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Reflections on the New Romanian Codes

Abstract

The social changes that have occurred in Romania over the last two decades have been reflected in the legal life of the nation as well. The most significant recent development is the adoption of the new Codes – the Civil Code, the Code of Civil Procedure, the Criminal Code and the Code of Criminal Procedure. The adoption of the four Codes seeks to meet the needs of juridical modernity. Some criticism has already occurred, though, and that is inevitable – doctrinal arguments are an important feature of progress. Legal practice will confirm or disprove the efficiency of the new legal instruments. This study intends to offer a general view of the Codes, as well as a number of particular notes on some provisions and institutions.

Key words: *Romanian legislation, new Codes, Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure.*

Rozważania nad nowymi rumuńskimi kodeksami

Streszczenie

Zmiany społeczne, które nastąpiły w Rumunii na przestrzeni ostatnich dwóch dekad, znalazły odbicie zarówno w prawodawstwie, jak i funkcjonowaniu państwa. Najbardziej znaczącą zmianą w ostatnim czasie było przyjęcie nowych kodeksów – Kodeksu cywilnego, Kodeksu postępowania cywilnego, Kodeksu karnego i Kodeksu postępowania karnego. Przyjęcie tych czterech kodeksów jest próbą sprostania potrzebom jurydycznej nowoczesności. Pojawiła się jednak pewna krytyka, i co nieuniknione – argumenty doktrynalne stanowią ważny czynnik postępu. Praktyka prawnicza potwierdzi albo zaprzeczy efektywności nowy instrumentów prawnych. Niniejsze opracowanie zmierza do

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przedstawienia ogólnego poglądu na kodeksy, jak również kilku uwag szczególnych, dotyczących niektórych postanowień i instytucji.

Słowa kluczowe: *ustawodawstwo rumuńskie, nowe kodeksy, Kodeks cywilny, Kodeks postępowania cywilnego, Kodeks karny, Kodeks postepowania karnego.*

Introductory Remarks

The social changes that have occurred in Romania over the last two decades have been reflected in the juridical life of the nation as well.

More than twenty years after the Romanian Revolution of December 1989, we are in the position to witness a powerful penetration of our legal system – not just by EU legislation but also by some western countries' systems.

At the same time, a substantial renewal of our legal system as a whole is obvious; no doubt, it covers all departments of both public and private law.

Romania was among the first countries of the former Eastern Block to adopt a new Constitution, in October 1991 (after Bulgaria, in July of the same year).

The Constitution was revised in 2003, but certain reform solutions implemented at the time remain disputable. Two such issues are: the specific manner of determining membership of the Superior Council of Magistracy (*Consiliul Superior al Magistraturii*) by the Constitution, an inflexible approach if compared with the former determination by organic law; and the deeming of the Supreme Court of Romania as a court of Cassation (its very name – *Înalta Curte de Casaţie şi Justiţie* – implies, we believe, a questionable return to the past). Yet in this context it is not constitutional institutions that we intend to analyse.

1. The New Codes

In our opinion, the most spectacular legislative "works" in Romania, after the Constitution of 1991, are the adoption of the new Codes, namely the Civil Code (Act 287/2009); the Code of Civil Procedure (Act 134/2010); the Criminal Code (Act 286/2009) and the Code of Criminal Procedure (Act 135/2010).

The new Civil Code became operative on 1 October 2011, while the Code of Civil Procedure came into force in February 2013. The Criminal Code and the Criminal Procedure Code will also, probably, become operative in the first half of 2013. The delay is accounted for by the Ministry of Justice by virtue of the need to prepare the judicial personnel, as well as the logistics necessary for the efficient implementation of the mentioned Codes.

The drawing of the four Codes is the effect of exceptional efforts on the part of their authors; as a consequence, such an endeavour deserves to be highly appreciated.

