

The Civil Code between the legislative modernization and his adjustment to reality

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Abstract:

The codes, which are the expression of the systematization and rationalization of the law, have continued to evolve both substantially as well as formally once the changes in the collective consciousness come to be. In the plan of its organization we can notice the great guiding lines which the political, economic and religious elements have left. Thus, the “described” juridical reality of the code must transpose the social reality as precisely as possible.

Nowadays, the beneficial effect of codification is almost unanimously discussed because of how profoundly the legislative crisis was felt, a crisis determined by the dispersion of laws which no longer matched the old supports, the multiplicity and excessive specialization of norms, the periods of transition to the social, political and economic level, which were clearly felt on a juridical level. The evolution of facts has brought several changes and diversified the framework of codifying the law. Thus, even though there are legislative works which now serve as true examples of “the art of codification”, time does not spare them and it leaves its mark on them. New boarders are thus opened for the process of codification. The diversity of examples of codification has increased as we have observed, both formally as well as structurally.

Key-words: *the Code, the legislative modernization, tradition, the social reality, the law.*

Introduction

The fundamental nature of the law has a historical basis: this rule is acknowledged as an expression of the general will, in other words, an expression of sovereignty. Despite the fact that this notion has been seriously contradicted by the profound evolution of the legal hierarchy, it still has far-reaching effects on positive law. Even so, the law has maintained a certain preeminence since its origins on the acts of the executive branch, a preeminence guaranteed by legislative control.

Nowadays, the law is one among several acts of law. Many authors [1] claim, however, that the law no longer represents the cornerstone of the legal system. Another form of law originating from other institutions than those of the state, takes precedence over the law and competes with it.

The law is at the centre of a mutating hierarchy of legal norms, which shows deep changes in the relations between democracy and human rights, between judge and political authorities, and between the state and the European Union.

The traditional view of the law is simultaneously transfigured by the crisis[2], which the law faces as an act of authority. The desire to revalue the law is somewhat manifested in the process of codification in 2011. It certainly responds to a social need but is also dependent on changes in the political life.

1. Conditions for maintaining the codes and keeping them viable

The idea of codifying seems connected to the “advent of modernity”. Codification is seen as a simple remedy to legal inflation and dispersion of sources, in which case does the code itself risk becoming an excess? According to Aristotle, political thinking only allows for the law to govern and not man, in conformity with historical precedent, in order to guarantee freedom [3]; at the same time, the law must not become a simple instrument in the hands of men, or it risks losing its permanence, stability and universality; if the process of codification may reconstitute the traditional virtues to the law, then it has a bright future, if not, it will be discredited as the law was and all the predictions made by great authors will be confirmed: “Nowadays, the codes do nothing but choke us with their long phrases...” [4] .

The legal system does not evolve through the action of the environment, but thanks to it. The social environment just generates the imbalances that the system absorbs thanks to its self-regulating capability. It compensates for external shocks through its “self-consciousness” or *sui generis* [5], thus keeping its identity. “The law is, of course, the creation of the social body, but once created it reorganizes this body and changes its purpose.”[6].

The social relations and the way in which they manifest at a given time must at least correspond with the norms that regulate them. Therefore, the bond between the law (in the broader sense) and the social behaviors is extremely tight. Any discordance between these two elements may give rise to difficultly controlled phenomena, such as: legal inflation, instability in the legal circuits, decay of the law, lack of legitimacy. In a constantly changing and developing society, in which the amount of legislation is considerable, the variety of normative acts needs to be systemized. This is determined by the need of organizing the acts based on precise criteria, so that the juridical norms are well known and applied in social relations.

In order to unify and focus the legislation, to rationalize and systemize the norms of law, they are grouped depending on the field or branch, based on common principles. Depending on the form, the structure and contribution to the unifying work, it can have different meanings either as a code or a codex[7]. Thus, according to article 17, paragraph (1) from Law nr. 24/2000 concerning the norms of legislative technique for the development of laws, “throughout the consolidation of the legal system, the regulations in force which concern the same field or related fields, contained in the laws, ordinances and governmental decisions may be incorporated by homogenizing the texts in a structure, a codex, which facilitates their knowledge and application.” We notice in the definition above that incorporating legal texts of different dates and origins represents a gathering in a collection based on external criteria as set by the Legislative Council. Also, this procedure does not reform the initial texts, but the normative ones included will be presented by considering all the subsequent modifications and completions, partial amendments, either intended or implicit, as well as the actualizations of names and places. Thus, since the created collection follows a logical pattern, it is accessible and clear and represents an inferior form of systematization.

