



ORIGINAL PAPER

The Constitutionalisation of Codification in Romanian Law

Mădălina-Cristina Dănișor*

Abstract

The paper aims to explain the role of codification in our societies, in which degree the objectives of rationalization and unification of law are accomplished in Romania and what is the proper way to conceive the legal system of codification in order to counteract the inflation and instability of the law. The study concerns the evolution of codification in post-totalitarian Romania, in relation to the Civil Code and the Criminal Code. From this perspective, the constitutionalisation of the procedures of codification, of the areas that can be codified and the constitutionality control of the codification can lead to finding the equilibrium between the need to change and adapt the legislation and the imperative of predictability and legal security. The solution to the lack of predictability and the incoherence of the law is to create a new category of normative rules, i.e. the codes, protected from political majorities by a special procedure, with certain areas reserved and a procedure of control, all of these guaranteed by the Constitution.

Keywords: *codification, rationalization, legal security, constitutionalisation, legal instability*

* Lecturer, PhD, University of Craiova, Faculty of Law, Constitutional Law and General Theory of Law specialization, Phone: 0040755017257 E-mail: madalina.danisor@yahoo.com.

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The Social and Political Role of Codification in the 19th Century

Codification played a particular role in the political and social life of the 19th century. From a political perspective, it represented the clearest manner through which power – by now already centralised – gained a type of legitimation which could hardly be contested anymore. The political role of codification is inherently related to the social impact of codes on human relations. The 19th century could be referred to as the “the golden age of codification” (Cabrillac, 2002: 29), only if we take into account the whole process of consolidation of nation states and the process of unification and simplification of legal rule that has brought about an effervescence to which states could not oppose. “Already present in the course of the compilation of rules drafted by royal power in the previous centuries, political factors play an even more prevailing role in the 18th century. The codification accompanies the end of the process of state centralization revolving around an all-powerful sovereign and the disappearance of complex socio-political structures inherited from the last remains of the feudal age” (Cabrillac, 2002: 25).

Thus, the French codification, which opens the way to codifications, is constantly and enthusiastically requested by the actors of political and social life. Article 19 of the Law on judicial organisation (August 16th 1790) provides that “civil laws shall be revised and reformulated by legislators and a general code of simple and clear laws, appropriated to the Constitution, shall be drafted”. The ideas that have campaigned for the waiver of the fragmentation and division of law in favour of a unique and coherent system have not spared the Anglo-Saxon environment, to this day impregnated with the prevalence of customary law over written law. It is Jeremy Bentham’s case who, “convinced by the superiority of law, militates for the adaptation of a universal and integral code, the Pannomion, drafted in a language which is accessible to all, of absolute completeness which would give leeway to no interpretation” (Cabrillac, 2002: 33).

Driven by the great Napoleonic codification work, European states had to meet the demand for a simple and clear legislation. From an ideological point of view, Germany was divided between the supporters of codification and the supporters of the Historical School, who considered that customary law reflected best the need of the society for justice. Thus, the representatives of the opposed trends concisely expressed the need for reform, present during the age. In *De la nécessité d'un Code civil général pour l'Allemagne*, F. Thibaut fights against legal insecurity as follows: “Let us sum up all of this: any patriot should subsume to the desire that a simple Code, the work of our own power and mastery, be created according to the needs of the people, to root and fortify correspondingly the state of our civil relations and that all German governments, by forming a patriotic league, eternally bestow on the ensemble of the empire the blessings of the same civil constitution” (apud. Duffour, 1996: 54).

On the other hand, in *De la vocation de notre temps pour la législation et la science du droit*, Savigny rejects the idea regarding the confiscation of legislative sovereignty by a state organ, awarding local particularities and case-law the primordial role in the customary and jurisprudential creation of law: “Civil law already presents a determined character, specific to each people, similar to its language, principles and constitution... any law is created in such a way that current language qualifies it as customary, i.e. it is first produced through the use and the opinion of the people and through case-law” (apud. Duffour, 1996: 55).

The French Civil Code of March 21st 1804, which represented the starting point and source of ideological, liberal and conservative inspiration for most European legal

systems and for others as well, triggered a cascade process of codification in the newly formed nation states and in those states which were under French political and cultural influence. This was also the case of the Romanian Civil Code of 1865 which was a natural consequence of the 1859 Union of the Romanian Principalities and which contributed, if not to the union of local customs, at least to the typically Romanian political unification, on the basis of the recognition of a unique source of the rule of law, i.e. the legislator of the new national state.

The notion of codification designates a “body which restores law by putting an end to the plurality of its sources. It particularly designates the movement of transformation of the sources of law which was driven by actions undertaken by modern states, through the crossover from customary law to written law” (Zenati-Castaing, 2011: 356). In the 19th century the code, i.e. the product of codification, received a new definition which “resulted from the Philosophy of Lights and from Iusnaturalism which praised the law as expression of the general will and manifestation of human reason. The code was conceived as a coherent body of rules which reformed existing law, a new conception which would generalise fast” (Cabrillac, 2002: 55). Nonetheless, this body of rules does not confine to its role as instrument, but is rather necessarily “animated by the philosophy of the School of modern natural law, according to which positive law is an attempt to reveal natural law, a type of law which is common to all people, and this revelation can only be performed through the exercise of reason” (Zenati-Castaing, 2011: 356).