The history of humankind is scattered with the admirable efforts and high responsibility of lawmakers of codes that have shaped the progress of society and the lives of tens or even hundreds of millions. It should suffice to mention the circumstances in which Napoleonic legislation, particularly the Civil Code of 1804, were drawn, whereupon the Emperor himself participated. The high repute of the French Civil Code is uncontested even in our day, and its reception in large parts of Europe, Africa and Latin America is solid proof of its perpetuity. The force of the French Civil Code was anticipated by Napoleon, who admitted that his glory did not reside in winning forty battles (as Waterloo did manage to "delete the memory of so many victories"). The great Emperor of the French foresaw the eternity of his Civil Code. What great insight!

The Napoleonic Civil Code is still operative today in France. So are quite a few others, that were adopted under the great influence of the French Code, e.g. the Civil Code of Austria (adopted in 1812), Germany (1900), Chile (1857), Serbia (1844), Japan (1866 and 1869), Holland (1838) and Spain (1899). The Codes named above are but a few of those adopted in the 19th century and which permanence is proved by their being still operative in our time. And it was the great French Code that inspired many others in European countries as well as other parts of the world.

In some European countries, new Civil Codes were adopted during the 20th century, e.g. Italy (1924), Poland (1964) and Portugal (1966).

The Romanian Civil Code of 1864 was a true-to-life copy of the French counterpart; it was operative until the time of the new Code entering into force on 1 October 2011. The adoption of the new Civil Code is undoubtedly a remarkable feat, as many countries, including France, still enforce Codes adopted in the 19th century.

2. The New Civil Code

The new Civil Code promotes new principles and new institutions. Some of them are inspired by other modern codes, for instance that of the Canadian Province of Quebec, or the Swiss Code. The Code of Quebec in particular exerted a major influence on the new Romanian Code, including the structure of the document. The new Civil Code of Quebec was adopted in 1994. It did not lose all bounds with the previous Civil Code, adopted in 1866 under the decisive influence of the French Code of 1804. Two French professors wrote in a 1996 edition of the Code that "although the new Civil Code of Quebec is a genuine

recodification, it preserves the connection with the past, namely the 1866 Civil Code of Bas-Canada, or the jurisprudential law developed after that time"[2]. It is that particular combination of the mentioned Code, between codified law and jurisprudential law, that epitomizes the originality of this modern legislation. The Civil Code of Quebec includes solutions inspired by the Codes of the Swiss Canton Vaut, as well as the state of Louisiana.

The Romanian lawmakers, just like the commentators quoted above wrote, did not break away from the past of our civil legislation. On the contrary, the new Civil Code of Romania preserved many of the principles and institutions of the old code.

Our new Civil Code is quite innovative in character, unlike in nature to the basic principles of the last half a century; some of the most significant are highlighted below. The first of these is the promotion of a monist concept regarding the contents of (private) civil legal relations, in the sense that all regulations regarding the (natural) persons and the family relations are incorporated in the new Civil Code.

Second, let us point out the regulation of the statutes of limitation (prescription) in the new Civil Code (Book VI). A brief but substantial regulation of other preclusive time limits is also included (Book VI, Title II). The regulation of International Private Law, dealt with in a separate section of the new Civil Code (Book VII). The innovations implemented in the field of Family Law, particularly those regarding the matrimonial regimes and divorce, are nothing short of spectacular. The matter of Land registration is also regulated in the new Civil Code. New contracts, not included in the previous code, are regulated too, such as current accounts contracts as well as other banking contracts.

The present description is a general one. An analysis of the new Civil Code would inevitably imply a comprehensive approach in many volumes depicting its present and future (no doubt, that kind of doctrinal enterprise will be accomplished).

3. The New Code of Civil Procedure

The statements above are to a large extent valid in the case of the new Code of Civil Procedure. Undoubtedly, the procedure legislations of the 19th century shared the viability of the great Napoleonic Code. Here are some succinct comments on the former as well as the current Code of Civil Procedure. First, it cannot be ignored that the Romanian Code of Civil Procedure, adopted in 1865, was based on the 1806 French Code (actually, to be more

[2] See: J.-L. Baudoin, Y. Renaud, *Introduction* [in:] *Code civil*, Québec 1996-1997, Judico, Wilson et Lafleur limitée, Montréal 1996.

accurate, on the 1819 Code of Procedure of the Swiss Canton of Geneva – in turn, an improved version of the French Code).