To this effect, article 16 from Law nr. 24/2000 states: for the systematization and concentration of legislation, the regulations from a certain field or branch of law, subordinate to certain common principles, may be gathered in a single structure as a code. This time, it involves not just the gathering of legislative materials but also the creation of a new law. “The code is not a simple compilation, but a creative work, which fundamentally changes the existing regulations.”[8] As a legal procedure, the action of codifying standardizes a single branch of law or an important part thereof in a systemic, rationalized and complex whole, and represents a higher form of systematization. “Although it has the legal force of the law, the code is not a regular law, it is a unique legislative act, with a special internal organization, in which the juridical norms are organized in a logical and strict sequencing, very well thought out, which reflects the internal structure of that branch of law.”[9]

The changes brought to the legal system through the codification process may be very far-reaching or it can modify those aspects that are no longer conforming to the social reality. If the legislative reform involves elements of law from other countries,

such as in the case of the New Civil Code, then the transformations due to the old law are fundamental and extremely important, in part because of the new elements themselves and also because of the compatibility with the reality it belongs to.

The stages of the codification process include a tight link between the humanities and the juridical sciences. Before turning to norms of legislative techniques, we consider it necessary to the development of such an important work as a code of law to officially study the public policies in order to determine the level of perception of values which are to be instilled. This is the way in which the will and need to reform the legislative system are known and established in the collective consciousness, the compatibility of principles borrowed from the new legal system with the morality and traditions.

The diversity of laws is due to the growing complexity of the social life, coupled with the need for coordination, in order to protect the natural and social environment, of millions of individual decisions[10]. The normative acts are worthless on their own. They must be integrated in a legal system and serve its goals. To systemize the laws means precisely to include them in such a system.

In time, the law has permanently evolved under the pressures of social and political changes, whose source and limitations are traditions and the characteristic mentality of different people, the social customs and practices as well as the history. Thus, the frequency of one human relation or another will create a certain juridical regulation, or the periodicity of a certain event will entail the need to consider it from a juridical point of view [11].

Despite the fact that in the doctrine there were several opinions[12], which supported the inefficient existence of codes – considered as being too rigid and a limited form of law – we conclude that the systematization of these laws has a double role: on one side, the norms in a code ensures the accessibility of the text for the reader in order to better know the law, and on the other, all contradictions with other normative acts are prevented or eliminated through codification. Quite often, codifying is seen as a simple remedy to legislative inflation and dispersion of sources, in which case the code itself could be an excessive measure. All these notwithstanding, the codification becomes the expression of a rational law based on a logical and systematic method, which should enable to set certain general principles and to stipulate clear and

comprehensible consequences for the individual [13]. To quote Portalis, “the code is the spiritual method of applying the law”. Codification represents more than a sum of laws, it contains the essence of a system in its entirety[14].

2. Permanently Adapting the Norms to the Social Reality

A theory specific to law called sociological positivism is founded on the claim that to adopt a positive juridical norm is preceded by “an idea of law”, as G. Burdeau said. This is a diffuse representation at the core of society, of “the desired social order”[15]. Leon Duguit, influenced by sociologist Émil Durkheim, states that the juridical norm is nothing else a social norm established in objective law and moreover “ the law retains its obligatory force not because of the will of those in power but in accordance with the social requirements”, or in other words, with the aspirations of society[16].

If the law’s purpose is to express the values of society and to regulate them, this role is increased even more by the code. Thus, the ideology on which it is based may come out in every title, in certain provisions or in design and in content. Besides its ideology, the political core or the religious influence, we find a trace of the social consciousness deep in the legislation. The tradition, morality, history and culture of a people are relevant to the process of codification, as they are determining elements in reaching the goal, but also in determining the effects, accepting or denying the conformity of a certain juridical norm with the social reality.

The juridical system does not evolve because of the action of the environment, but thanks to it. The social environment only generates the perturbations that the system absorbs thanks to its self-organization. It makes up for external shocks and thus keeps its identity by being endowed with a sort of “self-consciousness” sui generis [17].

The law is, of course, a creation of society, but once created, it recreates society itself and its purpose.

Therefore, the purpose of the law must be achieved, which must be perceived dually: the internal purpose of the system, ensured by its own existence through its increasing unity and an external purpose, represented by the common good.

Codifying has therefore a social dimension: it often follows a social crisis at the end of which it seems necessary to establish new rules and reestablish the original order through a new social contract[18].

From a historical point of view, codifying has represented since the earliest times, the purpose in the struggles of the weakest, of the middle classes to obtain certain improvements in the life conditions (to erase the debts and renew property, etc). but, most importantly, the Civil Code of 1865, which understood the importance of promoting a new social order, in the spirit of melding traditions with new aspirations of liberty and equality, after an unstable period of changes that led to the Great Unification of the Principalities; we may therefore say that in this ages, the Civil Code represented a key element in establishing social relations: “the civil Code established for more than a century, the values of essential juridical relations, which predefined society”[19].

