200 years ago, strict liability was largely unknown. The development of strict liability can be seen as a by-product of the technological revolution of the 19th century, which brought forth devices whose operation is associated with certain dangers even when due care is taken. It does not come as a surprise that the development of strict liability started with the railways; motor vehicles and other dangerous equipment soon followed.[35]

Again, the legal framework of strict liability is highly fragmented. There is neither a general law nor something that could be understood as a general part. Both the conditions for exemption from liability and

29 BGBl I 2014/33; latest amendment in BGBl I 2022/109.

30 BGBl I 2021/175.

31 BGBl I 2004/62, latest amendment in BGBl I 2018/17.

32 BGBl I 2010/28, latest amendment in BGBl I 2021/1.

33 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, pp. 64–88.

34 See Stabentheiner, Cap, 2017, p. 53, p. 59 et seq.

35 See Bernat (n. 19), p. 45 et seq.

the maximum liability amounts vary considerably. Among the most important laws on strict liability are the following:

- law on liability for railroads and cars (*Eisenbahn- und Kraftfarzeughaftpflichtgesetz*)[36]
- law on product liability (*Produkthaftungsgesetz*).[37]

It is highly disputed whether the application of strict liability based on analogy is possible.[38] The Austrian Supreme Court accepts the analogous application of rules on strict liability in general; however, it is very cautious when it comes to an analogy in individual cases.[39]

2.3. THE 21ST CENTURY AND THE ROAD AHEAD

As has been shown, Austrian civil law is highly fragmented and divided between the ABGB and numerous special laws. The ABGB as such has become a torso. It is still a general code in the sense that it applies to everyone. However, it is no longer a general code that provides solutions to many conflicts that one would expect from such a law.

Around 1300 to 1400 articles of the ABGB are in force. This is far less than one would expect from the apparently 1503 articles of the law. The reason is that many articles are missing. This applies, for example, to arts. 47–88, which used to contain some parts of the marriage law, which are now regulated in the Marriage Act. Furthermore, arts. 618–645, which contained the law of entailment (*fideicommissum*), is missing. Although some provisions are still in force, they no longer have any practical application. There may be two reasons for this:

First, there may be provisions whose subject matter is now regulated in special laws: they are still formally in force, although they have been materially derogated. This applies, for instance, to insurance contracts

36 BGBl 1959/48; latest amendment in BGBl I 2021/245.
37 BGBl 1988/99; latest amendment in BGBl I 2001(98).
38 See Schwimann, Kodek, *2022, § 2 n. p. 16 et seq.*
39 E.g., Supreme Court (*Oberster Gerichtshof) 8 Ob 84/12d.*

(arts. 1288–1292),[40] which are now regulated in the insurance act (*Versicherungsvertragsgesetz*).[41] § 943 of the ABGB stipulates that a gift agreement must be concluded in writing if there is no actual transfer of the gifted object. However, according to § 1 of the Notarial Deeds Act, the original version of which dates to 1871, a notarial deed is required for the validity of such a contract. As a result, art. 943 seems to provide a formal requirement for gift contracts, which has not been effective for more than 150 years (!), without having been abolished formally.

Second, some provisions reflect the social and economic circumstances of the early 19th century, which have changed dramatically. As a result, some provisions no longer have any practical application and their content is outdated. This can be illustrated by a few examples:

> *Art. 297 (dealing with accessories to a thing): 'In the same way, immovable objects include those which are erected on land with the intention that they should always remain on it, such as: Houses and other buildings with the air space above them in a vertical line; furthermore: not only everything that is earth-wall, rivet and nail-proof, such as: brewing pans, brandy kettles and built-in cupboards, but also those things that are intended for the permanent use of a whole: e.g. well buckets, ropes, chains, fire-fighting equipment and the like.'*
>
> *Art. 402: 'The right to spoils and property taken back from the enemy is regulated in the law of war.'*
>
> *Art. 488: 'The servitude (easement) of a window only entitles to light and air; the view must be specially authorised. Anyone who has no right to a view may be required to bar the window. (…)'*

Approximately 30–40% of the provisions in the ABGB are based on the original version from 1811, for example, the chapters on purchase, donation, and agency, and the law on liability for damages. Sometimes, when

40 See Fenyves, Kerschner, Vonkilch, 2012, §§ 1287–1292 n. 3 et seq.; Kletečka, Schauer, 2024, § 1288 n. 1.

41 BGBl 1959/2; latest amendment in BGBl I 2022/70.

talking to foreign colleagues, they might tell you that their impression of the Austrian codification is that it is a kind of *'legal museum'*.[42]

3. MOOD OF REFORM?

Austria is not a country in which willingness to undertake fundamental reforms in the field of Civil law is particularly pronounced. Some efforts for a reform failed. The reform of tort law is an example of that.

3.1. REFORM OF TORT LAW

Most of the provisions of tort law date to 1811. Courts have developed a wide range of case laws, which are not reflected by the provisions in the ABGB. It is impossible to understand Austrian tort law without having the extensive case law in mind. In 2001, the Ministry of Justice started a project on a complete reform of tort law. A commission was appointed, the members of which were mostly academics and judges. However, a second working group was formed, which consisted mainly of professors who advocated ideas that were contrary to those of the ministry's commission.[43] After fierce disputes between the members of the two rival groups about almost everything – the methodology, scope and the content of such a reform – the Ministry of Justice lost interest, and the reform ended several years later.

42 Similarly, Oberhammer, 2011, pp. 219, 231 et seq., describes the reaction of German and Swiss lawyers when they deal with the Austrian codification: 'Stets ist es ungläubiges Staunen, dass derlei heutzutage mitten in Europa noch in Kraft steht'. [It is always a matter of incredulous amazement that something like that is still in force in the centre of Europe today.]

43 See Schwimann, Kodek, 2016, §§ 1293 n. 6 et seq.

3.2. THE BICENTENNIAL OF THE ABGB IN 2011

2011 was a symbolic year, the Code's bicentennial. Just in years around the 100-year celebrations, discussions about the future development of the ABGB started again.[44] The Ministry of Justice promoted a project *'ABGB 200plus'*. The title was intended to express the fact that a reform process was being initiated, which was to be implemented in the years following the 200th anniversary. However, the outcome was modest. In 2010, the legal framework of credit contracts was restructured.[45] While legislation claimed that this should be the first step of a larger project to modernise the ABGB,[46] the immediate reason was the need to transpose the Consumer Credit Directive into national law.[47] The next step was a complete renewal of the provisions on partnerships since most of them dated to 1811.[48] In 2014, the partnership law was remodelled along the lines of the commercial partnerships.[49]

3.3. REFORM OF SUCCESSION LAW

Although no explicit reference was made to the reform of the ABGB on the occasion of its 200th anniversary, the reform of the law of succession[50] must also be placed in the series of laws that were intended to bring the law in line with the social and economic conditions of modern times. The aim of the reform was bold: almost all the 300 provisions on inheritance law, most of which dated to the original version of the law, were renewed. However, a closer look reveals that the legislator used a remarkable regulatory technique that makes his reform intention appear less bold. The vast majority of the provisions in succession have

44 See Fischer-Czermak, Hopf, Schauer, 2003; Fischer-Czermak, 2008; Bundesministerium für Justiz, 2012.
45 Darlehens- und Kreditrechts-Änderungsgesetz, BGBl I 2010/28.
46 ErlRV 650 BlgNR XXIV. GP 1.
47 See also ErlRV 650 BlgNR XXIV. GP 1.
48 See ErlRV 270NR XXV. GP 1.
49 GesbR-Reformgesetz, BGBl I 2014/83.
50 Erbrechts-Änderungsgesetz, BGBl I 2015/87; see e.g., Schauer, 2023, p. 67.

just been rewritten: There were translated from the antiquated language of the early 19th century into contemporary language. Of course, there were some substantial changes, especially in the field of compulsory shares. The forced heirship of parents and other ancestors was abolished. Although the right to a compulsory portion is basically a monetary claim, the testator has been given more freedom to organise the coverage of the compulsory portion (arts. 761 et seq.). In certain cases, the maturity of the compulsory portion can be postponed for up to five years, in exceptional cases even up to 10 years (arts. 765 et seq.). In this way, the heir should be given the opportunity to obtain the liquidity required to fulfil the compulsory portion.

Two more changes brought by the new succession law should be mentioned: First, a non-married partner of the deceased for at least three years is entitled to intestate succession, but only if there are no other intestate heirs, such as children or a spouse (art. 748). The life partner's right of inheritance merely supersedes the state and legatees, who would also be entitled as extraordinary heirs in certain cases. However, the life partner has no right to a compulsory portion. Second, certain persons who cared for the deceased prior to their death have legal right to a legacy (*Pflegevermächtnis*), which can only be withdrawn if there are grounds for disinheritance (art. 677 et seq.).

3.4. REFORM OF PRESCRIPTION

Another result of the *ABGB 200plus* project could have been the reform of the prescription, the relevant legal basis of which is the original version from 1811. Working groups at the Federal Ministry of Justice produced a number of text proposals[51]; several articles on this topic were published.[52] Nothing more has been heard of the project in recent times. It is unclear whether it will be pursued further.

51 Reform des Verjährungsrechts, no date.

52 For example, see Madl, 2020, p. 149; Weber, 2021, p. 162.

4. CONCLUSIONS

There is no real spirit of reform in the area of civil law in Austria. Elections are not won with the promise of a new civil code. The situation in Austria is regrettable, considering the deplorable state of the codification. In this respect, Austria is different from many other countries in Europe, such as Germany and Switzerland, where reforms of a larger area of law are always tackled and at the same time system-related thinking, which is essential for codification, prevails. If an amendment does occur, it is usually for one of the following reasons:

- transposition of EU directives, especially in the field of consumer law,
- initiative by stakeholders (e.g. consumer organisations), which lead to casuistic provisions
- (in rare cases) replacement of provisions that are repealed by Constitutional Court or overruled by the European Court of Justice

As of now, the idea of a fundamental reform of the Civil Code, which was quite vivid at the time of its bicentennial, has ended before it really started. As far as one can tell, there are no plans for a major reform of the Civil Code in the near future. Will the ABGB – or what will be left from it – reach its 250th anniversary in 2061? Of course, it is difficult to predict the development for a period of several decades. However, if I had to place a bet today, my answer would be, yes!

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RECENT DEVELOPMENTS IN ITALIAN CIVIL LAW ON COMPENSATION FOR NON-PECUNIARY DAMAGE

CLAUDIO SCOGNAMIGLIO

ABSTRACT

The problem of compensation for non-pecuniary damage has become particularly important in the context of the Italian doctrinal and jurisprudential debate. In fact, the Italian civil code of 1942 had established a rule of compensation for non-pecuniary damage only in cases provided for by law (art. 2059); this rule was initially intended to limit the area of compensation for non-pecuniary damage to cases in which the illicit act also constituted a crime. This original approach was however overcome thanks to the enforcement of the 1948 Constitution, which placed the protection of human personality at the centre of the system, affirmed by art. 2 of the Constitution, as well as with reference to specific personality profiles, including the right to health in art. 32. The remarkable aspect of this evolution is that the constitutional principles just mentioned were concretised by jurisprudence, thanks to the reconstructive contribution of the doctrine, without a modification of the normative data, as regards the civil code. This has determined, in the matter under discussion, and from the point of view of the method

Scognamiglio, C. (2024) 'Recent developments in Italian Civil Law on compensation for non-pecuniary damage' successful campaign for a complete revision of the Dutch Civil Code (1838)' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 491–519. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_18

of evolution of the system, an approach very similar to that of common law. A similar methodological approach has also been found in recent years with reference to the issue of proof and settlement of non-pecuniary damage. This is an aspect that represents the privileged key to understanding the entire thematic area of non-pecuniary damage; in fact, and since non-pecuniary damage cannot be immediately traced to an evaluation using market criteria, it is necessary to find techniques to compensate for it otherwise. Further, from this point of view, the Italian legal experience is characteristically peculiar considering the widespread use of tables for the settlement of non-pecuniary damage so as to ensure the need for predictability and fairness.
Keywords: *non-pecuniary damage, compensation, Italian Constitution, liquidation, burden of proof.*

1. INTRODUCTION

First, I think it is necessary for me to illustrate the reasons that led me to dedicate my contribution, within a book titled *Codification of Civil Law, assessment, reforms, and options,* to the subject of compensation for non-pecuniary damage from the point of view of the Italian scholar. I found this theme particularly significant of a special technique by which a civil codification now in force for over 81 years, such as the Italian one, can evolve and transform and, therefore, be reformed. As I attempt to demonstrate, it is a technique that has seen judges' decisions, in particular, those of the Constitutional Court and the Supreme Court, play a key role in a framework where the text of the Civil Code as such has remained largely unchanged. The judges' decisions, in turn, were largely prepared from the writings of scholars; so, in the field, a particularly fruitful form of interaction between doctrine and jurisprudence has emerged; and this interaction can be considered a model for the development of a civil code in other areas as well.

In fact, the recent history of this problem, as outlined over the course of more than half a century, is so interwoven with reciprocal links between doctrinal reconstructive proposals and responses in terms of case law that the formula proposed by Franco Galgano, now a classic, of

dialogues between doctrine and jurisprudence is even reductive. Suffice it to think of the subject of biological damage in years gone by, to which we will return shortly, whose initial arrangement was the merit, as is well known, of the joint contributions of the Pisan civil law school, the Genoa school, and the jurisprudence of the Court of Genoa,[1] as well as the contents of sentence no. 184/86 of the Constitutional Court, in whose argumentative framework it was easy to see the traces of an arrangement of the problem of non-asset damage, and the relations between art. 2043 and art. 2059 of the civil code, dating to over a quarter of a century earlier; or, closer in time, the accreditation of the category of existential damage, notoriously due to the contribution of the Trieste School[2]; or again to the dense thread of doctrinal references that can be seen in the United Sections sentence nos. 26972-5 of 11 November 2008, for example, but not just regarding the introduction of the prerequisites for compensation for non-asset damage seen in the seriousness of the injury and the gravity of the damage.

It could be said, therefore, with reference to the subject of non-pecuniary damage, and paraphrasing the title of a celebrated essay,[3] that it is not so much the case law that has become doctrine, but the doctrine that has impregnated the case law: and this notation, on the contrary, would already allow a different approach to be taken to a discussion that too often, and in a somewhat repetitive manner, is carried out in terms of a doctrine placed in a submissive position with respect to a case law that has become too creative:[4] almost as if the doctrine's submissiveness can already be seen in the circumstance of not always wanting to criticise, and one might even say for the sake of taking sides, the solution to a problem for the mere fact that it has been put forward at the level of jurisprudential law and has been accompanied by an argumentative framework whose richness, surprisingly, is not perceived as the fulfilment of the constitutional obligation to justify decisions, sanctioned by art. 111, para. 6 of the Constitution (obviously all the more pregnant

1 See on this point Monetti, Pellegrino, 1974, pp. 159 et seq.
2 See Cendon, Ziviz, 2000, pp. 10 et seq.
3 In this sense see Busnelli, 2013, pp. 1519 et seq.
4 In this sense see the title of one of the chapters of the volume by Castronovo, 2015, pp. 87 et seq.

the more complex the issue to be dealt with and the more original the decisional outcome to be reached), but rather as a sort of hubris of the judicial body, moved 'more by the need, true or alleged, to argue than by the anxiety to decide'.[5] It is almost as if the creativity of jurisprudential interpretation were to be understood, regardless of the results it reaches and the argumentative apparatus with which it accompanies them, as an overflowing of jurisprudence from its specific function, responsible, among others, for a sort of eclipse of civil law, where the assumption as an ordering criterion of the discourse of the value of the effectiveness of protection would not be the (almost banal) recognition of a fundamental principle of our legal system, but the point of emergence of an 'attitude in which the solution adopted in the concrete case finds no other foundation in itself, and the traditional otherness between legislation and jurisdiction is lost'.[6]

Indeed, it is difficult to understand, even on a purely logical level, how an attitude that is defined as 'not (of) ignorance of doctrine, but rather (of) care and knowledge in order to measure oneself against it on an equal footing' can be the cause of jurisprudence finding itself 'without the secure backing of doctrine',[7] thus giving rise to a sort of 'originality with the risk of discontrol'. Especially when it must be acknowledged, on the part of the author whose thoughts we are referring to, that a pronouncement of some years ago by the United Sections took care to specify that 'the "creativity" of jurisprudential interpretation must challenge the interpreter's sense of measure and above all his sense of responsibility', since 'the safeguarding of the unity and "stability" of jurisprudential interpretation … must now be considered … as a matter of course … as a legal criterion for the interpretation of legal norms, in order to avoid "confusion" between (jurisdiction) and legislation'.[8]

This leads one to believe that the fundamental junction of the relationship between doctrine and jurisprudence in the present time does not lie in the fact that jurisprudence is overflowing and creative and

5 Ibid., p. 88.
6 Ibid.
7 Ibid.
8 The reference is to Cass. 6 November 2014 no. 23675.

doctrine is weak and submissive, but rather in the physiologically different, but for this very reason fertile, position in which one and the other are placed in the interrelationships created between doctrine and jurisprudence. In this perspective, the circumstance that jurisprudence, precisely because of the task, which is proper to it, of providing concrete answers to the problems that are submitted to it, may have even more awareness of the dimension of effectiveness than doctrine, in fact, represents the peculiar added value of the jurisprudential contribution. This is provided, of course, that the canon of effectiveness is understood, as case law has, for the most part, understood and applied it, not as a mere and generic affirmation of a need for justice, such as to lead to decisions that are oblivious to the constraint that the interpreter derives from the regulatory system, but rather as an indication of the fact that the function, one might say the mission, of the jurist is legitimate, and is justified, if, and to the extent that, it is suitable for offering an effective (hence, effective) solution to the problem of material life that is submitted to it, failing which, law risks turning into a game of icy, self-referential logic.