Codification pursues the imposition of human reason against all other circumstantial, political or power-related grounds. Hence, the philosophy which has animated codification is based on objectives of systematisation, simplification and unification of different disparate regulations, in order to extract the true meaning of the rules of social conduct and to guarantee legal security. The three essential principles of codification can be synthetically rendered through three generic objectives assigned to it: “To codify means firstly to systematise a scattered legal matter; it then means to accomplish a work of political unification by means of prioritising fundamental values; lastly, it means to guarantee the legal security of citizens against arbitrariness” (Blanco, 1998: 510). Thus, codification is much more than merely a legislative technique; it is “an instrument of Power whose symbolical, political and legal aptitudes go much further than if it were a simple collection of laws” (Blanco, 1998: 510).

The Transformation of Objectives and of the Social Goal of Codification

Subsequent to the 19th century codification, marked by a desire for the rationalisation and reformation of law and its sources, the following century witnessed the settling and sedimentation of the work of codification, which led to “an abandonment of the scheme of codification of the 19th century in favour of codifications called ‘à droit constant’, which consisted of the rational regrouping of existing law without modifying it” (Cabrillac, 2002: 45). Although in certain areas of the law we no longer speak of an original codification, but only about a recodification of the matter for the purpose of the systematisation and updating of primary regulations, the process of codification maintains a certain, almost mythical aura. As regards the objective of the rationalisation of law, extremely valued in the Iusnaturalist age, its place seems to have been replaced by other benefits which codification can bring to public power. Thus, “codification does not limit itself to the science and the ensemble of techniques which ensure the rationalisation of law, it also responds to the challenges of power” (Sakrani, 2008: 462).

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Current societies are confronted with changes in the nature of codification, as a result of the priority which state intervention seems to obtain over the practice that society does to law. “The state is no longer content to ratify the law which is produced by civil society, such as it had done until then and as it did on the occasion of codification, it has taken over the task of telling the law. It has complicated law which codification had in mind to contrarily simplify, creating vast spaces of regulation populated with special laws and hence ruining the effect of exhaustiveness which the code was meant to produce. In contrast, it has brought about the deconstruction of certain codified parts, striking a heavy blow at the principle of ‘code’ itself” (Zenati-Castaing, 2011: 362).

The multiplication of special laws has led to the unravelling of the coherence of codes, to the dilution of the significance of their authority, hence to a process which is diametrically opposed to the process of codification. General principles have been replaced with particular rules which are meant to respond to some special momentary needs (Dănişor, 2013: 12-28), which leads in turn to a spectacle-legislation that imposes quantity in the detriment of quality, compromising the very fundament of rational law. “Today, more than ever, legal rationality is nothing more than the rationality of a type of politics which has grown to be reasonable” (Blanco, 1998: 516). The codification specific to the 19th century was followed by the consolidation of existing legislation through punctual amendments and updates, which is referred to in French doctrine, in its own style and out of its own need for categorisation, ‘codification à droit constant’. This attenuation of the effects of codification has concretised into the loss of the authority of the codes, into the exponential growth of the number of special laws and, eventually, into decodification. “The decodification and development of special laws sketch a different vision from that of the age of codification, a vision in which the cult of general principles which form the basic structure of modern codes has gone into decline. Today, we rather regulate naturally in detail than put emphasis on maxims and the fecundity of common law” (Zenati-Castaing, 2011: 362-363). In this context, the challenge that current societies face is to conceive the concrete way to recodify law by returning to principles. Consequently, it is decisive to establish which those principles are that recodification must put its basis on and whether traditional objectives can still be assigned to the codes. In other words, we must outgrow the relationship codification – consolidation – decodification.

The Objectives of Codification – The Case of Post-Totalitarian Romania

Similar to the nation states that have consolidated their legitimacy through centralised law, monopolised by state power and, hence, codified, contemporary states tend to use codification again in order to counteract the practice of the multiplication of special regulations. We witness a paradoxical situation: on the one hand, the political power seems unable to resist the temptation of frantic law-making, meant to tackle the tiniest change in social reality; on the other hand, states preach the legal security persons ought to enjoy and promote the need for more stable codes. The paradox springs from the impossibility of political power to find a balance between the immobility of legislation which is indispensable to legal security and predictability and the mutability of law, as vector of adaptation to the evolution of society. Hence, state law seems to alternate between periods of legislative inflation and periods when the stability provided by the codes is acutely felt. Codification, as legislative technique, would bring “a welcomed symbolic surplus for surmounting the legitimacy crisis which institutions suffer of” (Blanco, 1998: 522).