However, such a process of codification clearly implies a number of circumstances which rarely come together in the history of a nation; a people is not determined in every moment of its history to accept consciously the complex procedure needed for codification. The technical considerations which appear in the legal system (the crisis of the legal process, decay of law, normative inflation) are often elements which lead to a restructuring of the law. However, adopting a legal system and trying to adapt it to the social reality does not guarantee a transfer of the enforced law at the level of the social consciousness, also. The compatibility between the legal system and the collective consciousness is ensured only if the norm to be applied is itself founded on morality, traditions and the people’s way of life. At the same time, the fast pace of progress in our society, determined by several factors of the transition – be it political, social, economic, religious – involves a fast restructuring of the legal system, by maintaining the constant elements of the law, to which new ones are added, which are translated by factual realities of generated by the international context.

The problem of knowing the quality of the law and therefore knowing what a good law means, has preoccupied the authors of the Civil Code of Naples, and before them, philosophers like Montesquieu, for example.

For the latter, the law must adhere to a number of fundamental principles [20]:

- the style must be simple and concise, the law must not contain unclear phrases, nor should it be subtle, since it is created to be understood by the common person;
- exceptions and limitations must be avoided, because the apparent details lead to the exaggeration of real details; as useless laws diminish the authority of necessary laws, those which make exceptions confuse and weaken the legal system; a law must have effects and must not allow for any derogation from it through a special convention;
- finally, the laws must not be modified or changed, if there is no clear reason to do so.

This idealistic view of the law, this idealization even of the law, has inspired those who drafted the Civil Code. Portalis explains, better than anyone, the golden rules of law-making, nowadays called legislative technique, in his speech on the Civil Code. With the risk of exhausting all sources, it is necessary to recall to our mind some of the principles: "The laws are not acts of power in the strictest sense; they are acts of morality, justice and truth. The legislator has a calling, a holy role than a duty. He must not lose sight of the fact that laws are meant to serve people and not the other way round; they must be adapted to the characteristics, customs and circumstances of the people for whom the act is drafted; we have to be guarded when it comes to novelty in law-making, because, if in an institution it is possible at all time to calculate the advantages that new theories offer us, in this case we cannot know what drawbacks that appear only when put into practice... To simplify the situations by stipulating everything is a true art form. The useless laws must not be considered and thus weaken the authority of the necessary laws, since the former do nothing but compromise the certainty and superiority of the legislative act."

The objective of the law is to establish in broad lines the general principles of the law; to establish both the creative principles as well as their consequences and to not get into the details that may come with such a problem, in any field... We would be mistaken to think that from the start there could be a legislative corpus which regulates all future social situations and can also serve the common citizen... When the law is clear, it must be respected; when it is obscure, it is disputed in order to refine the stipulations. If the laws do not exist, it is necessary to consult the customs and the good morals. The law regulates for all citizens, it must be seen to apply to all and never make a particular exception. It must never serve individual interests, or differentiate between

citizens in a suit. If this were the case, we should create new laws every day; their increasing numbers would be detrimental to them and lead to observations[21].

The interest is to return to what we may call “The Golden Age of the Law” and from this to what today we understand as the law that follows the principles of Montpensier, and also to measure the progress achieved, to assess the degradation but also to discover the means of giving the law the authority it needs. However, we must keep two things in mind. The first, criticism is not new and it may be considered as part of the liberal doctrine.

The second, which is more obvious, is that we must remind ourselves that the society where the law applies and for which it organizes the reality is very different from that of the nineteenth century[22]. We are talking about a complex society, dominated by technology, well-lit and subject to few rules.

3. The Flexibility and Diversity of Methods of Codification

Ever since ancient times people have turned to codification because it is meant to combat the wide differences between rules and to ensure a clear understanding of the law and implicitly respect for the law. The need for unity and security which the law has to fulfill are inherent to the concept of the code, even though it has had different forms throughout time: the history of modern western law gives us numerous examples of codes created based on the need to collect, publish, simplify or make all sources of law coherent[23]. The development process is without a doubt inseparable from the technical implications. In order that the codified law be respected and respectable it must meet numerous technical qualities, without falling into any of the extremes. The popularity of the code, the attempt to ensure the sureness of the law, the rationalization of the law, are only a few objectives that the codes has. However, to make the code a purpose onto itself may have negative consequences for the whole process, determining contrary effects that those wanted. This idea of a code is strictly connected to the form it takes at the moment when the norms so systemized are presented to the people, but too much attention is given to the form which may have particularly serious consequences on the code.