The centrality of the issue of non-pecuniary damage, also from the perspective of the dialogue between national courts and the Court of Justice of the European Union, also results from the very recent decision of the latter, of 4 May 2023 in case C – 300/21, which, facing a problem of compensation for non-pecuniary damage from unlawful processing of personal data, affirms some principles of general importance on the subject. We will return to some aspects of this pronouncement in the course of this chapter.

2. THE ORIGINAL STRUCTURE CONTAINED IN THE CIVIL CODE OF 1942

As I mentioned above, with regard to compensation for non-pecuniary damage, the legislative data within the Italian Civil Code have never been amended. It is, therefore, still in force, in its original text, art. 2059

of the Civil Code, according to which 'non-pecuniary damage must be compensated only in cases determined by law'.[9]

The reasons that led the Italian legislature to introduce this provision are still under discussion; the most reliable reading of them sees at the base a consideration of politic of right policy that had induced the legislature of the time – influenced by the ideology of the fascist regime – to reject the bourgeois conception of civil liability, of which the French Civil Code was instead an expression. In fact, the idea that even non-patrimonial values could always be converted into pecuniary benefits was typical of the bourgeois conception just mentioned, at least according to the reading that the legislature of the Italian Code of 1942 gave of it. Instead, the Italian legislature of 1942, limiting the compensation of non-pecuniary damage only to cases determined by law, had wanted to affirm the idea, clarified in the report accompanying the Civil Code, according to which non-pecuniary damage had to be compensated only when the unlawful act determinates a particularly serious offence of the values founding the legal system. For this very reason, the cases determined by the law of compensation for non-pecuniary damage, to which art. 2059 of the Italian Civil Code largely coincided with those in which the unlawful act also constituted a crime; in fact, a provision of the Italian Penal Code, art. 185, provided, and still provides, that the offender is required to pay compensation for the damage, including non-pecuniary damage, that the crime has caused.[10]

In this way, the legislator of the Civil Code of 1942 had constructed a system of compensation for non-asset damage that scholars have defined as bipolar, that is, hinging on the rule of the general compensability of pecuniary damage, so to speak, and the compensability of non-asset damage only in the cases provided for by law.

9 The contributions of scholars on the subject are numerous. A recent and comprehensive review can be found in Navarretta, 2021, pp. 1586 et seq.

10 See on this topic, Salvi, 2019.

3. THE NOVELTY OF THE CONSTITUTION OF 1948 AND THE FIRST INTERVENTIONS OF THE CONSTITUTIONAL COURT

However, this structure of the discipline of compensation for non-pecuniary damage in the Civil Code – which sees precisely the non-pecuniary damage compensable only in cases where the unlawful act also constitutes a crime – has been called quickly into question by the entry into force of the 1948 Constitution in Italy. The latter – as well as other constitutional texts that came into force after the end of World War II and the defeat of the Nazi-fascist regimes (think, for example, of the German *Grundgesetz* of 1949) – has placed at the centre of the hierarchy of values which it has affirmed the need to protect the human person, his dignity, and his fundamental rights, also emphasising the duty of solidarity between private individuals, to which art. 2 of the Constitution refers. In fact, and attempting an always debatable work of chronisation, there is no doubt that the season of civil liability that began, in our doctrinal elaboration, in the 1960s, can certainly be defined as that of solidarity. It is no coincidence that this principle was at the basis of S. Rodotà's[11] reconstruction of the problem of civil liability, which resolved, from the point of view of identifying the functions of civil liability, in the affirmation of the centrality of the reparatory function of damage, leaving

11 See Rodotà, 1964.

the concept of tort in the background.[12] It was, in fact, effectively noted, in this regard, that at the basis of the renewal of studies on civil liability, precisely in the first half of the 1960s, there was a perception 'of the functional evolution of civil liability from a means for the prevention and sanctioning of the reprehensible behaviour of the agent, to an instrument that allows compensation, with the greatest intensity and in the greatest number of cases, for the victim of the damage'.[13]

The next step, in terms of the speech we are referring to here, has been easy, although not quick: given that non-pecuniary damage derives mainly from the injury of non-pecuniary interests, and, therefore, from the violation of the rights of the person, the need to protect the latter in a full and effective manner has led to doubt the conformity with the Constitution of a discipline that limited the compensation for non-pecuniary damage to only cases in which the fact also constituted a crime.

This doubt arose first of all with regard to the non-material damage resulting from the violation of the right to health; this right is, in fact, protected in a very incisive way by art. 32 of the Italian Constitution. We read, in this provision, that 'the Republic protects health as a fundamental right of the individual'; therefore, the constitutional protection

12 Decidedly against this trend, as is well known, is the contribution, also almost contemporary to Rodotà's work, by Cian, 1966, where, already in the introductory note (pp. VI–VII), it is observed that
in the system of civil responsibility not only the interests of the injured party must be affected, but also those of the person to whom the burden of compensation should be borne', further specifying that 'a system that is based on the assumption of culpability, and looks at the obligation to compensate not only as a means of reparation but also as an evil threatened to the offender, constitutes, with its differentiated treatment of guilty and not guilty persons, a valid instrument of justice to induce individuals to that shrewd and prudent conduct that can exempt them from liability and therefore always represents a strong means of preventive protection of the protected interests; whereas a system that merely considers the causation of the damage, with the inevitable consequence of the almost necessary recourse to various forms of insurance, may also result, in the formation of custom, in a diminished supervision of one's own conduct.

13 In this sense see Salvi, 1983, p. 12, who starts from the analysis of Rodotà's work already mentioned above, as well as the works of Scognamiglio on the concept of damage (among others, Scognamiglio, 1957, pp. 277 et seq.; Scognamiglio, 1969, pp. 464 et seq.).

of this right has led to the affirmation of a sort of *Drittwirkung* (i.e., the effectiveness also in terms of relations between private individuals) of the right to health, creating the conditions for a broad compensatory protection of non-pecuniary damage to health. The argument proposed by a judgement of the Italian Constitutional Court dating back in time – no. 184 of 1986 – to achieve this result, despite the restrictive wording of art. 2059, can be summarised as follows: art. 2059 does not refer to the entire area of non-pecuniary damage, but only to damage consisting of pain or suffering. The damage to health, in and of itself considered, instead, finds its discipline directly in the general rule of the civil code on civil liability, namely, in art. 2043; the latter identifies the condition of compensation for damage in its injustice, which, in turn, certainly exists where the damage results from the violation of a right protected by the Constitution. Therefore – this was the conclusion, which allowed the Constitutional Court to exclude the constitutional illegitimacy of art. 2059 – the non-pecuniary damage to health, with its own peculiar nature, such as to distinguish it both from patrimonial damage and from subjective moral damage (from pain and suffering) can be compensated on the basis of a direct application of art. 32 Cost., read in relation to art. 2043.

Judgement no. 184/86 of the Constitutional Court paved the way for the elaboration of the category of biological damage, meant precisely as damage to health in and of itself considered: a category that has been effectively defined as an Italian way to compensation for personal damage.[14] In my speech today, for reasons of time, I cannot dwell on other moments in the evolution of the category of biological damage: I would simply like to recall that, a few years after the aforementioned sentence, another judgement of the Constitutional Court, no. 372/1994, led the damage to health back to the provision of art. 2059, stating that an interpretation of this provision in the light of art. 32 of the Constitution required in any case the compensation for that damage, because the cases determined by law were meant precisely to consider the bond deriving from the Constitution. A few years later, the category

14 The evolution of the category of 'danno biologico' is illustrated in several works by Castronovo. See in particular Castronovo, 2018, pp. 157 et seq.

of biological damage became a category, also normative, in the field of accidents at work, through d. lgs. 38/2000.

4. THE JURISPRUDENCE OF THE SUPREME COURT IN THE FIRST DECADE OF THE XXI CENTURY: RISE AND CRISIS OF THE CATEGORY OF EXISTENTIAL DAMAGE

The argumentative model that led to affirm the compensation for damage to health – on the basis of the direct application of constitutional rules – was quickly extended to other interests or profiles of the person, and to the damages resulting from their violation: in fact, on the one hand, the Italian Constitution contains a provision, art. 2, which recognises and guarantees, in very broad terms, the inviolable human rights, both as an individual and in the social formations in which human personality takes place; on the other hand, the European Convention on Human Rights and, more recently, the Charter of Fundamental Rights of the European Union have also come into play. These normative texts have drawn a very wide sphere of protection of the human person and his interests and have therefore created the premises for a very significant compensatory protection. Two judgements of the Supreme Court, also dating back in time, can be placed in this perspective, namely, judgements 8827 and 8828 of 2003; these have stated that the legal concept of non-pecuniary damage is broader than both that of the so-called subjective moral damage, that is, pain or suffering, and of biological damage, meant as an injury to the psycho-physical integrity ascertainable as such on the basis of medico-legal criteria. Therefore, the concept of non-material damage coincides, according to these judgements, with any unjust injury to an interest of the person from which prejudices incapable of economic evaluation arise.

This approach had the merit of widening the scope of compensatory protection of the person in the case of non-pecuniary damages, protection that the category of biological damage limited to the area of damage to health; at the same time, and on the contrary, it has created the risk of

an excessive expansion of the area of non-pecuniary damage compensable. In fact, if every interest of the person, as constitutionally protected, if harmed, can found an unjust damage, and therefore compensable, in relation to the provision of art. 2043, conditions are created for a generalised compensation for non-pecuniary damage, also extended to what, in doctrinal contributions and in the jurisprudential elaboration in Italy, has taken the name of existential damage, and which is similar to the category, known in English law, as *loss of amenities of life*. It then becomes necessary to introduce a filter to the compensation of these damage profiles, both in order not to empty the rule contained in art. 2059, above mentioned, and to avoid the proliferation of trivial compensation claims, such as to undermine the functionality of the judicial protection system from the point of view of its suitability to process too many applications.

This is the context of the subsequent jurisprudential intervention of the Supreme Court represented by the judgements of the United Sections no. 26972–5 of 11 November 2008. These judgements have argued, first, the unitary nature of the category of non-material damage, which cannot be articulated internally through the recognition of an independent relevance to existential damage. Moreover, in order to arrive at a synthesis between the need for wide recognition of the protection of compensation for the interests of the person and the opposing need to avoid an excessive expansion of judicial claims relating to minor non-material prejudices, the judgements affirmed that the assumption for the reparability of non-material damage is, first, that it has led to the infringement of constitutionally guaranteed inviolable rights. The problem becomes, at this point, one of identifying the criteria through which it is possible to formulate the judgement of inviolability of the right: and this is certainly one of the most controversial aspects of the matter, as it is outlined by the sentences of the United Sections just mentioned. In this regard, it does not seem tenable that the area of inviolable rights coincides, and is exhausted, with those expressly defined as such by the Italian Constitutional Charter: and this from a twofold angle.

On the one hand, in fact, it is not seriously debatable that there are rights recognised by the Constitution, but not expressly qualified by it with the attribute of inviolability, which must instead be considered as

such, since they pertain to the very essence of the human person: such as, for example, and on the basis of an expositive order dictated only by the existence, as regards the first of the situations that will be recalled, of a consolidated case law orientation – above mentioned – in the sense of the compensability of damage resulting from the lesion of the right, the right to health (art. 32), the right to freely profess the religious faith of one's choice (art. 19), the right to freely manifest one's thought (art. 21). This last, that is, the right to freely manifest one's thought also makes it possible to realise that the test of inviolability of the right, which the United Sections themselves seem to suggest (i.e., the possibility, contemplated by the same constitutional norm, of limitations to the exercise of the same, dictated, as happens in the case of the right of free movement, by reasons of health or security), does not always lead to fully reliable results; in fact, even in the presence of the provision of exceptional and entirely temporary limits that may be imposed on the exercise of the right to freely express one's thoughts (as happens in the case of art. 21, 4th Const, in the event of the seizure of the periodical press by officers of the judicial police), it does not seem tenable, from a systematic point of view, that the right to freely manifest one's thoughts is devoid of the attribute of inviolability.

It is a question, therefore, of identifying a normative criterion through which to make a judgement as to the existence, in concrete cases, of a hypothesis of constitutionally qualified injustice in the sense attributed to this formula by the United Sections: and it must be a normative criterion that is necessarily elastic, in the presence of the rule of art. 2 of the Constitution, which models the inviolable rights of the person as an open genus, as, moreover, considered by the same sentences of the United Sections.

In this research, the constitutional normative datum can offer us an initial, though not exhaustive, indication, where, from the same, according to a reading that can be considered consolidated for some time now, the choice in the sense of the centrality of the value of the human person clearly emerges; but this axiological choice of the Italian Constitution must now be further meditated upon in the light of the content of the European Charter of Fundamental Rights of the European Union of 7 December 2000, adopted on 12 December 2007 in Strasbourg. This, as is

known, and on the basis of art. 6 of the Treaty establishing the European Union, as amended by art. 1 of the Treaty of Lisbon, now has *the same legal value as the Treaties* and, therefore, is included in the design of the sources of law, having now overcome the uncertainties over its regulatory status that had followed its original adoption in 2000, on a level of equiordination with the 1948 Constitution. Title I of the Charter (*'Dignity'*) opens, in art. 1, with the statement that *'human dignity is inviolable. It must be respected and protected'*, which is followed, within the same title, by arts. 2–5, which recognise the right to life (Art. 2) and the right to the physical and mental integrity of the person (art. 3), then sanctioning the prohibition of torture and inhuman or degrading treatment or punishment (art. 4) and the prohibition of slavery and forced labour (art. 5).

The normative structure of the Charter of Fundamental Rights of the European Union therefore leads to the conclusion that all the rights of the person that pertain to the essential core of his or her dignity must be considered inviolable: and here the jurisprudential elaboration of the Supreme Court subsequent to the United Sections shows us, as we shall see in greater detail shortly, suggestive examples of argumentative forms that move from the qualification of human dignity as an inviolable right, when it comes, in particular, to compensation for non-material damage: indeed the latter, as mentioned at the beginning and as we shall see in greater detail shortly, seems to really take on a leading role in drawing the *'complexity'* of non-pecuniary damage.

It can therefore be acknowledged that, in the design that we could define of evolutionary typicality that the United Sections intended to model as regards the area of compensation for non-asset damage, the category of inviolable rights could in fact play a significant role as a criterion for selecting the non-asset damage that can be compensated, circumscribing the scope of extension of cases of compensation for the latter to cases in which compensation was really necessary in order to protect the dignity of the person.

