



ON UNITY IN THE AGE OF DIVERSITY: THE MONISTIC APPROACH OF ROMANIAN CIVIL CODE

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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.

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1. INTRODUCTION

Like any other nation in crowded Europe, Romania too had its share of historical conundrums. To the extent that laws mirror¹ 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 jurisdictions² or, vice-versa, different texts produce similar results in practice.³ After all, law is a type of social construct⁴ 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 Gogoășe, 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; Rizoïu, 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’ – *Școala 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 (Wallachia), 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.: *obraz*) 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 were almost all educated in France). In the aftermath of the 1853 Crimean War, Russian ‘supervision’ of the two provinces ended, and French and British¹⁴ 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 happened¹⁸ 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 Ionaşcu 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 Romania 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 became 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 neoliberalism²⁵ – 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 Court²⁶ trying to say that European institutions cannot overcome some local legal solutions. This decision was followed by certain decisions²⁷ 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 Constitution²⁸ specifically states that Romania has a market economy, pointing to the ideal of neoliberalism on paper. Another text²⁹ says that business should be free for anyone, again a neoliberal approach. However, in the very first article of the Romanian Constitution, an important paragraph³⁰ 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, Rizioiu, 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 text³¹ 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 text³² 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 works³⁵ 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 (Baiaș, 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 rule³⁹ 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 Court⁴¹ ‘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 level⁴²). 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. Nobody⁴⁷ 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 law⁴⁸ 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 law⁵³ 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 impervious⁵⁵ 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 decided⁶⁰ 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 ruled⁶² 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 point⁶⁶ 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 recently⁶⁷ 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 High Court plays a pivotal role. The main issue was created also by a decision⁶⁹ of the High Court stating that awarding the right jurisdiction is a matter of public order. For example, it decided⁷⁰ 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 restraints were brought to the *error communis 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 entities⁸³ (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 property⁸⁵ 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 Rizoïu, 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; Vedinaş, 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 Court⁸⁸ 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 decided⁸⁹ 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 held⁹⁰ 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 text⁹³ 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 stated⁹⁴ 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, Rizoïu, 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 drafting⁹⁵ 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' element⁹⁶ 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 begin.

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 explained¹⁰³ 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 *Abstraktionprinzip* 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 codes¹¹³ 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 decision¹¹⁴ imposing unanimous decisions in matters dealing with condominiums, the only material change came in 2022¹¹⁵ in the area of protection of impaired persons. This change was triggered by a decision¹¹⁶ 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 politicians¹¹⁷ and civic society¹¹⁸ 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 traditions¹¹⁹ or by resorting to geographically (and culturally) closer models.¹²⁰ In addition, for some novel ideas, the European models of codification¹²¹ 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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