Experience has systematically allowed us to distinguish certain various forms of codification and to establish the following methods:

a) certain codes are deemed nothing more than compilations, of public or private law, which aim to group certain existing and future texts, in order to ensure a certain practicality, but without classification or amendment: as an example, we may offer collections of legal texts.

b) other codes fulfill the function of consolidation: this means that they aim to gather texts from jurisprudence, or to unite and integrate in a logical order, chronologically, texts pertaining to a legal issue or a certain field.

c) the integral form of a code is represented by the great reformative works, which integrate a group of traditional rules in one whole, to which innovative rules expressing principles of organization for the new society; the archetype is represented by the French Civil Code and to a lesser extent and depending on its extremely conceptual and technical quality by the German Civil Code.

d) one last form of codification, which has gained great importance in recent years, is represented by “the ordering of existing laws, with a rational repartition of fields in any code and a methodical and systematic organization of each one of the laws.”[24].

Quite often, in the framework of this process of codification there have been opinions that support the predominant desire to reform the Code. Must we have a new code or reform the old legislations? The answer is determined by the advent of some real movements of codification.

On one side, we have innovative codification, which creates new rules, and on the other, the codification consists in only consolidating the old laws. We have often concluded that the innovative modern codification cannot not exist[25], since creating anew code does not mean changing the legislation. More frequently, the bases remain the same, the general principles change very little, or are enriched with texts which ensure their applicability in the society where they are meant to be used. The innovative element is characterized quite often by the presence of new materials, by trying to unify and harmonize the legislation with the territory, in this case Romania, and align them with the norms of European law.

With concerns to the constant law, this is a means of administrative codification, as it is called in western European doctrine. The name is in accordance with the means that give rise to this type of code and by adjusting the legal texts from the Commission of Codification [26]. This body is entrusted with the actualization of legislative texts through the repeal of old or contradictory ones, and through adding new regulations etc. quite often the texts are refined so that they do not contradict one another and nor contain any errors especially when they can lead to misinterpretations.

As we can observe, the two types of codification do not exclude each other, but on the contrary, may be completed throughout time in a society in which evolution determines economic, social and political growth, which causes the rapid modification of laws.

The concept of the pilot code appeared at the time when the economic and social evolution has determined the advent of new materials whose regulations were reunited in one code, which is very precarious since it is very specialized. Thus it is necessary to relate to the general norms from the specific field [27]. Among such fields there are business law, transport law, employment law, customs law, maritime law etc. which use the characteristic principles of either public or private law. Thus, in private law, the Civil Code becomes pilot code for a great number of other subordinate codes.

The legislative inflation and a too specialized regulation are the causes of this tendency to undermine the law. The difficulty in relating to the pilot code, every time the specialized norm is mentioned, gives rise to a delay in applying the law. The jurist finds himself caught in a number of traps. Quite often the specialized law is not harmonized with the guiding principle from the Civil Code. In our law system, the Family Code represents such a case, since it makes reference many times to the articles from the Civil Code. Obviously, this is not the case in just our law system, but also in most Central and Eastern European countries. During the Communist period new laws were imposed by the political regime of that time, which was modified more or less through the transposing and systematization of the laws[28].

Once the new Civil Code came to be, family law is reintegrated in the great branch of private law. The Family Code becomes a component of the New Civil Code, as it was between the two world wars, before the rise of communism.

The principle of juridical stability therefore finds one of the most important of its attributes, its accessibility. Thus, both an unspecialized individual as well as a legal specialist may know the law without the need for a legislative migration. The legislator also has the possibility to exclude contrary, illegal or ineffective laws with greater ease, observing them all in their systemized entirety.

“Each State of Law needs the confirmation of a complete and coherent legislative corpus.”[29]. These are all ideals to which Jeremy Bentham aspired when he discussed the matter of codification.

At the time of codification, Portalis became aware of the difficulties of this great project: “To simplify is a task which we need to come to terms with. To stipulate everything is a goal impossible to achieve.”

The beneficial effects of codification, as a factor of political unity, social integration and unification and knowledge are counterbalanced by severe consequences: the legalist positivism radiates from there; we have tried to believe that the law may be a norm of social conduct independent of political or geographic limitations; we have forgotten or lessened the historic source which is a cornerstone of the legal system; we have forgotten to identify the legal morality because the only expression of this is codified; the idea of common law was limited by the tendency to regionalize; the law thus unfortunately faces its sovereign authority.[30]

Conclusions

“Born” out of a desire to systemize the internal laws and to harmonize it with the European laws, the New Civil Code appears as a manifestation of the collective consciousness, weighed down by factors which determine and rally the passage of time. Such factors are doubtlessly the mark of policies, the economy, traditions, morality, in one word of the place where the code appeared, will create its own history, ideas and behaviours. Time and reality will give the verdict whether the New Civil Code is a mere fantasy or on the contrary a common reality. Thus, the new codes will follow the tradition of other important legislative works which have survived the ages and have guided the material from which they appeared or they will fall trap to themselves, and thus become only mere collections of texts without the possibility of originating new

ideas and behaviors without the protection offered by the enforcement of the state. However, a code, be it civil, criminal or procedural, needs to have the support of the people that it serves without any external intervention from a constraining force.

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