The first pronouncements immediately following the United Sections in fact used the aforementioned criterion: thus, in the presence of a claim for compensation relating to a tort of misleading advertising, the assessment of whether or not an inviolable right of the consumer to

free determination as to the choice and use of the product (Art. 21(2) of the Consumer Code) can be configured, assumed a central importance in the economy of the reasoning.[15]

However, it must be acknowledged that, in the subsequent jurisprudential elaboration of the Supreme Court, the parameter of the inviolable right seems to fade away, often and simply flowing back into the ascertainment of the configurability of the lesion of a fundamental right of the person constitutionally guaranteed.

Thus, for example, in a ruling on non-pecuniary damage resulting, according to the victim's argument, from intolerable and unlawful emissions, the reasoning of the judgement is set out in terms of injury not to an inviolable right of the person, but to a constitutionally guaranteed fundamental right, excluding the judgement that the right to domestic tranquillity could be considered as such.[16]

Similarly, in another decision, which compensated non-pecuniary damage, in a case of serious injuries suffered by a person of non-EU citizenship, who – in the trial on the merits – had been awarded biological damage, but not non-pecuniary damage, it is discussed in terms of compensation for non-pecuniary damage configured as a consequence of the injury to the right to health, considered a fundamental right.[17]

Similar argumentative modules can also be found in a sentence shortly after the decision by the United Sections, in the context of solving the problem of compensation for non-asset damage in the case of contributory negligence on the part of the injured party: in fact, the compensation of non-pecuniary damage in this hypothesis is also affirmed 'where the illicit act objectively covers the elements of a crime, or in any case involves damage to values of the person that are

15 The reference is to Cass. S.U. 15 January 2009 no. 794.

16 See Cass. sez. II, 8 March 2010, no. 5564.

17 This is the principle stated by the Court of Cassation, section III, 24 February 2010, no. 4484: if the content of the factual hypothesis referred to in the decision – denial of compensation for non-material damage in favour of the non-EU victim of a health injury – is well understood from the statement of the judgement, it would have been a case in which the argument in terms of the inviolability of the right was particularly pertinent, because it related to the very essence of the dignity of the person.

constitutionally protected, or configures other cases of compensation foreseen by law, pursuant to article 2059 of the civil code', since, on the other hand, contributory negligence may be relevant only for the purposes of liquidation.[18] However, one must ask oneself whether the non-use of the argumentative form regarding the identification of inviolable rights is simply the result, so to speak, of a terminological habit, such as to be linked to the jurisprudential direction of the Supreme Court's 2003 rulings, also referred to above,[19] or derives from the fact that, at least in the case of injury to the right to health, the inviolability of the same is, so to speak, self-evident and therefore does not require further argumentative support; while the assessment criterion is based on the possibility of identifying, or not, in the case in point, the injury of an inviolable right is destined to be relevant above all where it is a question of scrutinising new subjective legal situations that have not yet been definitively accredited in the sense of their suitability to trigger, if injured, the protection of compensation.

The judgements of the United Sections no. 26972–5 of 11 November 2008 also specified that 'the seriousness of the offense constitutes a further requirement for admission to compensation for non-pecuniary damages to the person resulting from the violation of inviolable constitutional rights'. This second requirement has been understood to mean that 'the right must be affected beyond a minimum threshold causing serious prejudice' and 'the injury must exceed a certain threshold of offensiveness, making the prejudice so serious as to be worthy of protection in a system that imposes a minimum degree of tolerance'. In particular, 'the filter of the severity of the injury and the seriousness of the damage provides for a balance between the principle of solidarity with the victim and that of tolerance, with the consequence that compensation for non-pecuniary damage is due only if the level of

18 In this sense, Court of Cassation, section III, 10 November 2009 no. 23734; simply the violation of constitutionally protected interests is also referred to by Court of Cassation, 17 December 2009 no. 26516.

19 The reference is obviously to the sentences of the Court of Cassation 31 May 2003 nos. 8827 and 8828, published, among other places, in Navarretta, 2003a; see obviously also the sentence of the Constitutional Court no. 233 of 11 July 2003, in Navarretta, 2003b.

tolerability is exceeded and the damage is not futile'; the assessment of both requirements remains subject to the parameter constituted by social conscience at a given historical moment.

These statements have aroused radically contrasting attitudes between Italian scholars: from full agreement on the part of authors who, moreover, had essentially inspired them,[20] to the subscription of the idea underlying the rule, albeit with some critical clarifications as to the argumentative apparatus that should have supported it or the conclusions that could be drawn from it,[21] up to the affirmation that the introduction of the exceeding of the limit of tolerance as a further prerequisite for the compensability of non-asset damage, resulting in an unreasonable disparity of treatment between the compensation for non-pecuniary damage and that for pecuniary damage would expose the solution accredited by the United Sections to a doubt of constitutional illegitimacy.[22]

In fact, it is the very consideration of the function of the aquilian institute (all the more so) when non-pecuniary damage is considered, and the reconnaissance of the developments in European private law of civil liability, that make it possible to confirm that the rule of the non-compensation of non-serious damage constitutes a real systematic and applicative gain, but that it probably needs to be argued in a more articulate manner and specified in some of its applicative aspects.

From a functional and systematic point of view, then, the rule of the non-recoverability of non-serious damage finally represents a point of emergence of awareness of the limits of the aquilian institute: in the sense that the latter, even in the ductility of the rules that characterise it, at least in our regulatory system, cannot be attributed the suitability to follow, offering protection through the modality of the indemnity sentence, every situation of legally relevant interest, which is outlined in experience, having instead to discount the existence of an area of

20 The reference is, in particular, to Navarretta, 2001, pp. 801 et seq. as well as, in commentary on the judgements of the Sezioni Unite; see Navaretta, 2009, pp. 139 et seq.

21 In this sense see Mazzamuto, 2009, sections 588 et seq., 593; we would also refer, in this perspective, to Amato, 2009, 460 et seq.

22 See Ziviz, 2009, p. 98; Riccio, 2009, pp. 277 et seq.

prejudice destined to remain entrusted to social complexity.[23] The conclusion in the sense that such suitability cannot be attributed to it is already connected to the need to avoid what has long been effectively described as a crisis of excess inputs, or of demands, of the institution of civil liability, which cannot be seriously entrusted with an overall and pervasive function of the 'government' of the economic-social reality.

Therefore, and at least in the field of non-pecuniary damage, the Italian regulatory system, precisely through the jurisprudential orientation mentioned, came up with a solution very similar to that one contained in the Draft Common Frame of Reference, where it is present, also referring to the area of pecuniary damage, the c.d. *de minimis rule*, according to which (VI – 6.102) *'Trivial damage is to be disregarded'*.

In the latter regard, it should be pointed out, however, that it is precisely the very recent decision of the CJEU, aforementioned on damage caused by violation of *privacy*, that art. 82 (1) of the GPDR must be interpreted as precluding a national rule or practice which makes compensation for non-material damage subject to the condition that the damage suffered by the person concerned has reached a certain degree of seriousness, both because art. 82 refers to the concept of non-material damage without mentioning a threshold of seriousness, and in the light of the GPDRs need to ensure a consistent and high level of protection of individuals with regard to the processing of personal data throughout the European Union.

5. THE LATEST DEVELOPMENTS IN CASE LAW: PROOF AND SETTLEMENT OF NON-PECUNIARY DAMAGE AND THE PROBLEM OF PUNITIVE DAMAGES

The subsequent developments of the problem of compensation for non-material damage in the jurisprudence of the Italian Court of Cassation can be briefly described in terms of a partial overcoming of the

23 Mazzamuto, 2009, section 593; Castronovo, 2008, pp. 315 et seq.

principles affirmed by the judgements of 2008 illustrated just now and of an increasingly marked attention to issues relating to proof and liquidation of damages.

In particular, the overcoming of the principles affirmed by the aforementioned case law can be seen in the articulation of the category of non-pecuniary damage. The idea that is proposed by an orientation developed in 2018 (Cass. 901/18; Cass. ord. 7513/18) is in fact in the sense that any injury caused to an interest protected by the Constitutional Charter is characterised by a double dimension of damage: the dimension of the relational/external projection of being and that of the moral damage/intimistic internalisation of suffering. In this way, a sort of 'symmetry' is envisaged with the double dimension of the pecuniary damage, the emerging damage ('internal' damage, which affects the already existing assets of the subject), and the loss of profit (which, of that heritage, is the dynamic and external projection). The procedure that the court must carry out in order to verify the existence of non-pecuniary damage that can be compensated therefore presupposes, first, the identification of the right of the protected person at the constitutional level; subsequently, the court must carry out the analysis, and a rigorous assessment, on the level of proof, both of the inner aspect of the damage (moral suffering in all its aspects, such as pain, shame, remorse, self-esteem, melancholy, sadness), as well as of its worsening modifying impact on daily life that returns to evoke the idea of existential damage (the *loss of amenities of life*).

As regards the questions relating proof of non-pecuniary damage, the problem of the liquidation of the same has arisen, in particular, with regard to the category of biological damage, where the prejudice suffered by the victim is objectively appreciable to the extent that it refers to the impairment of the individual's health. Here, the issues that arise concern, first, the need to satisfy the requirement of uniformity of the liquidation of damages in all the hypotheses of fact that present analogous characteristics, from the point of view of the injury suffered by the victim, thus also ensuring as far as possible the predictability of the decision; and, then, the need to leave a margin within which the judge can consider, when liquidating the non-pecuniary damage, the particularities of the individual case.

It is well known that a pair of Supreme Court rulings dating some twelve years gave a sort of normative value to the Milan tables (*tabelle milanesi*), while leaving room for judicial discretion in the matter. The Milan tables consist of a document drafted by a working group active precisely at the Court of Milan, and which is composed of judges and lawyers; the group has collected and analysed hundreds and hundreds of decisions issued with reference to cases in which the victim had suffered non-pecuniary damage and has drawn up parameters for quantifying the damage, which take into account medical-legal criteria for assessing the seriousness of the injury. In this way, once the data considered by the table are known (e.g., the age of the injured party, in case of biological damage), the use of an electronic programme is sufficient to arrive at the determination of the compensation sentence.

It was recalled a short while ago that the jurisprudential direction, accredited from 2108 onwards, in the jurisprudence of the Court of Cassation, through the distinction of the two components into which the violation of a personal right can be divided (the external/relational dimension and the internal dimension of a moral/suffering character); an approach that, insofar as it is relevant to the discussion taking place here, seemed, among other things, suitable to lead to a reconsideration of the use of the Milan tables in the settlement of non-asset damage, not so much from the point of view of the premise of their substantially normative value, but from the point of view of the congruity of the criteria accredited by them. The course of reconsideration has led, in fact and finally, to a calling into question – which then became an erosion – of the Milan tables, as the criterion that the court of merit must use when it is called upon to liquidate the non-asset damage, in favour of the Roman ones.[24]

In this perspective, the emphasis was first of all placed on the circumstance that unlike biological damage, moral damage, that is, subjective suffering, which does not have a medico-legal basis, by definition,

24 See Court of Cassation, 10 November 2020 no. 25164 with a note by Ponzanelli, 2020b. See also Ponzanelli, 2021, pp. 37 et seq. Lastly, returning to the subject, also taking into account the new Milanese tables of March 2021, and with particular wealth of developments, Court of Cassation no. 10579 of 21 April 2021.

eludes a priori assessment, but must be attached, proven, and assessed in its concrete, multiform, and variable phenomenology that no logical reason, nor any positive basis, allows it to be related in standardised terms to the seriousness of the injury to psychophysical integrity.[25] This prefigures a liquidation technique that even if still based on the system of tables as regards damage to health, could not be extended to non-material damage, given that the assessment and settlement of the latter should still be entrusted to the preliminary investigation of the individual case *'in its concrete, multiform and variable phenomenology'*.[26]

In the latter regard, a particularly significant example of a technique for settling non-pecuniary damage, other than health damage, which takes into account the seriousness of the injury, is an order by the Supreme Court of Cassation, which states, with reference to a case of dissemination of news seriously damaging to the reputation of a person accused of being part of a mafia-type association, that the moral damage in the presence of an injury to very personal rights, such as those invoked by the injured party, is by definition

> *a damage that 'cannot be proven in its precise amount', pursuant to art. 1226 of the Civil Code, as referred to by art. 2056, paragraph 2 of the Civil Code, since it relates to compensation for the prejudice represented by inner suffering, or moral damage (sub specie of pain of the soul, shame, self-loathing, fear, despair...). It is, therefore, a type of damage in which, more than elsewhere, it is necessary to have recourse to equitable liquidation, which the court of merit performs – as occurred in the present case – by assessing the damage itself by means of its 'personalization'*.[27]

Confirmation of the difficulties to which the problem of personalisation of damages gives rise, in particular as regards the evidential techniques of moral damages, can be deduced from another recent intervention by

25 In this sense see Court of Cassation 4 February 2020 no. 2461, with a note by Ciommo, 2020, pp. 223 et seq.; also see Ponzanelli, 2020a.

26 See again Court of Cassation 4 February 2020 no. 2461.

27 See Court of Cassation 8 June 2022 no. 18430.

the Court of Cassation.[28] In particular, the Court, in the decision now referred to, first reiterated that the personalisation of compensation for damage to health consists in a variation upwards (or, in abstract hypothesis, downwards) of the standard value of the compensation, in order to consider the specific features of the concrete case. These must consist of 'exceptional and specific circumstances', with the consequence that 'no upward variation in the standard compensation envisaged by the "tables" can be granted to take account of injuries that any victim who has suffered the same injuries must bear, according to the *id quod plerumque accidit*, since they are consequences already considered in the settlement of the damage according to the table'.[29] This sentence also reiterated the principle, repeatedly shared in previous sentences, of the autonomy of moral damage with respect to biological damage, on the premise that it is a prejudice of an entirely interior and non-relational nature and therefore deserving of additional compensation beyond the personalisation foreseen for the dynamic aspects compromised: therefore, what is being considered here is damage that is not susceptible to

28 See Court of Cassation 10 November 2020 no. 25164 with a note by Ponzanelli, 2021, p. 32; see also Zappatore 2021.

29 In the case in question – observes the judgement now being examined – the territorial court had granted personalisation by stating that 'no useful elements are to be found in the records that would allow the loss of work capacity, both generic and specific, to be otherwise assessed in economic terms' and that the victim was in the 'undoubted impossibility of engaging in physical activities', and considering that this circumstance should be considered as an element for personalisation within the framework of biological damage. However, in so doing, according to the Court, the Court of appeal has made a twofold error of law: on the one hand, it failed to consider that the personalisation of the damage – as has already been recalled above – must be justified by the positive finding of specific exceptional consequences, in addition to those ordinarily resulting from the impairment and which could not constitute the means of remedying the lack of evidence of damage to the ability to work (particularly since the injury to the general ability to work is included within the scope of the ordinary consequences of damage to health and that relating to the specific ability to work, to be assessed within the scope of pecuniary damage, falls outside the scope of biological damage). On the other hand, the Court twice liquidated the damage relating to the impossibility of performing certain physical acts, first as damage to health and then as personalisation, although without, as stated above, indicating specific and exceptional circumstances.

medical-legal assessment and is substantiated by the representation of a state of mind of inner suffering that is independent of the dynamic-relational events of the injured party's life. Hence, in the sentence that we are reviewing at this point of our discussion, the indication of a series of guidelines that the tribunal and the court of appeal must follow when proceeding to liquidate the damage to health: ascertain the existence, in the individual case, of a possible concurrence of dynamic-relational damage and moral damage; in the event of a positive ascertainment of the existence (also) of the latter, determine the quantum of compensation by fully applying the tables in Milan, which foresee the liquidation of both items of damage, but arrive (incorrectly) at the indication of an overall monetary value (made up of the arithmetic sum of both items of damage) in the event of a negative assessment, and consequent exclusion of the non-material component of the damage, consider only the biological damage item, deprived of the increase foreseen in the table for non-material damage, according to the percentages indicated therein, consequently settling only the dynamic-relational damage; in the event of a positive assessment of the conditions for the so-called personalisation of the damage, proceed to the personalisation of the damage, proceeding to the settlement of the amount of the damage, according to the percentages indicated therein. personalisation of the damage, proceed to increase the value of the biological damage by up to 30%, stripped of the moral component of the damage automatically (but erroneously) included in the table.