The great French Emperor attended just one of the twenty-three meetings that took place to that end. In the period following its adoption, the French Code of Civil Procedure was subjected to harsh criticism. Points of disapproval were its almost complete silence on the count of Cassation or the organisation of the judicial system. The passive role of the judge was vehemently criticised by doctrine: some analysts wondered if that was so because of Napoleon's wish to "stabilise the civil procedure" in order to avoid disturbing the enforcement of the new substantive law[3].

Regarding the Code of Civil Procedure, a famous French specialist said that, up to a point, it is "a revised and completed version of the Ordinance of 1667". Jean Appleton also wrote: "Our procedural legislation was encoded in a rush; the Code of Civil Procedure is not worth of the Civil Code." The idea was rendered in similar terms by other French proceduralists. Glasson-Tissier, for instance, noticed in a famous work that it is obvious that "the Code of Civil Procedure of 1806 is not the kind of great work that the Civil Code of 1804 is".

Nevertheless, we have to admit that later on, the Code of Civil Procedure enjoyed considerable praise. The remarkable Italian proceduralist Enrico Tullio Liebman considered that Napoleonic procedural legislation developed the Ordinance of 1667 and gave it simplicity and rationality. Indeed, it is easy to see that Napoleonic legislation, procedural rules included, exerted a massive influence on the regulations of the 19th century (as is the case with the Codes of Civil Procedure of Italy and Germany). The fame enjoyed by French civil and civil procedure legislation reached far beyond the confines of Europe. The French Code of Civil Procedure was received in some African countries, but especially in the countries of Latin America. That is enough reason to deem the French Code of Civil Procedure one of the most representative legislative monuments of humankind, as it survived the various predicaments of history for almost two centuries.

The Romanian Code of Civil Procedure had its share of harsh criticism. A Romanian specialist deemed it "a slightly improved version of the French Code"[4].

[3] See: S. Guinchard, C. Chainais, F. Ferrand, *Procedure civile*, Paris: Daloz 2010, p. 69.

[4] See: N. Solomon, *Spre o reformă a procedurii civile. Studiu comparat* (*Towards a reform of civil procedure. A comparative study*), „Curierul Judiciar", Bucharest 1932, p. 11.

The survival of the Code of Civil Procedure to our day is due, to a large extent, to its original "edifice", as well as to the consecutive alterations, of which one of the most notable is the Dissescu reform of 1900.

Despite the long period of enforcement and the many alterations, the Code of Civil Procedure failed eventually to keep up with the remarkable evolution of modern law. That is why attempts at drawing a new code started as early as the 1930-s; others followed during the Communist regime. That was no longer acceptable, as Romania was among the few countries in the world where a French-originated code from the beginning of the 19th century was enforced in the 21st century. France itself renounced the old procedure and drew up a new Code of Civil Procedure in 1975. Most European countries drew up Codes of Civil Procedure at the beginning of this century or later. One of the most recent regulations in the field is Spain's Act of Civil Procedure no. 1 of 7 January 2000, operative from 8 January 2001 (replacing the Spanish Act of Civil Procedure of 1881). Moldova also has a new Code of Civil Procedure (adopted in 2003). And Switzerland also adopted, via a national referendum, a new federal Code in 2009 that unifies the twenty-six cantons' codes.

Judiciary procedure is, no doubt, one of the most important warranties of the rule-of-law state and of the constitutional rights and liberties. It is "the twin sister of freedom". That is why the adoption of a new Code of Civil Procedure, along with the Civil Code, the Penal Code and the Code of Penal Procedure are, at this time, some of the most important juridical events in Romania.

It is the right time now to ask ourselves if the new Code of Civil Procedure is going to be a great code, worthy of the older one and the original French code that inspired it.

In a text published in 2009 in a law journal, we wrote that the new Code of Civil Procedure is endowed with undoubted qualities. Yet, a prompt answer to the issue would be not just risky but would also lack juridical realism, as the great legislative works of a nation are generally hard to assess by their contemporaries. On the other hand, the viability of a major legislative work cannot be settled prior to its enforcement, for it is practice that can confirm or disprove the efficiency of juridical institutions. This latter statement applies to all four new codes of Romania.