From the point of view of the proof of non-material damage, then, and – as mentioned above, with some variety of accents with respect to Cass. 2461/2020 – the Court, in sentence 25164/2020, reiterated that, since the prejudice to an intangible asset is at stake, recourse to presumptive evidence is destined to assume particular importance and may also constitute the sole source of the judge's conviction, although the burden of the injured party remains unchanged to allege all the elements which, in the concrete case, are suitable for providing the concatenated series of known facts, in order to allow the unknown fact to be traced. The subject of this burden of allegation are the primary facts, that is, the facts constituting the right to compensation for the damage; with specific regard to the prejudicial consequences causally ascribable

to the conduct, 'the assertory activity must consist in the full description of all the suffering for which compensation is claimed'. However, such a precise burden of allegation is not matched by an equally broad probative burden, in the light, also and above all, of the eminently subjective dimension of non-material damage. Hence the possibility of proving non-material damage also by means of maxims of experience that would make it possible to avoid 'that the party, unable to prove the prejudice of being, that is, of the condition of physical and psychological affliction in which it has found itself as a result of the injury suffered, is forced to articulate exhausting chapters of evidence relating to the significant change of inner states of mind from which the demonstration of the prejudice suffered may be inferred'.[30]

The most recent jurisprudence of the Supreme Court discusses of the Milan Tables (as already said, '*tabelle milanesi*') with reference to some particular hypotheses of damage such as the so-called damage from loss of parental relationship, that is, the damage suffered in the event that a person to whom one is related by a particularly close family relationship dies or is seriously injured, thus the relationship of life and affection that existed between the primary victim of the offense and the secondary victim of the same was interrupted. In such cases, proof of damage may be given largely on a presumptive basis, when the family relationship is particularly close or it is a relationship of marriage, but it will always be possible for the defendant to offer evidence to the contrary, demonstrating, for example, that the relationship between the primary victim and the secondary victim was in crisis (so Cass. 9010/22).

30 The debate continued with the following affirmation (Court of Cassation, ord. 10 February 2021, no. 3310; previously see also Court of Cassation, ord. 13 January 2021, no. 460): this court has already established that only in the presence of 'specific and exceptional' circumstances, promptly put forward by the injured party, which make the concrete damage more serious, under the aspects indicated, compared to the consequences ordinarily deriving from injuries of the same level suffered by people of the same age, the magistrate is allowed to increase the sums due as compensation when personalizing the settlement, with analytical and not stereotyped motivation (...) as of the last sentence of sentence no. 25164 of Civil cassation, no. 3310 of 10 February 2021.
See also, again in the vein of Cass. 25164/2020, Cass. ord. 12 September 2022 no. 26805 and Cass. ord. 9 November 2022 no. 32935.

Thus, and to begin with, it has been specified, with regard to the operation, and the limits, of presumptive evidence with reference to this item of damage that

> *On the subject of non-asset damage from the loss of a parental relationship, the existence of effective relationships of mutual affection and solidarity with the relative is assisted by a. presumption 'iuris tantum', based on the common membership of the same 'minimum family nucleus', which can be overcome by contrary evidence supplied by the defendant, also based on presumptive elements such as to eliminate (or attenuate) the aforesaid presumption, the judge in any case having to proceed, pursuant to Article 2729 of the Civil Code an overall assessment of the gravity, precision and concordance of the circumstantial elements at his disposal.*

Applying this principle, the Court of Cassation overturned with reference the judgement on the merits that, in compensating a woman for the non-pecuniary damage for the loss of her husband, had not taken into account the uncertainty as to the actual cohabitation between the spouses, the undisputed existence of an extra-marital relationship of the deceased spouse, and the circumstance that, shortly after her husband's death, the plaintiff had entered into a stable sentimental relationship with another man, from which a child was born.[31]

On the other hand, a slightly later ordinance of the Supreme Court provided an important clarification regarding the concrete physiognomy assumed by the damage from the loss of the parental relationship in relation to other possible lesions of the victim's personality assets deriving from the same illicit act. It was, therefore, noted that

> *On the subject of non-pecuniary damage, the liquidation of the damage from loss of the parental relationship – affecting the preservation of the emotional-subjective balance of the injured party and, in a dynamic-relational dimension, on the concrete impediment to the continuation of a personal relationship – and of a further amount by way of compensation for biological damage – as prejudice to the psycho-physical integrity*

31 See Court of Cassation 21 March 2022 no. 9010.

> *caused by the killing of the relative – does not constitute a duplication of compensation, since these are different items of damage deriving from the lesion of logically and ontologically distinct assets that are referred to, respectively, in Article 29 and Article 32 of the Italian Constitution. 29 and Article 32 of the Constitution respectively.*

From this angle of view, therefore, the different point of emergence, at the level of the constitutional relevance of the interest, of the damage from the loss of the parental relationship compared with biological damage, excludes that the simultaneous recognition of a compensation benefit for one and the other can give rise to an inadmissible duplication of compensation.[32]

Lastly, and again in terms of proving the actual existence of the prejudice that can be described in terms of loss of the parental relationship, it has been clarified that

> *The loss of the parental relationship, in its non-material dimension, determines the loss of reciprocal affections in progress, which are, unlike subjective moral damage, 'objective dimensions' of the prejudice, i.e. 'utilities' whose extinction is relevant regardless of the suffering that that loss can produce on the surviving relative. Therefore, the loss of the parental relationship, as the loss of the 'utilities' that the relationship allows, is necessarily a present loss, consisting in the definitive impossibility of enjoying that bond, with the consequence that it constitutes relevant prejudice only for the relative who is a party to that relationship, not in the formal sense, but in the sense of being able to draw from the relationship the 'utilities' that it offers and that the wrongful act causes to be definitively lost. The infant's future harm, that is to say, his future suffering from the present loss of his grandparent, is therefore a possible harm that cannot be considered relevant now for then, since if one can recognize, in the abstract, a possible posthumous suffering, one cannot admit a posthumous enjoyment of the goods that the family relationship allows.*[33]

32 See Court of Cassation 28 March 2022 no. 9857.

33 See Court of Cassation 26 April 2022 no. 12987.

On this basis, the claim for damages made by the parents of a minor child as a result of the death of her grandfather following an accident was rejected in the case at hand. In particular, the plaintiffs complained of the loss of a kind of future parental relationship, that is, the loss that, once conscious, the minor would have felt and that would have taken the form of not being able to have her grandfather with her, that is, to live moments with him as in the normal relationship between grandfather and grandchild.

In a general perspective, we can say that Italian jurisprudence is however constant in stating that a person who intends to obtain compensation for non-pecuniary damage must prove it, even by means of presumptions (Cass. 12249/23), since damage *in re ipsa* is not admissible. From this point of view, there is a significant similarity with the jurisprudence of the CJEU just mentioned: namely, the decision of 4 May 2023 in C–300/21, which excluded that mere violation of the rules of the GPDR can lead to a non-pecuniary damage compensable.

Then, once again, the prospect of liquidation, and its criteria, takes decisive importance when one wonders about the function of compensation for non-pecuniary damage: in fact, the attribution of relevance, in the perspective of the quantification of this item of damage, to aspects also concerning the seriousness of the conduct of the person responsible, from the point of view of the subjective element underlying it, or of the particular merit of protection of the injured interests, offers food for thought of particular significance when it comes to investigating also the possible sanctioning component that the compensation sentence in the field of damage is destined to assume. From this point of view, it has been affirmed, by some scholars, that the measure of compensation for non-pecuniary damage is also related to the seriousness of the fact and the proportionality of the sanction that, overall, the legal system imposes (also in preventive function) on its author. Even in Italy there are questions – but for now it is only a doctrinal debate – on the possibility of introducing, as a competing criterion for the liquidation of non-pecuniary damage from injury to personality rights, that of the profit obtained by the offender who has committed it intentionally and in order to achieve a profit contained, in art. 6.33 § 3 of the Belgian draft reform of civil liability law.

In the background of the approach that attributes importance to the seriousness of the conduct of the person responsible for the purposes of liquidating non-pecuniary damage, there is, once again, a ruling of the Supreme Court (S.U. 5 July 2017 n. 16601), which affirmed the principle according to which 'in the current legal system, civil liability is not assigned only the task of restoring the patrimonial sphere of the subject who suffered the injury, since the deterrence function and the sanctioning function of the civil responsible are internal to the system'. From this principle, the judgement has affirmed the corollary according to which 'it is not … ontologically incompatible with the Italian legal system, the institution of American origin of punitive compensation', while specifying that 'the recognition of a foreign judgment that contains such a ruling, it must, however, correspond to the condition that it has been rendered in the foreign legal system on a regulatory basis that guarantees the typicality of the hypotheses of conviction, its predictability and the quantitative limits, having regard, in the deliberation, only for the purposes of the foreign act and their compatibility with public order'.

6. FINAL THOUGHTS

I hope that this short essay has been able to offer a picture of the way in which compensation for non-pecuniary damage has been modified during the 81 years of validity of the Italian Civil Code, by means of the interventions of jurisprudence, in the wake of the contributions of doctrine and through the concretisation of the general principles contained in the Constitution of 1948.

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CODIFICATION OF THE CIVIL LAW IN POLAND

PIOTR STEC

ABSTRACT

In this chapter, the developmental trajectory of civil law codification in Poland is traced in parallel with the major events of Polish history. It reveals that codification work began in earnest during the so-called Second Republic, being subject to numerous international influences, in different parts of Poland, which affected it in various degrees. The traditionally dualist system of Polish civil and commercial law is also analysed in light of its effects on codification. Finally, the codification work during the communist dictatorship, and its later modification, is examined, and a question is posed as to whether a new codification would be preferable and appropriate.

Keywords: civil law, codification, private law, commercial law, Poland.

1. INTRODUCTION

Codification of civil law is an enormous task and a milestone in a nation's legislative history. Poland is no exception; the country's codification attempts have been connected with its turbulent history. We have the union with Lithuania, partitions, the Napoleonic era, regaining independence, communist rule, the fall of the Berlin Wall, etc.

Stec, P. (2024) 'Codification of the Civil Law in Poland' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 521–546. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_19

In this chapter, I present the attempts to codify Polish Civil law and explain why Poland, one of the two Eastern and Central European countries, did not prioritise recodifying its civil law. And, why do we still have a civil code enacted in 1964?

2. FROM THE FIRST REPUBLIC TO PARTITIONED POLAND

Since the 16th century, Poland was a federation of two states: the Kingdom of Poland and the Grand Duchy of Lithuania. Both countries had equal footing in the Commonwealth, with most offices doubling. For instance, there were two lord chancellors, one for Poland and one for Lithuania. Both countries had one monarch and were politically united as one federal State but had separate legal systems. Lithuanian law was codified in the 16th century by the so-called Lithuanian Statutes, a modern codification of local law highly influenced by Roman law, a gold standard in that era. Roman law was also used as a subsidiary law to fill potential loopholes. These statutes survived Poland's partitions and were still in use years after the Commonwealth ceased to exist.[1]

Polish law remained largely customary, although in the 14th century, the Polish king Casimir the Great ordered the codification of existing customs in what is known as Wiślica Statutes (Statuty Wiślickie). Later, creating a new civil code was impossible for various reasons, although restatements of existing customs were made and used in courts and professions. In the final years of the Commonwealth, Andrzej Zamojski prepared a draft of a uniform civil code for Poland. This work was not completed because Poland ceased to exist as an independent state for over one hundred years.

Ignacy Koschembar Łyskowski claims that the relatively low interest of the kings in codifying private law was caused by the plurality of legal systems in use. The restatements and customary law were used outside the cities, that is, primarily by the nobility. The cities used Germanic

1 Zakrzewski, 2023, p. 578.

laws, suitable for trade relationships, and were not interested in replacing something that already worked.[2]

Another peculiarity of the pre-codification era was the lawmakers' attitude towards Roman law. Polish and Lithuanian nobility loved the Roman Republic but feared Roman law as an instrument of German imperial oppression. A centralised state with a strong ruler could bring an end to constitutional monarchy and individual freedoms they loved so much.[3] Moreover, the kings of Poland knew that an attempt to create a code based on Roman principles led to a revolt in neighbouring Czechia and were afraid that the same could happen in Poland.[4]

The first Polish university in Cracow, established in 1364, had many Canon Law professorships. Still, in the 16th century, it had only one professor of Roman Law, a Spanish scholar and poet, Pedro Ruiz de Moroz (Piotr Roizjusz, Doktor Hiszpan). In his writings, he complained about Poles' disregard towards Roman law and his low salary, which additional sources of income could not supplement.[5] Finally, de Moroz quit academia and became one of the royal experts responsible for preparing the Lithuanian Statutes. Lithuanians, unlike the Polish nobility, had nothing against Roman law.[6] Reformers on the Polish side knew that Roman law was state-of-the-art and tried to include its principles in their codification drafts with different results. Contemporary opinions on these attempts vary from close to enthusiastic appreciation to wry remarks on scholars who only knew Roman law existed and pretended to know it.[7]

In the partition period, Polish territories followed the fate of the occupying countries. So, at the end of World War I, parts of Poland under German rule used the BGB, those under Austrian rule ABGB (and in some small parts also Hungarian law), and those under Russian control under Code Napoleon (Semi-autonomous Duchy of Warsaw) and Volume

2 Koschembar-Łyskowski, 1925, p. 11.
3 Hamza, 2016, p. 87.
4 Sondel, 2001, pp. 47–48.
5 Kremer, 2010, p. 479.
6 Diccionario Biográfico Espanol, 2013, p. 799.
7 Sondel, 2001, p. 47 (59).

10 of the Roll of Laws of the Russian Empire (Svod zakonov).[8] The first three were modern brainchildren of the Age of Great Codifications. The last one was a not-so-good attempt to adapt the Russian law to modern times.[9]

3. THE SECOND REPUBLIC

Creating a unified legal system was the task of the codification committee composed of the greatest Polish legal minds of that era. The works of the committee were public, and the proposed acts were widely discussed. The committee had worked on particular themes, such as commercial law or criminal law in full-fledged codes or, like in the case of the codification of private law in acts regulating particular matters, for instance, contracts or matrimonial law. Assembling all this in one volume was not a high-priority task. The committee had a lot of freedom in preparing the laws promulgated as presidential decrees, which means, as submitted, without any parliamentary amendments.[10]

Interestingly, Polish lawyers have not even considered looking to old Polish legislative traditions, relying instead on the Great 19th codifications and the Swiss code of obligations. We do not know why no one has even tried to show the iunctum between the First Republic consciously and restituted Poland. As Koschembar- Łyskowski points out, it would be simply impractical.[11] On the other hand, The German Civil Code, the Austrian Civil Code, and the French Civil Code were at that time state-of-the-art and a really good starting point for drafting your own legislation. The Swiss civil law had no dependency connection, and, of course, was also a state-of-the-art solution at that time. Just marginally, one may mention that some traditional Polish institutions, like, for instance, the *dożywocie* contract, were imported to the Code Civil from old Polish law, and the *nawiązka,* a lump sum indemnity provided in the

8 Giaro, 2015, p. 309.

9 For an account of the partition period see Hamza, 2016, passim.

10 Górnicki, Prawo, 2020, p. 109.

11 Koschembar-Łyskowski, 1925, pp. 14–15.

Lithuanian Statutes, was imported to the Polish penal code as a sort of criminal indemnity.

Since it would be both impractical and politically irresponsible to keep five different legal systems running or to take one of them as Poland's own, it was necessary to create a new system of laws, based partly on the laws currently in force but being a new set of tools for a new country. Lawyers working on this were trained in five different legal systems, aware that these systems, although all within the Roman law tradition, were often incompatible. On the other hand, this was one of the rare moments in legal history when new laws were created using, something we could call today, a comparative method. Finding the common core of legal systems and creating a set of rules lawyers trained under Austrian, German, French, or Russian law could use and understand. It seems also that the law of that time was written with a wider set of stakeholders in mind. So, its language was precise and simple enough to be understood by a merchant or a farmer deciding who will inherit his land. This specific legislative technique was a hallmark of the Second Republic lawmaking and highly appreciated at home and abroad. The quality of these laws was so good that some survived almost intact until modern times.[12]

One of the first tasks of the newly established republic was ensuring that its citizens could do business, enter into contracts, marry, and deal with property affairs. There were no rules available to solve simple problems, like, for instance, which law should be applied if a lady from Poznań (BGB area) wants to marry a divorcee from Warsaw (Code Civile) in Cieszyn (ABGB area). The solution for this was simple and genial: Inter-provincial Private Law was created to solve internal conflicts of laws just like private international law resolves conflicts of laws in an international context.[13]

Another interim but important act was the law on recalculating pecuniary obligations after currency exchange resulting from inflation. This act was rather complex legislation, with exchange rates from old currency (Polish mark) to new (Polish zloty) depending on the region

12 Koźmiński, Jackowska, 2023; Koźmiński, 2019, passim.

13 Dvorský, 2020, p. 70; Jastrzębski, 2015, p. 277.

and branch of the industry connected with any given obligation. The exchange rates were negotiated with stakeholders, which was sometimes detrimental to the stakeholders, who, being honest merchants, declared that they would pay all their debts and did not ask for special treatment.[14]

The two largest pieces of legislation were the Code of Obligations and the Commercial Code. The logic behind them reflected the legal dualism of that era, with the division of general civil law and the law merchant regulating commercial relations. Both acts were complementary in the sense that in general rules of the code of obligations applied also to commercial transactions unless specifically stated otherwise.

The code of obligations did not deal with the law of persons, in particular, with the capacity to enter into a contract. These matters were still regulated by old foreign, laws still in force. It dealt with obligations in general, sources of obligations (contractual and non-contractual ones, like delicts, negotiorum gestio, or unjust enrichment), performance, transfer of debts, and liability for non-performance of the contract. The second part of the code regulated specific contracts.[15] Since the labour law had not yet been accepted as a specific branch of the law, labour contracts were also included in the code.[16]

Other main branches of civil law, including property law, family law, and the law of persons, have never been turned into statutes. All legislative works had to stop after the German and Soviet invasion in 1939 and the occupation of Poland for the whole period of World War II.

The commercial code regulated the legal status of merchants, accounting principles, some property law issues, and commercial contracts. The first part of the code was a complex regulation of legal status and organisational forms for commercial activities, starting with one-person-business, through unincorporated partnerships up to limited liability and joint stock companies. The second part dealt with so-called *commercial activities'* (*czynności handlowe)*, that is, contracts between merchants. Some minor provisions dealt with issues like

14 Jastrzębski, 2016 passim.
15 Jędrejek, 2001, p. 47.
16 Baszak, 2018, p. 189.

acquisition of property, sale of the enterprises, or good faith acquisition of movable property. The law of commerce was supplemented by a decree on insolvency, a law on amicable settlement for insolvent debtors, and two laws implementing the Geneva Conventions on cheques and promissory notes. Public law regulation of business activities was the subject of a separate statute called the Industrial Law (*prawo przemysłowe)*.[17]

The third stream of private law regulation was intellectual property, when copyright law, patent, trademark, and design laws were created.[18] Many issues remained unsolved or under construction; for instance, agricultural reforms and the dissolution of fideicommissa have not been fully implemented. The reforms were aimed at stopping accumulation of agricultural property in the hands of a small number of wealthy families and the Churches. The State bought the property at half the market price and distributed it among the farmers. The last act in this area was the act on dissolution of the trusts (fideicomissa). Basically, all trust property was to be transformed into standard real estate, which the owners could then sell without restrictions. The only exceptions were the not-so-numerous trusts established *inter alia* to fund museums and to aid the maintenance of important heritage sites. This act entered into force in September 1939, and, because of the war and later political changes, has never been really implemented.[19]

4. PEOPLES REPUBLIC OF POLAND

The end of World War II was also the beginning of the New World Order, with Europe and the rest of the world falling either into the US or Soviet sphere of influence. Poland, along with other Central and Eastern European countries, became a socialist state, implementing the communist vision of private law. This process in the case of Poland was somewhat distorted, and the final version of the Brave New World differed in some

17 Dąbrowski et al., 2019, passim.
18 Ferenc-Szydełko, 2000, passim.
19 Noniewicz, 2016, p. 76.

aspects in what was a standard experience of other Central European countries.

One of the founding myths of the new legal order was the agricultural reform, that is, nationalisation of large rural estates and giving the land to small farmers. This continued pre-war reforms but was well-packed and marketed as the eve of a happy future. Of course, unlike the nationalisation of enterprises, giving back seized property to farmers was not in line with the socialist property law theory, where the State should own all the land. This original sin of Socialist Poland had irreversible effects on the property law. Farmers who got the land were unwilling to return it to the State or join collective farmer enterprises (kolkhoz, aka farmer cooperatives). The resistance was so strong that even hard repressions against farmers failed, and the government had to accept private land ownership. The only regions where farms were state-owned were former German territories, where the State acquired the property of former landowners.[20]

The creation of a socialist civil code was difficult for many other reasons as well. One of them was that the legislators were trained under a *bourgeois* regime and were inclined to implement solutions they were familiar with. Another was that civil law remained largely uncodified, and the only interim solution possible was to use drafts prepared by the predecessors in the pre–war era. Hence, the acts regulating private law, in particular general norms of civil law, property law, family law, and law of succession, were based on the works of the pre-war codification commission. Of course, patches and add-ons making them more socialist in form were added, but still, it was the law of the ancient regime.

Somewhere towards the beginning of 1950, there was no one civil code for Poland, but separate statutes regulated all major branches of private law. The legal community considered it an interim period before creating a new civil code, preferably based on the work already done.[21]

The government had prepared a draft of a new civil code in the early 1950s. This code was supposedly a truly socialist piece of legislation taking Poland from the Western to the Socialist legal culture, or, as it was

20 Kozerska, Stec, 2018, p. 1115 (1126).

21 Ohanowicz, 2007, p. 99.

named in that period, to the Socialist legal family. Academic and professional lawyers criticised the draft and pointed out its many defects. This was one of the rare cases when the legal community had proven itself to be attached more to the rules of the profession than to the ideology and perspective of being rewarded by the government. Even hard-core adherents of socialist Poland were sceptical about making the draft a binding and working legislation.[22] Soon it was back to the drawing board, and a new set of legislators started to work on a new code. Their work was completed in 1964 when the Parliament accepted the new Civil Code.

The new Civil Code was still a brainchild of the Second Republic, although with socialist add-ons. So, unlike in some other Central European Countries, private law codification was not the emergence of a new era. Old legal literature and pre-war theoretical concepts were still a valid currency among legal scholars. Often it was supplemented by a ritual mantra *'that was then, and this is now,'* but still applicable. This does not mean that the Polish Civil Code created a bourgeois enclave in the socialist world. On the contrary, the new code, although capitalist in form, was quite socialist in many respects.

The structure of the Civil code reflects the Pandectist model, although with some modifications. Gluing up the code from different laws in force has also made its mark on the code. The code comprises five books: the general part, property law, the general part of the law of obligations, the specific part of the law of obligations, and the law of succession. Although the general idea was to have one, unified civil code, some important branches of private law were deliberately taken out of the code and regulated by separate statutes. The reasons for this were partly pragmatic, partly ideological. For instance, the work contract was not regulated in the code. Labour law became, as a result of natural evolution not only in Central Europe, a separate legal discipline with its own set of rules. The labour law was codified in 1973(?) in a separate code, with civil law serving as a subsidiary statute to cover matters like legal capacity not covered in the labour code. The reasons for regulating the family law outside of the civil code were of a more political nature.

22 Szer, 1967, p. 50.

The prevalent opinion was that it is too bourgeois to have family matters only classed as a private law. This responsibility for family policy and protection is also (if not mainly) a matter of the socialist State. So, the family code became a separate statute to maintain both legislative (separation of public and private law) and political purity.[23] Finally, land registration rules were also regulated separately. Land registration law was in a separate statute because technically private ownership of land was incompatible with the rules of the socialist economy. However, with relatively large number of plots owned by farmers and people owning their homes, it was decided that it is too early to abolish the land registration system.[24]

What was characteristic of the law of the general part of the civil code was the lawmakers' intention to put in it all legal institutions common to other parts of the code. So, besides the law of persons, this book deals with legal acts, formation of contracts, essential error, deceit, and other elements influencing the validity of the consent, power-of-attorney, conditions, and legal effects of the lapse of time. Persons according to the code were humans, legal persons and so-called '*jednostki gospodarki uspołecznionej*' (socialised economy units, the JGUs), that is, state enterprises, government-controlled cooperatives, trade unions, etc. Although there was the principle of unity of civil law as a general act to regulate all legal relationships, there were separate rules for legal relationships between JGUs included in the code.[25] In effect, the code regulated three types of civil law relationships:

- between natural and legal persons other than JGUs
- between JGUs
- between JGUs and natural persons (in rare instances, between JGUs and other legal persons).

The last category covered consumer protection law as well, although in the 60s this branch of private law was in *statu nascendi*.

23 Ziembiński, 1977, p. 11.
24 Szer, p. 58.
25 Dawidowicz, 1987, p. 18.

A peculiar problem of the law of persons was the legal status of so-called *imperfect legal persons* (*ułomne osoby prawne* in Polish). This problem resulted from a normative approach to legal personality: only entities explicitly defined as legal persons. This left many entities in a legal lacuna: they were unincorporated and had no laws regulating their status. The courts and part of the legal doctrine recognised them as quasi- or imperfect legal persons giving them *per analogiam* some of the attributes of a legal person, like, for instance, the capacity to enter into a contract. The discussion on the legal status of these entities continued until 1997 when a statute regulated their status. A safety valve built into the code was in art. 4 CC. According to this rule, all the provisions of the code should be interpreted following the goals and principles of the People's (i.e., socialist) Poland. This prevented the courts from applying a more *'capitalist'* approach to private law.

The property law was the part of the civil code most influenced by the rules of the socialist State. The reason for this was communism (I am using both terms interchangeably and I am aware of the debate on whether it was real socialism, communism, or commune-fascism), wherein the conviction was that all real property should belong to the State and should be strongly protected. As a result, we had a property stratification in the code with state property being the most important type of property, enjoying the widest protection, and the property of the JGUs and individual property the least protected one. State entities, even if they were legal persons, did not own real property. It was originally vested upon them by a special public law property right (not being the part of the civil code) called permanent administration right (prawo trwałego zarządu). Other JGUs could also get perpetual use (emphyteusis, see below) on public land.

Apart from the above rules many other provisions of the Civil Code cared for a preferential treatment of the state property. For instance, it could not be acquired by usucapio (acquisitive prescription, see old art. 177 CC), or, in the case of movables, acquired in good faith *a non domino* (see old art 171 CC).

Further, a specific form of using state land for private purposes, a perpetual usufruct (użytkowanie wieczyste), was created. This was (and still is, although its days seem to be numbered) a special property right,

somewhere between full ownership and restricted property rights. This right allows the user to use public real property within the limits normally assigned to the property owner. Buildings built on such land belong to the perpetual user, making an exception to the *superficies solo cedit* rule. The user was free to dispose of the perpetual usufruct with the buildings: sell it, donate, or lease. The right can also be inherited. There were normally two constraints limiting the user's rights. One was the agreement between the user and the State. Technically, the State could wind up the right in the case of improper use of the property, which, however, hardly ever happened. The other constraint was that the perpetual use is a time-limited right, created for 99 years, with the possibility of prolongation for the next 99 years. After that period, the property would return to the State, and the user would get only compensation for the buildings he or she built on the ground. The reason for creating the right was very simple: the socialist State was not able to build enough flats and houses for the booming post-war population, so it decided to let the citizens to solve the problem by themselves. Which they did with surprising effectiveness.[26]

The law of obligation seems to be least affected by the socialist ideology. It is still based on pre-war code of obligations, being a creature of the non-socialist past. Again, socialist era add-ons have been added to accommodate the needs of the growing JGU sector and the needs of the centrally planned economy. The law of obligations has its general part, dealing with debtor-creditor relationships, contractual obligations, non-contractual obligations like, for example, delicts, unjust enrichment, etc., execution of contracts, and contractual liability, that is, basically, civil code standard. The specific part of the law of obligations deals with named contracts and some non-contractual obligations, like, for instance, negotiorum gestio. What was new were rules regarding the JGUs, like, for instance, provisions on the duty to enter into a contract arising from state production plans. The centrally planned economy also regulated prices, which was reflected in the law of sales. Some of the contracts could only be concluded by state entities, a specific form of civil-law confiscation. In the case of profits from illegal or immoral

26 For a general overview from that era see Ohanowicz, 2007a, p. 99.

contracts, most civil law jurisdictions use the *condictio ob turpam vel injustam causam*. Polish civil code provides for confiscation of profits from such contracts by the State. The original version of the civil code was created in a way giving the State the right to confiscate property even in minor cases such as not putting the right fiscal stamp on the contract.

The law of succession was also more or less unsurprising with testaments, protection of minors, statutory rules of inheritance, etc. The most socialist part of the code dealt with rules of succession of agricultural property. The law had very detailed provisions on qualifications of heirs to such property. If none of the heirs were qualified to run the farm or were handicapped, the State acquired the land as a statutory heir. This was a tool to get back in time what had been given to farmers in the times of agricultural reform. Another incentive to give land back to the State was the retirement rules. Farmers had no retirement benefits, and, during their old age were literally at the mercy of the next generation. An alternative was to transfer the farm to the State in exchange for a lifetime pension. A separate statute regulated this particular contract.[27]

As far as commercial law is concerned, the situation in People's Poland was again a little unusual: The Commercial Code was abolished, but its provisions on business trade names, companies register, partnerships and companies were kept in force. Commercial contracts were incorporated into the civil code.

5. THE THIRD REPUBLIC

The fall of the Berlin Wall and the collapse of communist governments strongly affected private law. With Poland's turn towards a market economy and all the state entities competing with the private sector without preferential treatment from the state, modification of the civil code was necessary. As we know, the code already in force was still mostly compatible with the principles of the new political and legal

27 Moszyńska, 2013, p. 239.

environment, so, it was possible to run the business as usual without the need for a big revamp of the code. However, the code included rules on preferential treatment of state entities and distorting free competition. This is why one of the first law reform decisions was to enact an amendment to the civil code removing the socialist add-ons. Consequently, Poland entered the 1990s with a fully functional civil code fit for the needs of the market economy. Some new provisions like definition of the contractual freedom were added to the code. These changes took place in times of economic crisis, so the amendments included reintroduction of the *clausula rebus sic stantibus* and valorisation of pecuniary debts by the court in case of an unexpected change of circumstances.

This also removed the pressure on having a completely new civil code; approximating the Polish law to that of the European Union, becoming the new priority. Most of the legislative work of that era was focused on this goal. Although Poland became a member of the EU in 2004, preparatory works had started much earlier. One of the choices to be made was how much of the EU-related matters should be put into the civil code. The answer was not obvious and clear.[28] Changing the code is a big thing because it is a fundamental act for private law relationships. Putting something outside the code is easier, but it can lead to a systemic defragmentation of private law. Knowing that there is no good solution to the problem, Poland adopted a mixed approach: some of the changes became parts of the Civil Code, and some remained separate statutes. Although there is no hard evidence for this, the deciding factor was the predictable stability of a rule. Codes do not like frequent changes. This worked fine with product liability rules, unfair contract terms, and some others, mainly related to the consumer law provisions. On the other hand, rules on liability for sale of defective merchandise relating to consumers were originally kept in a separate statute; after the next change of the EU law, they were incorporated into the code to ensure uniform treatment of B2B and B2C relationships. In 2023, after yet another change of the EU consumer law, they are again regulated in

28 Radwański, 2009, 134.

a separate act. Apparently, the EU laws are not as stable or predictable as one may think.[29]

Other changes that happened were parallel to the approximation of the Polish law to that of the EU. They were mostly connected with social, economic, and technological changes.[30] Some of these changes were evolutionary, like the introduction of the rules on auction sales or some changes in the requirements of form. Some were thought as a response to the needs of the business community, for example, modifications of the rules on formation of contract or introduction of a Kaiufmanische Bestatigungsschreiben. Although these rules work in some cases, some of them, like the Bestatigungsschreiben, seem to be legal transplants from the 19th century having no place in the modern economy. As a result, we have again the code that regulates three types of private law relationships:

- B2B
- B2C
- All the other

The technological changes, together with the EU legislative actions, have caused the Polish Parliament to introduce the code rules on electronic signatures and documentary form, making contracts documented through a sheer exchange of emails as sufficiently documented.