The new Code of Civil Procedure is endowed with undoubted qualities. Here are several major ones.

First, the new code feats a good systematisation of the subject matter by means of the seven Books, the same number as in the current code, although the issues are not fully identical; for instance, the last Book of the new Code deals with international civil suits

litigation. Worth mentioning is also the preliminary Title, which includes the fundamental principles of the civil suit. Such systematisation of the subject matter matches the regulations of other modern codes of the last few decades, whereby the fundamental principles of the codes are systematised in the initial part (see Codes of Civil Procedure for France, Portugal, Venezuela, etc).

Second, there is a rigorous regulation of most judiciary institutions specific for the field, the highly technical character of this branch of Law being nowadays generally acknowledged.

Nevertheless, by way of exception from this rule, Book V is drawn in a partly different manner. In our opinion, this particular section of the code includes an extremely detailed regulation of the matter, and it could actually work as a genuine code of Judgment Enforcement Procedure. The specific nature of judgment enforcement and its importance could work as a reason for the adoption of an entirely separate code, especially since similar trends are manifested in other democratic countries, where more and more the particular evolution of the matter from "a right to judgment enforcement" to "Enforcement Law" is under scrutiny.

The preservation of current legislative solutions in various matters of civil procedure is also a critical landmark of the new Code of Civil Procedure. Such an approach is all but a normal one, we believe, as the abandonment of procedural rules that have proved their viability over the past decades, also validated by doctrine, would be a major mistake. Certain text fragments taken from the current Code of Civil Procedure and implemented in the new one are, generally, improved both from a linguistic and from a legislative-technique standpoint, and they have a significant weight in the whole of the new code.

The authors of the new code introduced new institutions that had not been included in the previous procedure, such as: the request for the opinion of the Court of Cassation on legal issues; the complaint for delaying the proceedings; the small claims procedure; the eviction procedure, etc.

In our opinion, the most delicate issues that we can expect the future Code of Civil Procedure to raise are those having to do with the jurisdiction of the courts, as well as the innovative regulation regarding the appeals, particularly the Cassation. The rules that are promoted in these matters are likely to raise many problems regarding the efficiency of Romanian justice, over the next few decades. We will probably ask ourselves if this reform is the effective one, or rather the previous structure of the judicial system was optimal.

4. Criminal Legislation

The status of the penal legislation is totally different from that of the civil legislation. We do not mean here to address the need of a reformation of the penal legislation – although that is a real issue. What we mean is the cadence of penal and penal procedural regulations, in conjunction with regulations of civil legislation. The two current codes – the Penal and the Penal Procedure Codes – were adopted in 1968 and became operative in January of 1969.

On the other hand, we cannot ignore the fact that Inter-War Romania had a Penal Code that was unanimously appreciated, made in 1936 and inspired by the Italian, not the French legislation. In the present, the most influential penal regulations are, in Europe, the Italian and the German ones. The new Penal Code has preserved some of the traditional institutions. It has also taken into account the evolutions occurred in such legal systems in modern times.

The new Penal Code has for the first time (in a code) determined the penal liability of a legal person; this being an institution present in the laws of other European countries. New types of crimes were introduced in the Code, consonant with the social and economic developments of recent years, such as computer and electronic-payment fraud, crimes committed against the safety and integrity of information systems, electoral, crimes etc.

It is quite hard at the present time to talk about the new Penal Code as a great legislative work, since it remains for jurisprudence to validate the quality of this normative act. If we were to express some criticism, that would be related to the general decrease of penalty amount in the social context of criminality increase. Healthy social policies cannot overlook the amplitude and trends of criminality.

In our opinion, the dis-incrimination of certain criminal offences, such as insult and slander, is also a de-merit. Such an approach will generate an actual “right to insult” – which is hard to counter by means of civil law. The Constitutional Court of Spain has recently ruled that there is no actual “right to insult”. Such a right must not exist in a democratic society, as it would ruin the balance between the right of free expression and the dignity of the individual. Consequently, in such a system, it is not the victim but the perpetrator, who is protected. Arguments contrary to this opinion, namely that the victim may resort to means of civil law, are not convincing. That is because the effects of these offences are different in nature from those that can lead to civil compensation.