Finally, social changes have had a huge impact on the law of succession and family law. The changing model of family relationships has caused lawmakers to widen the number of statutory heirs. The limitation of liability of heirs was introduced to protect minors and heirs not aware of the financial status of the deceased. New rules on wealth transfer in business-related matters were introduced,[31] and a new vehicle of intergenerational transfer, the family foundation, was introduced in 2023, to name a few.

The family law, still outside the civil code, was enhanced and now includes new matrimonial property regimes and rules of representation

29 Max Planck Encyclopedia of European Private Law, 2012.
30 Radwański, 2009, pp. 134–135.
31 Borysiak, 2011, p. 39.

and liability of spouses for business debts of one of them. All this was done to protect the spouse and the children from reckless business decisions of the other spouse. No serious legislative attempt to regulate same-sex relationships have been undertaken, although the problem is still on the political agenda.[32]

Other branches of private law, especially company law and intellectual property law, have undergone massive changes leading to recodification. Unlike the civil code, the old commercial code and the decrees on insolvency and amicable composition with creditors did not survive the test of time. They were prepared for old-fashioned business models, with entrepreneurs avoiding risks, acting honestly, and striving to pay their debts. The wild early years of market reforms were not the time for such people. Furthermore, it was easier to introduce a new code than to revamp the laws from the 1930s.

6. WHY NO NEW CIVIL CODE IN POLAND?

Poland has not decided to recodify its private law for reasons that are complex and not always clear. The debate on recodification peaked somewhere around 2010, after the rather successful recodification of the Commercial Companies Code (Kodeks spółek handlowych), intellectual property (copyright and industrial property laws plus insolvency law). In all the above cases, change was inevitable. Either, as in the case of the Companies Law of 1936, the act was outdated, and it was easier to rebuild than to revamp the code, or the need to adjust the laws to European Union laws forced the lawmakers to act.

Speaking in general terms, neither of the two reasons existed in the case of the civil code. The 1964 Civil Code was more a vestige of the pre-1945 legislation than a not-so-proud relict of the socialist past. The reasons for this have been already explained elsewhere in this paper. The discussion on the (re)codification of the civil code in the first decade of the 21st century started with the Adam Mickiewicz University in Poznań's Professor Zbigniew Radwański, who assembled private

32 Załucki, 2022, p. 107.

lawyers, formed teams, with each team responsible for preparing one of the books of the future code. The unwritten rule (shared with me by one of the members of these teams) was that the teams should not share their ideas not only with the general public, but also with each other. Only after the publication of all the books the discussion and gluing and fitting the books into one, new code should begin. The only document known to the general public from the very beginning was the Green Book on the reform.[33] The codification teams managed to publish only a draft of the general part of the civil code,[34] and then, subsequently, their activities slowly died out. One of the possible reasons for this was the death of the spiritus movens of this enterprise, Professor Radwański: no one was willing to step into his shoes. Another important fact was that, at that time, many lawyers believed that it would be possible to create a European Civil Code, one that would make all other codes obsolete. Finally, in 2015, owing to political tensions, the government disbanded the Codification Commission, and law professors lost their interest in the subject.

Further, the private project of the civil lawyers from the Jagiellonian University suggested that the new law of obligations should be centred around services as a central term. Cracow scholars purported that in the 21st century, the economy is a services economy, not a goods economy, so traditional approaches centred on sales and ownership.[35] This approach, although quite innovative and interesting, has not been discussed in the legal literature. The proposed idea was either too novel to be considered by the academic community, or simply too impractical at the time the proposal was made. Today, with software-as-service solutions and widespread use of online shopping and streaming services, the Jagiellonian team proposal could be a good starting point for a discussion on the new framework for private law regulation.

Apart from the external circumstances described above, strong debates were common about the necessity of recodification. The debates,

33 Radwański, 2006, passim.

34 Available at: https://www.gov.pl/web/sprawiedliwosc/komisja-kodyfikacyjna-prawa-cywilnego (Accessed: 11 September 2023).

35 Karasek-Wojciechowicz et al., 2009, passim.

as usual, took place in law reviews, and the practitioner community issued its own (generally unfavourable) statements..[36] A book from the conference commemorating 50 years of the Polish civil code has been published.[37] The opinions issued by learned colleagues varied from strong support of recodification, through proposals for the reform of select institutions, up to the straightforward *'it ain't broke, don't fix it'* position. Clearly, no consensus was observed on the need to create a new civil code. It seems, however, that the majority opinion seems to be that it is better to amend the existing code than to create a new one from scratch.

Other circumstances also need to be considered. One is that every new codification needs to have a leitmotif, something that sets its goals and objectives. In the age of great codifications, sometimes the need is to fix a patchwork of local or particular laws, just to put together what has already been in force. In most cases, however, the need to put the blocks together is not enough to start drafting a new code. You need something more. The 19th-century world had been changing both politically and economically. It needed legal tools that could be used to deal with the challenges of the second industrial revolution and also be the hallmark of emerging political powers. Two of them – Germany and France – became such important players that they managed to influence the shape of laws elsewhere in Europe and abroad: the French lawyer Boissonade authored a draft of the modern civil code commissioned by the Emperor of Japan. This draft was not adopted, because the Japanese government decided to adopt the German civil code (already in force and working) instead.[38] The same was true for Polish interwar codification attempts: one, its goal was to show that Poland is an independent state with its laws (maintaining a legal system created by former rulers was not an option).[39] Even the 1964 code seems to maintain the decorum of being the creation of an independent country, maintaining its independence against all odds. At the same time, it was a symbol of the

36 Radwański, 2009, p. 131; Kępiński, 2014, p. 237; Andrzejewski, 2014, p. 87.
37 Stec, Załucki, 2015, p. 25.
38 Epp, 1967, p. 15; Sherman, 1918, p. 198.
39 Górnicki, 2011, p. 111.

new normal. In this socialist economic system, even bourgeois rules of the civil code can be tamed, fixed, and used to regulate relationships between state-owned enterprises.

There was no such thing as a 'we need to do something new' moment after 1989. The Polish transition from being a socialist state to something new, called The Third Republic, was peaceful and negotiated. The communist government and democratic opposition or, more precisely, the part willing to parley concluded a series of so-called *Roundtable Agreements* being a roadmap for both future actions and transition of power. It was a system where former apparatchiks and former dissidents served as cabinet ministers in the same government. It is for future historians to analyse this period and to assess the outcomes of the Roundtable era. What we know for sure is that these political changes were not violent. There was no symbolic fall of an equivalent of the Berlin Wall. Rather, it was named after a largely misunderstood statement of the first non-communist prime minister of Poland, Tadeusz Mazowiecki, *'a thick line policy'*. He meant that in 1989 we decided to cut off from the past and start anew. No hard feelings, no revenge, let bygones be bygones. This policy of forgiveness and giving a second chance could not be a turning point for re-creating civil law. It was more business as usual. No Big Idea, no Big Picture!

Besides, the principal goal of that era was mainly to make Polish law compatible with the European one, to join the European Union within reasonable time. Having joined the EU, the Polish parliament spent years passing laws implementing numerous directives. It was not a good time for codification; although, as far as I know, this issue has never been raised in the codification debate, Poland's being a part of the EU can also be an argument against recodification, understood as creating something more than just a restatement and a cleanup of existing laws. The reason for this is that even if we have this Big Idea, it should fit into an even Bigger Idea, which is the European Union, which, so far, has not been able to come up with a coherent draft of the European Civil Code, but is more than keen to regulate contractual matter, particularly consumer contracts. In the case of the sales contract, regulated in the Civil Code, we have witnessed so far four different modifications of the rules on the liability for sale of defective goods induced by constant changes

of the EU law. This lack of stability is disastrous for the code and is not a good prognosis for the new code.

Another reason for no particular drive seen for recodification is because what we are experiencing right now is another trend, which is sometimes called the de-codification of private law. The subject-matter of private law became so complex, and socio-economic environment so unstable, that the idea of having everything important covered in one civil code is no more sustainable. Consumer relations, business-to-business relationships, transnational entities, intellectual property, or international private law, and online transactions all require separate legislation. These tend to be amended every now and then. The same goes for more specialist legislation and areas regulated both by private and public laws. With this complexity of regulated matters *'one single code to bind them all'* is but a dream.

7. CONCLUSION: THE DECLINE OF THE AGE OF CODIFICATION?

Will there be a new Polish civil code? I believe that recodification will not happen in the near future, unless something really unusual happens. The Age of Codification sems to be over. What we see in countries liberated from Soviet dominations is nothing more and nothing less than completing the work started in the first half of the 20th century. Of course, newly emerged states will still have to create their laws, but having a brand new civil code will no longer be as important as it was one hundred years ago.

Much to my regret, if we ever get excited in the future over a brand new code, it will most probably not be a civil code but some public law creation. All this because of what I called in one paper a 'post-civil-law society'. In the 1960s German lawyer and economist Bohm wrote a paper about private (civil) law society.[40] A socio-economic system is governed by the principles of the civil code. Very bourgeois, but also oriented at individual freedom, wealth generation, and entrepreneurship. Such a

40 Böhm, 1966, p. 75.

society exists no more. Even in Bohm's times, it was difficult to organise one's affairs in a way that a person was completely or almost completely independent from the support of the State. Today, it is almost impossible. Almost everything, access to health care, retirement benefits, public transportation, roads, and even Internet access, is regulated by the State. The world has become too complex for individuals to organise on a purely contractual basis. It is the State that takes over from here, becoming increasingly omnipotent and omnipresent. Thus, we are faced with our good old friend Leviathan, whose actions are perhaps counterbalanced by Behemoths: large, multinational firms able to operate outside of the nation-state legal system and able to create their own 'rules of the community': contractual in nature but uncertain and unpublished. No traditional Privatrechtsgesselschaft institution: family, churches, NGOs, or cooperative will be able to defend its members from any of these two powers. They most probably with either cease to exist or become vassals of either Leviathan or Behemoth. So will the people.[41]

I am not declaring that the civil law is dead. No, or at least not yet. As long as people have property and accept traditional values of the Privatrechtgesselschaft, civil law institutions will be needed. Wills have to be made, contracts prepared, companies run. However, this will not be forever. It is possible that we are going towards the Public Law Society of the future, where public law reigns over minds and hearts of people, which means that perhaps we should preserve our old textbooks from the times of the centrally planned economy era. Because, regardless of political reasoning behind giving power to public law institutions, legislative techniques used to make the system work will be the same as those used before 1989. This will go well with the world of Leviathans. The Behemoths are much more whimsical and can be governed by changing moods of an Elon Musk and his ilk, or by mutating ideas of what is fair and held by self-appointed volunteers acting as guardians of the *'standards of the community'*. Classica civil law techniques will not work while dealing with Behemoths. Perhaps the Behemoth law will be analysed with data science methods, or perhaps it will be easier and

41 For an elaborate version of this argument, see Stec, 2022, p. 103.

much cheaper to buy a pack of Tarot cards and try to guess the rules in force today. If any of this happens, it will mean that private law will no longer shape the mindset of the general public. Will this change of mindset have any longstanding effects on the society? Only time will tell.

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CUSTOMARY LAW VS. CODIFIED LAW IN 1930S HUNGARY: INSIGHTS FROM THE WORK OF KÁROLY SZLADITS

EMŐD VERESS

ABSTRACT

This chapter explores the delayed codification of Hungarian private law, tracing its roots to ideological divisions and historical circumstances unique to Hungary. While neighbouring states codified civil law early to signal modernization, Hungary relied on customary law, leading to sustained debates between anti-codification advocates and proponents of a formal code. Compelling arguments were presented both in favour of maintaining the characteristically uncodified, customary nature of Hungarian private law, akin to the common law system, and for establishing codified civil law. Key figures, such as Károly Szladits, argued for codification as a means to modernize Hungarian law. The eventual codification under the Soviet regime in 1959, and in principal the new Civil Code of 2013, still reflects a compromise between codified law and the flexibility of customary principles, capturing Szladits's vision of a living legal system.

Keywords: *Hungary, codification, customary law, civil law, Károly Szladits.*

Veress, E. (2024) 'Customary Law vs. Codified Law in 1930s Hungary: Insights from the Work of Károly Szladits' in Veress, E. (ed.) *Codification of Civil Law: Assessment, Reforms, Options*, pp. 547–571. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2024.ev.ccl_20

1. BELATEDNESS? A BASIC REFLECTION ON THE HISTORICAL CONTEXT OF HUNGARIAN PRIVATE LAW CODIFICATION

In the history of Hungarian private law, Act IV of 1959 was the first Civil Code, except for the short, few years of application of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* – ABGB) (between 1853–1861).

If we look at this historical fact from a comparative legal point of view, a clear picture of belatedness emerges, especially if we consider the fact the Civil Code was undertaken by the 1848 legislature in a programmatic act.[1] Practically all states in the region had enacted a written civil code: for example, Moldova had its own code in 1817, Serbia in 1844, the newly established Romania in 1864, and the Croatian, Slovenian, and Czech territories belonging to the Habsburg Empire had the ABGB in force from the beginning of the 19th century.[2]

However, belatedness in this case is an incredible oversimplification. On the one hand, the states that adopted their own civil codes were precisely those that were in the most disadvantaged political environment, integrated into the Ottoman Empire: Serbia and Romania gained their independence decades after their civil codes came into force, only in 1878. The legal transplant of civil codes (Austrian for Serbia and French for Romania) was triggered by the impossibility of organic development. The adoption of Western legal models, which were fundamentally incompatible with the local social structures, also served as a political statement reflecting a strategic intention to align with Western development trajectories. This choice was not merely a legal reform but a deliberate effort to signal modernization and integration into the broader framework of Western political, economic, and legal norms. Thus, the motivation behind the codification effort in Serbia

1 Act XV of 1848 on the abolition of the *aviticitas* (i.e. strict succession order) states that 'the Ministry shall draw up a civil code on the basis of the complete and total abolition of *aviticitas* and submit a proposal for this code to the next Diet' (§ 1).

2 On the beginnings of civil law codification in the East Central European region and further details and refinements, see Veress, 2022, pp. 174–178.

and Romania was fundamentally different from that underlying the Hungarian question of the creation of the Code.

The Austrian imperial context was also different: in the Slovene, Croatian, and Czech territories, the codification, that is, the enactment of the ABGB, was justified not only by the (moderate) modernisation dictated by enlightened absolutism, but even more so by the idea of imperial unification. Hungary, also under Habsburg rule, opposed legal unification from the outset, leading Austria to avoid imposing the Austrian Civil Code (ABGB) in Hungary during the first half of the 19th century, unlike in other Habsburg territories.

However, in the absence of civil codification, the medieval private law based on customary law remained in force. After the fall of the revolution in 1848–49, the ABGB was introduced in Hungary as a political sanction, but this meant only a few years of forced application of a law that was considered alien. In the words of the justice Kamill Sándorfy, 'In 1853, the Austrian Civil Code of 1811 arrived on the new Austrian stagecoach'.[3] The National Conference of Judges decided to repeal the ABGB stating that 'the Hungarian private civil substantive law shall be restored…' (1861). Later the civil law professor Károly Szladits (1871–1956), the protagonist in this chapter, wrote that , 'since 1861, the rule of written law in Hungarian private law has been suspended, so that the most delicate legal relationships are regulated by case law'.[4] (This 'case law' – as Szladits named it: *esetjog* – in Hungarian context was the customary law identified and applied by the courts). Indeed, the primary source of Hungarian private law, beside isolated acts, was customary law, and indeed, the greater part of Hungarian private law was customary law rather than statutory law: a mass of legislation developed through practice. According to Szladits,

> *the collective will that creates a legal rule can manifest in two ways. First, when the body designated for lawmaking by the community declares something to be a legal rule. Second, when the community, in its external order – in so-called legal life or legal transactions – engages in a certain mode*

3 Sándorfy, 1941, p. 86.

4 *Pesti Napló*, 24 November 1929, p. 36.

> *of action (practice or custom) from which it is unequivocal that conformity to this order is demanded with the force of law (…) In the case of customary law – even if it is written down – it is not the text itself that is binding, but rather the legal idea (principle) manifested in practice. Consequently, customary law is not considered written law.*[5]

What is the reason for this – as we have seen – apparent delay in codification? There was deep tension between two groups of Hungarian private lawyers on the issue of codification from the 19th century until the introduction of the Soviet-style dictatorship. The group representing the ultimate impossibility or impracticality of codification (the creation of a written code) was incredibly tenacious. It is not simply a question of the late flowering of Savigny's historical school, but of a line of thought that was organically rooted in Hungarian legal thought. In many cases, Savigny's work was not even the direct basis of the anti-codification attitude, but the evolution of Hungarian private law resonated positively with anti-codification views. The great Hungarian private lawyers of the post-1848–49 era, Gusztáv Wenzel (1812–1891)[6] and Imre Zlinszky

5 Szladits, 1933, pp. 27–28. See also Wenzel, 1863, pp. 50–60.

6 Wenzel noted, somewhat curiously, that 'there is a school of thought that assigns to the judiciary the limited role of faithfully applying established laws.' In his view, if a civil code were to be drafted, it would require the utmost care and thoroughness. He believed that the 'achievements and attempts' at codification aimed primarily at the simplification of civil law through comprehensive and systematic codes. However, he pointed out that this simplification is, strictly speaking, merely formal and has only a limited impact on the substantive elements of civil rights, which are their essential aspects. See Wenzel, 1878, pp. 30–31. For Wenzel, domestic law represented an expression of national legal life and legal consciousness. See Wenzel, 1863, pp. 5–6. He also acknowledged, however, that 'our entire contract law is in a noticeably disordered state.' Thus, his position on codification was not entirely dismissive; rather, he advocated for the careful use of historical experience and prudence. See Wenzel, 1878, pp. 35–36. He explicitly supported the adoption of specific laws (regulating issues such as bills of exchange, commerce, industry, railways, and telegraphy), viewing their creation as regulations required by societal progress.

(1834–1880),[7] were also proponents of this attitude and of the historical school.

They were opposed by a group of pro-codification advocates, such as László Szalay (1813–1864)[8] and Rezső Dell'Adami (1850–1888)[9], who sought the development of Hungarian private law through the creation of a civil code. Szalay's fundamental idea held that a legal code, by its very nature, sought to inaugurate a new era by dissolving historical elements and disrupting the fabric of gradual development. He also believed that the French Code exemplified the best approach to achieving this vision of progress.[10]

However, the confrontation was not limited to the historical moment described above but spanned generations. Moreover, the dividing line between the two groups was not clear. This phenomenon was captured vividly in the context of the law professor Béni Grosschmid (1851–1938), probably the most original thinker in Hungarian private law. As far as the codification of civil law is concerned, Grosschmid can be seen as the prism of the entire period [1867[11]-1914[12]]: in the afternoon he writes a code of laws in the government committee, and in the morning he teaches in his lectures on private law that codification is a useless exercise, because 'it is only a certain imperceptible historical process that can create institutions which bear the characteristics of the nation deeply imprinted on them'.[13]

7 According to Zlinszky, the legislator establishes private law regulations *arbitrarily*. In contrast, customary law norms 'have developed and evolved based on demands expressed with regard to the various relationships between individuals and in relation to things.' He also clearly acknowledged that there are issues and areas in which customary law proves insufficient, 'and thus the necessity emerges for state authority to formulate, establish, and declare the principles and rules of law explicitly and definitively (…) Yet, no matter what degree of internal or external perfection these laws achieve, they can never completely strip customary law of its significance.' Zlinszky, 1902, pp. 39–40.

8 On László Szalay, see, for example, Nizsalovszky, 1964, pp. 17–27.

9 On his life, see Stipta, 2017, pp. 475–487.

10 Nizsalovszky, 1964, p. 24.

11 The Austro-Hungarian compromise in 1867.

12 Beginning of World War I.

13 Mádl, 1960, p. 59.

It is essential that this fault line is not approached along black and white, good-bad value judgments. There was a great deal of truth and even more (still valid) lessons to be learned in the high-quality arguments of both groups: anti-codification and pro-codification. The debate is ultimately about the very essence of law: How is law made?

The realisation of the 1848 commitment to create a civil code was temporarily blocked by the fall of the Revolution and the repression that followed. However, the Austro-Hungarian reconciliation (1867) created the context for codification to be back on the agenda. The ideas on codification are illustrated by the debate on the Transylvanian question. Since the Battle of Mohács (1526) and the division of the country into three parts, Transylvania has followed a particular legal development path.[14] One of the fundamental demands of the 1848–49 revolution was the reunification between Hungary and Transylvania, which was briefly achieved, and then, because of the Reconciliation, accomplished again. Thus, the problem of codification began with how to create legal unity in the Hungarian legal space, in the reunified country. In 1853, based on a separate imperial pact, the ABGB came into force also in Transylvania, but the work of the Conference of the Judges in Hungary could not cover Transylvania, which was still a separate entity at that time. Thus, at the moment of reunification (1867–1868), the ABGB was still in force in Transylvania.

Subsequently, it was determined, though not without substantial debate, that there was insufficient justification to pursue immediate legal unification, given the imminent completion of the Hungarian Civil Code. This (unfounded) optimism is illustrated by the speech of Miklós Szabó Nárai (1821–1907), State Secretary for Justice[15]:

> *It is natural that Transylvania should wish to free itself from the Austrian law as soon as possible, as we ourselves did, and once the first opportunity presented itself we immediately eliminated it.*[16] *But there is a very important difference between us and the situation in Transylvania. At the time when,*

14 On the development of Transylvanian law, see Veress, 2020.
15 Later President of the Curia, the supreme court of Hungary.
16 Reference to the Conference of National Judges.

because of the Conference of the Judges, Hungary repealed the Austrian laws, it restored the old Hungarian laws. Transylvania, however, does not want to do this, does not want to restore the laws that were in force there – in Transylvania – before the Austrian laws were introduced, but wants to introduce Hungarian laws, that is to say, completely new laws. I would find this very natural in the case of Hungary having well-ordered codified laws (...) According to Gál (...) it would take decades for a civil code to be enacted.[17] *But I am not of this opinion (...) Thus, I would consider it far more practical to have this legislation enacted in Transylvania when there are finalized in Hungary, rather than to have new laws enacted there twice within three years (...).* [18]

Codification efforts have indeed started in the post-1867 Hungary, but the rapid creation of a civil code has proved impossible. There was no new civil code to be extended to Transylvania, where the ABGB was still in force at the time of the change of sovereignty (annexation of Transylvania to Romania – 1918/20) and remained in force until World War II.[19] At the same time, the first 19th-century partial drafts did not seem convincing to many and were severely criticized by legal scholars and practitioners.[20] These failures further strengthened the bias against codification.

17 János Gál, a Member of Parliament, argued that 'the codification which the opposition believes will free us from Austrian law is not as simple as some may think. Elsewhere in Europe, a private law code has been created, but it took decades of work to achieve. How can we expect, for example, that it will be completed in Hungary within a single year? (...) The principles of constitutionalism and the Union [between Hungary and Transylvania] require that Austrian law should no longer weigh upon Transylvania.' Historical events ultimately validated János Gál's perspective.

18 Cited in Sándorfy, 1941, p. 106. The full debate, which is extremely interesting and worthy of detailed analysis, can be read in the section of the Chamber of Deputies Journal on the national session of 8 December 1868. *Az 1865-dik évi december 10-dikére hirdetett Országgyűlés Képviselőházának Naplója*, 1868, pp. 427–432.

19 For details, see Veress, 2019b, pp. 157–171.

20 In 1871, for instance, Pál Hoffmann prepared the general part of the code, but even Rezső Dell'Adami, a supporter of codification, rejected it. Similarly, István Teleszky's draft on the law of succession faced significant criticism from Béni Grosschmid. On Teleszky's draft, see Pólay, 1974, pp. 3–48.

In this context, Károly Szladits (a former student of Grosschmid) emerged onto the stage of the codification debate,[21] as a new phase of the codification struggle began. Szladits graduated in law in Budapest (1895) and soon became involved in codification work. During the drafting of the first complete official Civil Code proposal in 1900, he served as an assistant member of the Codification Committee, delegated as associate judge. In the reconstituted Codification Committee from 1906 to 1908, he contributed primarily to the inheritance law chapters as a court of appeals judge.[22] He was appointed as a university professor in Budapest in 1917. From 1922, he also worked on the Private Law Bill, a new version of the civil code[23], to be completed in 1928.[24]

In contrast to the ambiguous position of Professor Béni Grosschmid, already mentioned, his disciple, Károly Szladits strongly supported the pro-codification position. In particular, after the conclusion of the Private Law Bill in 1928, he was strongly in favour of codification as seen in two of his significant writings, *A Magánjogi törvénykönyv* (*The Private Law Code,* 1931)[25] and *Szokásjog és kódex* (*Customary Law and the Code,* 1936).[26]

2. ARGUMENTS FOR AND AGAINST CODIFICATION

2.1. CODIFICATION AS A MORAL OBLIGATION

In the following, I will contrast several anti-codification arguments with the views and arguments of Károly Szladits. My aim is to provide an overview of Szladits's pro-codification stance and reasoning, focusing primarily on the 1930s – a period when there was genuine hope

21 On his life and work, see Vékás, 2019, pp. 81–96.

22 As a result of this work, the second and third versions of the text were completed in 1913, followed by the fourth version in 1915.

23 The Private Law Bill was effectively the fifth version of the Hungarian draft code.

24 See Vékás, 2019, p. 82.

25 Szladits, 1931, pp. 54–57.

26 Szladits, 1936, pp. 272–279.

for the adoption of the Private Law Bill, although this ultimately did not occur.

The Private Law Bill was an outstanding intellectual creation, fully suitable for enactment as a legal code.[27] Szladits fought for the acceptance of the Private Law Bill. However, the conflict between supporters and opponents of codification, rooted in the 19th century, did not diminish over time; instead, the debate continued and repeatedly reignited.

Szladits's fundamental position was expressed as follows: 'It is the moral duty of this generation to carry out the command left to its successors by the legislature of 1848 to draft the Civil Code'.[28] He noted with a sense of historical continuity and urgency that the Private Law Bill was presented to the House of Representatives in 1928, precisely 80 years after the original commitment made in 1848.[29] For Szladits, the bill was more than a legal framework; it symbolized a fulfilment of a long-standing national obligation, expressing the legal aspirations of successive generations. By advocating for codification, Szladits sought to resolve the legal inconsistencies stemming from the coexistence of customary and fragmented statutes, promoting a unified legal code that would bring Hungary in line with contemporary European legal standards.

2.2. TIMELINESS

The period between the two World Wars (the '*interbellum*') was characterised by ideological, economic, and social upheavals, transformations, and tensions. Therefore, according to those opposing codification,

> *a turbulent, transitional era, marked by evolving legal concepts, social structures, and legal sensibilities, is not suitable for the creation of a general code intended to last for an extended period, as its amendment would soon become extremely difficult. This risks exposing the legal system to the*

27 For the details of my position, see Veress, 2019a, pp. 17–32.
28 Szladits, 1931, p. 56.
29 Szladits, 1936, p. 272.

> *danger that, despite rapid changes in legal concepts and sentiments, the code – outdated and out of place – might obstruct legal development, the pursuit of substantive justice, and the flexible application of law needed to accommodate rapidly changing social realities.*[30]

In contrast, Szladits held a different viewpoint: 'Precisely because everything is in motion, because there is a tide of turbulent waters threatening from all sides, it is good for us to flee to the safe island of our own code'.[31] In his opinion, there was no sense in waiting for the 'empires' to form their positions: he examined the foreign, 'boiling' processes and came to the conclusion that many of the ideas that emerge as confused in them can already be found clarified in Hungarian practice and in the draft code. Thus, rather than being swept into confusion by foreign influences, Hungarian law could assert its unique character and values through codification.[32] In Szladits's view, the moment was particularly opportune for codification because it offered the chance to enshrine the distinctive elements of Hungarian law free from external pressures. Codification, then, was not merely a legal exercise; it was a way of safeguarding Hungary's legal heritage and ensuring a cohesive system that could endure the upheavals of the interbellum and beyond.

2.3. THE DURABILITY AND ROBUSTNESS OF CUSTOMARY LAW

Szladits considered the strength and tenacity of customary law to be the main reason for previous codification failures.[33] The customary law perspective asserts that the Code imposes rigidity, making the application of substantive justice challenging in individual cases. Decisions must adhere strictly to the precisely defined rules of the Code, often neglecting

30 Szigeti, 1938, p. 560. For the sake of accuracy, it should be noted that Szigeti, as a student of Szladits, took a pro-codification position, and in fact only synthesised the counterarguments.

31 Szladits, 1936, p. 277.

32 On this issue see also Szladits, 1936, pp. 276–277.

33 Ibid., p. 272.

the unique circumstances of each case that cannot be accommodated by abstract, prior, general rules. In contrast, the customary-law doctrine evolves through individual cases, transforming into a general doctrine rooted in practical experiences and specific life circumstances. This evolution occurs organically, influenced by changes in legal perception without legislative intervention. The customary rule slowly adapts its scope and wording, and occasionally, an entirely new customary rule may emerge from public tradition in special situations. The Code struggles to keep pace with evolving society, resulting in a disadvantage for future generations. Applying rules suitable for the circumstances of past generations to the transformed life of their descendants compromises material truth and disrupts the living sense of law shaped by contemporary public opinion, as it becomes entangled in outdated, abstract rules. [34]

Szladits also took a completely different view on this issue. He regarded the private law code as a necessary part of the integral realisation of the rule of law:

> *the most important requirement of the rule of law is legal certainty. And legal certainty has two elements: one is the certainty of the independent judge, the other is the certainty of the law, that is, the desire that the citizen of the state in his life circumstances should be able to anticipate the consequences of the law known to him.*[35]

Károly Szladits notes that Béla Szászy[36], who played a central coordinating role in the drafting of the 1928 Private Law Bill, firmly believed in the necessity of a regular code of law to provide the level of legal certainty essential for a forceful legal framework. Szászy astutely highlighted the slow and challenging process, often involving significant sacrifices by parties seeking justice, through which customary (consuetudinary) law rules are accepted through judicial practice. He emphasised the inherent uncertainty and instability of such rules. According to Szászy, a legal system compelled to formulate a distinct law for each new case,

34 Szigeti, 1938, pp. 560–561.
35 Szladits, 1931, p. 54.
36 The father of the renowned law professor István Szászy.

effectively at the parties' expense, does not constitute an affordable legal system for a less affluent nation. [37]

Szladits acknowledged that Hungarian judicial practice may yield as many, or possibly even more, rules compared to those outlined in the proposed draft bill. However, he pointed out a crucial deficiency in these customary law rules – they lack coherence and a well-thought-out system, making it challenging to rely on them with absolute certainty. He contends that the written legal system, particularly its perfected form, the code, is directly connected to the concept of the rule of law. Szladits emphasized that various codified areas of law in Hungary, such as commercial law, matrimonial law, and procedural laws have enhanced legal certainty within their respective domains. In his view, the code of general private law should be no exception to this principle.[38]

Despite the conflicting arguments, it is indisputable that the customary law system remained functional in the interwar period, largely due to the expertise and proficiency of highly skilled legal professionals and the strength of a well-established legal culture. Andor Juhász, the president of the Curia, for example, representing the anti-codification position, stated the following in 1929, after the draft Private Law Bill had been completed:

> *This important part of the proposal, which deals with succession (...) – I consider it to be only a sketch (...) I propose that we ask the broad strata of the people what their wishes are, how they imagine succession to be. In this way, we will be able to ascertain what lives in the nation, what desires, what wishes, what resides in the nation as a noble tradition to be preserved in the matter of succession.*[39]

Which position the journal publishing Andor Juhász's words prominently sympathised with is clear from the concluding sentence of the report: 'After these words of the President of the Curia, one of the architects of

37 Szladits, 1932, p. 146.
38 Szladits, 1931, p. 54.
39 *Előörs*, 1929, p. 15.

the proposal, Károly Szladits spoke and muttered something. What he muttered – it is not important.'[40]

The Code, in reality, is not the constraint its opponents feared. When applied and interpreted by the judiciary, a well-crafted and sufficiently abstract code establishes boundaries that allow for the necessary flexibility to account for individual circumstances. In the process of drafting a code, the level of abstraction that needs to be regulated can be examined on a rule-by-rule basis. Determining the appropriate level of abstraction for each rule is a critical process that requires careful assessment. This approach allows drafters to decide how broadly or narrowly each provision should be framed, balancing the need for clarity with the need for flexibility. Higher levels of abstraction in certain rules can accommodate a wider variety of circumstances and allow for judicial interpretation to evolve alongside societal changes, preserving the code's relevance over time. Conversely, some provisions may require more specific language to provide clear guidance and reduce interpretative ambiguity. This is still a legitimate aspect of the analysis and *'testing'* of any private law draft. Szladits expressed in lines of literary beauty that the

> *paragraphs of the Private Law Bill are, so to speak, filled with rootlets that draw nourishing strength from the living soil of life. They are full of safety valves through which the conflicts between life and legal regulations are diffused. It is filled with blank spaces, upon which the ever-evolving life can continue to embroider the rich cloak of law.* [41]

László Szigeti, a scholar of Szladits, argues that the imprecision of customary law rules and their frequent existence in multiple versions (such as varying formulations of liability rules for dangerous activities) render them significantly less effective than a codified system in meeting the standards of legal certainty and supporting the requirements of legal development.[42]

40 Ibid.
41 Szladits, 1936, p. 278.
42 Szigeti, 1938, p. 568.

As a believer in codification, Ignác Balla, an attorney, taking the position of Szladits a little further, and making a gesture towards the customary law position, stated his opinion that

> *every legal system requires firm, unequivocally defined principles that bind the judge, just as the human body requires a skeleton not just soft, flexible tissues. The skeleton alone is not a person, but without a skeleton, a person is equally incomplete. The same applies to law. Case law, without fixed principles, leads to chaos, while fixed principles without judicial adaptability result in the ossification of justice. Thus, the solid framework of justice is what we aim to establish with legislation, and because life does not stand still, customary law will continue to play an equal role alongside the code, just as it has in the past – sometimes supplementing, and potentially even modifying, the written law through the force of practice.* [43]

The framers of the Code clearly did not intend to overtly endorse customary law, as doing so would have weakened the authority of the written law. Nevertheless, § 7 of the draft stated that the term 'law' in this Code shall also include 'customary law', suggesting that Balla's interpretation – that customary law is explicitly acknowledged as a legal source – is well-founded. Thus, the drafters foresaw and accommodated the parallel existence of custom within the legal framework.