A similar kind of reasoning motivates the regulations included in the new Code of Penal Procedure, which aims to determine the speeding up and the simplification of penal

procedures, as well as the creation of unitary jurisprudence in concordance with that of the European Court of Human Rights.

Conclusions

The qualities of the four Codes are hard to challenge, and their adoption must not be regarded as a requirement of a national or continental entity, but a need of our juridical modernity. It is a natural thing, given that the four Codes are the pillars of any juridical system. Without them, the juridical life of a modern nation is hard to conceive of. Certainly, such a statement is a valid one especially for continental law.

In the present context, we have not aimed at a detailed analysis of the new Romanian Codes. Some criticism has already occurred, though, and that is inevitable, at least from the standpoint of doctrine – and doctrinal arguments are an important feature of progress. As the great German jurist Rudolf von Ihering said, "in Law, as elsewhere, history never stops."

In considering this, we can afford to make a few particular notes that are necessary for a more comprehensive view of the new Codes. A first remark regards the sometimes too doctrinal character of legislative approaches. This is true in particular in the field of civil procedure, where technique and rigour are of paramount importance. Its relevance is in the matter of judgment enforcement, comprising almost three hundred articles (there are almost two hundred in the previous code). Other specialists have already noticed that the new Code "has expanded the field of procedural norms over issues that belong with the doctrinal field"[5].

Such approaches have to do also with the general trend of "legislative inflation", from which neither the practitioners nor the users (the citizens) will benefit.

A flaw of the new Codes consists of renouncing certain legal terms, concepts or procedural institutions established not only by the legislation, but also by the doctrine and jurisprudence, institutions which abandonment appears to be totally unjustified. An example is the discharging of the concept of `the first day of appearance`, as determined by the current Code of Civil Procedure, Article no. 134, is being replaced by the term `the first court session when the parties are properly (legally) summoned`.

[5] See: A. Tabacu, C. Ioana, *Scurte consideraţii asupra dispoziţiilor Noului Cod de procedură civilă în materia executării silite – o reglementare în favoarea debitorului?* (*Brief considerations on the rules of the New code of civil procedure regarding the civil enforcement – is it a regulation in favor of the debtor?*), „Pandectele Române", no. 6/2009, p. 83.

In the same context, the reconsideration of the procedural institutions of incompatibility and recusal cannot be ignored – this may create confusion between the two traditional procedure institutions. Nonetheless, such notes are a matter of detail.

The most important limitations, particularly for the Civil Code and the Code of Civil Procedure, are in connection with the adoption of Act no. 202 of 12 October 2010, also known as "the little reform", as well as the projects for its implementation. "The little reform" aimed at speeding up the application of some of the institutions being promoted by the four Codes. From this vantage point, this specific option of the lawmaker cannot be criticised, as the intention was for practitioners to get to terms with some of the normative provisions already adopted, which did not become operative directly, but via "the little reform".

Yet the lawmaker would not be limited to such an approach, but contributed essential alterations into the new Civil Code and Code of Civil Procedure. What is more, the acts for the implementation of the two Codes include major innovations regarding the normative acts they are expected to make operative. For instance, the Act for the implementation of the new Civil Code alters or complements in excess of two hundred articles. A similar situation is encountered in the case of the new Code of Civil Procedure. Such a legislative approach deems as questioning the solidity of the legislative enterprise embodied in the two Codes. It would have been but natural to wait for the "validation" via jurisprudence of the solutions promoted via the two Codes – instead of a legislative intervention made at short notice and also repeated, namely in October 2010 and immediately after that (by means of the two acts for implementation).

By means of such a "technique", one having almost absolute novelty in Europe, the acts of implementation (so named by the lawmaker, as their obvious objective is in concordance with their names), acts were made for the alteration of yhe Codes that have not even become operative.

Such an approach is, in our opinion, akin to the process of legislative inflation we have witnessed over the last two decades, and which great "benefits" may occur sooner than we would expect.