2.4. THE UNCODIFIED CODE

The most interesting question of general, academic interest arising in connection with the Private Law Bill of 1928 is the start of application of the Bill in judicial practice. The Private Law Bill, which did not enter into force, *'shared the fate of the Tripartite:*[44] *it did not become a law, but as*

43 Balla, 1936, p. 26.

44 The *Tripartitum*, formally known as *Opus Tripartitum* or *Tripartitum Opus Juris Consuetudinarii Inclyti Regni Hungariae*, is a compilation of Hungarian customary law from 1514 by the jurist István Werbőczy (1465–1541).

a law … it passed into practice'.[45] However, this fact was interpreted in a completely different way by the pro- and anti-codification *'groups'*.

Opponents of codification say the judicial application of the draft code is a success story. In a 1934 publication, Béla Reitzer (who died in 1942 while serving in a labour battalion) described the Private Law Bill as an illegal code, noting that, since it was never enacted, it lacked formal legal status. He characterized it as a peculiar genre – essentially a compilation of provisions that, despite not having the force of law, were nevertheless applied in practice as if they were legally binding.

Reitzer said,

> *we both have a civil code, and we do not. That is, as a formally enacted law, it does not exist, but as living law, it does. Not only does it exist, but in practice, it is applied with almost the same regularity as if it were written law.* […] *It is interesting to observe that while initially references to specific provisions of the code were made only sporadically and, one might say, timidly – and primarily within the submissions and arguments of the parties – gradually, referencing the code's provisions has become systematic, appearing in judicial, and even supreme court, rulings.*[46]

Professor Lajos Vékás, in confirming this process, noted that many of the solutions of the Private Law Bill 'have been applied by the judiciary in a customary law way'.[47]

I contend that interpreting the practical application of the draft as a judicial enactment of the Private Law Bill is misguided. In judicial practice, the Private Law Bill was not regarded as a formal source of law; rather, it served to clarify the substance of customary law. Since the Bill was largely seen as a compilation of existing Hungarian private law principles, it was applied in the capacity of customary law rather than as a codified legal text. Professor Attila Menyhárd rightly pointed out that

45 Mádl, 1960, p. 67.
46 Reitzer, 1934, pp. 77–78.
47 Vékás, 2015, p. 567.

> *although popular opinion holds that the 1928 Private Law Bill functioned as a code despite not being enacted into law, this claim is unsupported. The courts were not bound by the Bill, and although it was indeed frequently referenced and even used as a point of reference in difficult cases offering multiple decision-making alternatives, it cannot be concluded that it was regarded as a source of law.* [48]

In my view, the courts have utilized the Private Law Bill as a written record of customary law, rather than recognizing the Bill itself as a formal source of law. Instead, it was the customary law, documented within the Bill, that was acknowledged in judicial practice. Furthermore, this phenomenon was not unique to the Private Law Bill; earlier versions of the draft text also influenced judicial practice and served as points of reference (similarly to the ABGB in certain cases). Thus, this approach was not a new development that emerged only after 1928.

However, Béla Reitzer's perspective is worth returning to. He viewed the Private Law Bill as a positive development that had gradually gained application within the judiciary. For Reitzer, the Bill's greatest strength and legitimacy derived from its acceptance by the public as an authoritative source of rights, perceived as binding law without the need for external enforcement.

> *It is a rather basic truth that all written laws are rigid, generalized, and lack sensitivity to the nuances and distinctions inherent in individual life situations. When there is a written statute, the judge is often compelled to apply it, even if they feel that the specific circumstances of the case, in terms of equity or subtle nuances, do not lead to a fully satisfactory decision. This strict adherence to the law frequently results in judgments that do not meet the general sense of justice, the expectations of the parties involved, or even the judge's own conception of fulfilling their judicial role properly. The judge's task is much easier if their hands are not tied, while still being able to find guidance within the law. In cases where, due to the specific nature of the situation, the judge considers it reasonable to depart from the statute, they may do so without conflict – conflict that often*

48 Menyhárd, 2016, pp. 322–323.

> *arises when the judge's personal convictions clash with the formal command of the law. Therefore, we may confidently say that the circumstances around private law codification have led to an almost ideal solution. It would be a mistake to alter this by pushing for formal legalization.* [49]

In other words, this perspective brings us back to the inherent "flexibility" of customary law that underpins the anti-codification stance.

Reitzer's concept of an *'uncodified code'* does not impede the continuous refinement necessary in law. If judicial practice reveals that a rule in the reference text fails to keep pace with societal realities, it can be adjusted without delay. This approach avoids the common problem where a rule, though recognized in practice as poorly drafted, must still be applied by judges who otherwise face years, or even decades, waiting for formal amendments.

According to Béla Reitzer, the informal, semi-structured system that has developed is a more effective solution than full codification. He did not believe that judicial application of the Private Law Bill demonstrated a need for formally codified law. Rather, he viewed the judicial use of the Private Law Bill as a triumph of uncodified, living law. In this way, Reitzer saw himself as a continuator of Grosschmid's theory, whereby the uncodified code became a value in itself.

In contrast, Szladits and his circle viewed the judicial application of the Private Law Bill as a strong argument in favour of its formal adoption, underscoring the necessity and irreplaceability of a codified system. The Bill was frequently referenced by courts, reflecting a clear need for systematic, written legislation to support the effective functioning of the judiciary. From this perspective, it was the formal adoption and enactment of the Code that could establish the required legal order. Conversely, customary law was seen as an inadequate vehicle for implementing needed reforms:

> *Without formal legislation, even the freest judicial discretion cannot implement the reforms that Hungarian legal life has long been ripe for. In*

49 Reitzer, 1934, p. 77.

numerous matters, the courts are tyrannically bound by old written laws – laws that have long been outpaced by both societal development… [50]

2.5. THE EXAMPLE OF ENGLISH LAW

Anti-codification advocates frequently cited England as an example, highlighting the advanced state of its private law system despite the absence of a formal code. They underscored the unique and similar developmental paths of Hungarian and English private law, emphasizing customary law as a defining national characteristic. They argued that it would be regrettable to replace the benefits of this flexible, customary approach with the rigid, written rules of a codified system. [51]

In contrast, Szladits argued, 'do not cite England, the ideal legal state, whose private law is based on case law. English private law, with its system of binding precedents, is a far more detailed body of written law than that of any continental state. While it is not a systematic codification, it is a digest-like collection of written legal material.' [52] Szladits likened English law to a coral reef, built up layer by layer from countless individual judgements. [53]

One of Szladits' students also pointed out that the English-Hungarian parallel is not accurate, as there is a fundamental difference between the two legal systems, English and Hungarian:

In English law, judicial decisions and precedents themselves create customary law, whereas in our system, a judicial ruling does not constitute customary law but may potentially initiate it. Through the accumulation of precedents, English customary law forms a much more detailed written legal system than ours.[54]

50 *Pesti Napló*, 1929, 36. The unknown author sent a message to the Parliament through the newspaper, arguing for the adoption of the Private Law Bill.
51 Szigeti, 1938, p. 563.
52 Szladits, 1931, p. 55.
53 Szladits, 1936, p. 274.
54 Szigeti, 1938, p. 563.

A key distinction in Hungarian law is that judges did not establish general legal rules; rather, their judgments reflected the legal principles they considered binding. Customary law principles generally became recognizable through repeated application, though even a single manifestation of legal consensus could sometimes express a rule. Most often, established doctrines within judicial practice served to temporarily define legal principles until they solidified into customary law. [55]

The previously mentioned Szigeti adds to this argument something Szladits did not write explicitly but likely thought: unlike in England, 'in Hungarian law, the fact that private law was not codified with statutory force was not a matter of principle but rather the result of misfortune and unfavourable circumstances.' [56] Szigeti was undoubtedly referring to the historical promise of codification made in 1848.

2.6. CODIFICATION AS AN OBSTACLE TO THE SUCCESS OF REVISIONIST POLICY

Opponents of codification argued that, given the revisionist policy[57] central to the interwar period, adopting a new code would have undesirably disrupted legal continuity with Hungary's former historical territories, which had been ceded to other states under the Treaty of Trianon (1920). Had the new Civil Code been adopted by the smaller, post-World War I Hungary, it would have posed an obstacle to the revision of the Treaty of Trianon and hindered the potential for a successful settlement following any future territorial revisions. József Illés, a legal historian, explained in 1929 that *'while Hungarian law continues to exist in the seceded parts despite all violent repression, it is not possible for a new law to take the*

55 See Szladits, 1931, p. 31.

56 Szigeti, 1938, p. 563.

57 The revisionist policy was a key political objective in Hungary between the World Wars, aiming to reverse or mitigate the territorial losses imposed after World War I by the Treaty of Trianon in 1920. Hungary sought to reclaim lost lands and reintegrate regions with significant Hungarian populations, aspiring to restore its pre-Trianon borders and cultural unity.

place of the old one in Smaller-Hungary'.[58] An important scholar of civil law, Bálint Kolosváry argued in a similar fashion: the Hungarian private law in force in the taken *territories*

> *is still an important factor of spiritual and intellectual unity … it embraces the Hungarian nation both within and beyond the new borders as an invisible spiritual wall. Its uncodified state is very, very ripe for codification,*[59] *but this codification would also cause irreparable loss.*
>
> *It would mean the destruction of private law unity – a new Trianon in the realm of private law (…) The new code's private law, in contrast, would be confined to the limited geographic area of a truncated Hungary, thereby initiating (alongside many other unfortunate factors) a slow process of estrangement, leading to psychological barriers far more damaging than physical ones.* [60]

Szladits did not agree with this argument either: he did not feel a contradiction between revisionist policy and codification. He was pleased to see

> *the resilient strength with which centuries of Hungarian legal development resist the annihilative efforts of new powers. But we must not deceive ourselves: on the other side, many breaches have already been made in the Hungarian legal system, and the tidal wave of unifying codification is ready to flood it. Legal unity has been disrupted in so many areas that preserving it can no longer be a valid argument against Hungarian private law codification.* [61]

After the union and before the awarding of Transylvania to Romania after World War I (1868–1918/20), the unity of private law was only partially achieved (in the field of commercial law), but the ABGB remained

58 See Illés, 1930, p. 217.
59 In other words, Bálint Kolosváry considered codification otherwise necessary.
60 Kolosváry, 1932, p. 3.
61 Szladits, 1934, p. 246.

in force in Transylvania. Expressing a more explicit stance, Szladits emphasised that

> *the only argument against the code, which in our Trianon grief is difficult to dismiss, is that the new civil code would break the legal unity that still exists today in terms of general private law between the mother country and much of the transferred territories. Yet this is merely a dilatory objection. Czech unification efforts, unfortunately, have already brought us close to the point where legal unity with Upper Hungary will be permanently disrupted. Transylvania and the Military Frontier are under foreign legal systems.*[62] *Will it be worth maintaining the semblance of legal unity for the sake of the Partium and the Banat regions?*[63]

In support of codification, it was argued that if the Private Law Bill effectively codifies customary law, and if this customary law becomes codified law, then this 'cannot prevent it from continuing to be applied there as customary law; for the fact that it has been made an act in our country does not detract from its customary character there.'[64] While it is true that the Private Law Bill can largely be viewed as a compilation of existing customary law, it is also clear that this code was intended as more than a simple transition toward codified private law. Despite its foundations in customary law, the adoption of the Private Law Bill would have marked a definitive shift in Hungarian civil law, positioning the written code as a primary source of legal authority.

3. CONCLUSIONS

It is impossible to determine where this debate might have led, how it would have developed, or which position would ultimately have prevailed if Hungary had been able to sustain a path of organic historical development. The uncodified private law continued to function in

62 The ABGB.
63 Szladits, 1931, pp. 55–56.
64 Tóth, 1934, p. 35.

everyday life, albeit without the level of legal certainty Szladits had envisioned. Nevertheless, as previously indicated, it operated without creating an urgent need for immediate codification.

One certainty is that the Private Law Bill, drafted in the decade prior to World War II, was never enacted, despite it being an opportune period to do so. The bill's trajectory was ultimately disrupted by the profound political changes that swept through Hungary: World War II and the establishment of a Soviet-style dictatorship. After 1945, the application of the bill as uncodified law, or its potential adoption as codified law, virtually ceased.

The theoretical debate outlined above – of remarkable practical importance – was concluded outside the realm of organic development due to artificial shifts in power. Codification occurred under the Soviet-style dictatorship, when the advantages of customary law could no longer be effectively realized, with the adoption of Hungary's first Civil Code, Act IV of 1959. Nonetheless, Act IV of 1959 undeniably incorporated many elements from the Private Law Bill, and within the limits imposed by the period, provided a measure of continuity with the previous social order.

Szladits witnessed the early stages of Soviet-style restructuring in Hungarian law but did not live to see the enactment and implementation of the Hungarian Civil Code. He passed away in Budapest on May 22, 1956, at the age of 84.

The academic debates outlined above also played a role in shaping the drafting of the current Hungarian Civil Code (Act V of 2013), which was developed with an awareness of the arguments from both sides. The guiding principle was to design the Code in a way that would maximize the benefits of codified private law while minimizing its limitations. The high degree of abstraction within the Code allows judges to interpret its provisions flexibly and creatively, accommodating the detailed and infinitely varied circumstances of individual cases. In this context, Szladits' insights remain remarkably relevant:

> *I can only conceive the code and case law as a unified whole in the synthesis of living law. In my view, the code and case law necessarily complement each other. This part of the legal system is like an iceberg in the polar sea,*

> *with only one-tenth visible above the surface, while the remaining nine-tenths lie hidden beneath the water. This visible one-tenth represents the written law, while the other nine-tenths consist of the accompanying case law, which the judge must bring to the surface from the depths of the sea of life (...)The code does not aim to displace customary law but rather to make it a complementary part of living law alongside the code.* [65]

Thus, in the end, Szladits remains a continuator of the Grosschmid-legacy.

65 Szladits, 1936, pp. 272, 279.

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