The Romanian state confronts with this paradox in a particular way, if we take into consideration the crossover from authoritarian totalitarianism to liberalism, which has not been accompanied by the development of civil society and by full internalisation, by the political power, values and procedures of liberal democracy. The new political regime was legally founded by a new Constitution, animated by the precepts of the philosophy of liberal democracy, but which was not followed in the downstream of normative hierarchy by new branch constitutions. Thus, until the moment of the adoption of new Civil and Criminal Codes, the legislator tried, through primary regulations, to keep up with the principles of liberal constitution. There were actually legislative interventions that brought punctual amendments, dependent on political and partisan circumstances, frail implants in a system immobilised by time, habit and obedience, which had no chance of success on the reformation of the legal system.

Until it could achieve recodification on other ideological and philosophical bases, the Romanian society suffered from destructuring through the multiplication of the sources of law, from the invasion of special laws, from the severe damage of the rationality and security of the legal system, due to lack of clear philosophy. Thus, alongside the codes, numerous special provisions coexisted, the laws and law-making acts of the executive led to substantial and constant amendments in the codified legislation, so as to adapt it to the new liberal logic, which consequently brought about insurmountable problems for the recipients of the law. On the one hand, there is an extremely low chance to decipher the legislator's will amongst the jumble of norms, on the other hand, there are the ambiguity, lack of predictability, clarity, coherence and unity that have transformed the rules of law into an irrational ensemble (as it could only be a sum of unorganised norms in the system, since a system is essentially defined by rationality). "The rationality that is released from this form of codification exemplarily translates the essential property of any system, according to which the ensemble has more important value than the sum of its elements; systematisation itself determines the emergence of nascent properties that each element, in isolated state, did not exhibit" (Van de Kerchove and Ost, 1988: 114).

The constant oscillation of the political power and the civil society between the practices of the old regime and the new liberal philosophy, normatively imposed through the fundamental law, has led to the creation of the above mentioned paradoxical situation. Codification has had two important moments in post-totalitarian Romania. The first is represented by the attempts to adapt the Civil and Criminal codes and the Codes of Procedure to the novel project of democratic and liberal society, concretised in punctual amendments, legislative repeals, the multiplication of special laws, overlapping of regulations from several normative levels, a codification 'à droit constant' specific to the Romanian society. This type of codification "is rather a matter of simple compilation and constitutes no more than a comfortable assemblage of some disparate rules. It is neither structured nor subject to a well-defined plan nor organised, coherent and systematised. It is not necessarily a model of logical and orderly architecture" (Baudouin, 2005: 615). The second moment was brought about by the need to adopt new codes, as a result of the dismantling of the legislative system through the belittlement of the normative value of codes. This phase concerns the movement from decodification to recodification. It is important to further analyse if there was a clear philosophical direction which guided the evolution of legislation throughout the two above mentioned moments.

The alternative to the regime of totalitarian dictatorship known by the Romanian state could not be, according to the revolutionary people and to the constituent power that it invested, other than liberal democracy. Thus began a long process of reconstruction that

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should have led to the foundation of a new type of society. Although it seemed clear that, in order to put the basis of the new political regime, a new constitution establishing the new principles of the political and social structure was indispensable, things were less evident for the other fields of law, due to the fact that new “branch constitutions” were not adopted in these areas as well. Subsequently to the revolutionization of the totalitarian regime and until the new Civil and Criminal Codes were adopted in 2009 and entered into force in 2011 and 2014 respectively, the normative ensemble was bombarded with uncoordinated amendments and could be characterised as lacking any systemic logic, due to the fact that the adaptation to the new project of society was conducted by philosophically confused institutions. “Indeed, a code is a whole, an ensemble, an organised, logical structure whose elements are all interdependent... fragmentation thus risks causing contradictions or, at least, harming the unity of thought and philosophy, which would not be desirable” (Baudouin, 1992: 16).

It is sufficient to analyse a few situations in order to uphold the conclusion of a lack of clear philosophical direction. Such a case concerns the legal regime of property and the regulation of the legal situation of some state-owned residential real estate properties. The legislation was intended to regulate the restitution of nationalised properties for the purpose of solving the disputes between former owners or their inheritors and the tenants who became the owners of those properties. Law no 112/1995 was amended, supplemented and implemented by a large number of normative acts (L. no 112/1995, supplemented by L. no 10/2001 regarding the legal regime of some properties taken over abusively in the period 6 March 1945 – 22 December 1989. L. no 10/2001 was amended and supplemented by: the Emergency Ordinance of the Government no 209/2005, L. no 247/2005, L. no 74/2007, L. no 1/2009, L. no 302/2009, L. no 202/2010, L. no 165/2013 (amended by L. no 386/2013), L. no 187/2012, L. no 135/2014 and the Emergency Ordinance of the Government no 98/2016), which has led to the disruption of the normative frame in question, to the deprivation of the legal security of the persons who were affected by these measures through the amendment of the legislative solution, to the creation of situations of legal unpredictability concerning the properties subject to restitution, to numerous internal disputes, to decisions of unconstitutionality and condemnations of the Romanian state from the ECHR, both for violating the right to property, as well as for the climate of legal insecurity and unpredictability caused by constant amendments (Judgment of the ECtHR in case *Brumărescu c. România*). Furthermore, we must not forget that all this special legislation has developed in parallel with the Civil Code and the Code of Civil Procedure.

As regards criminal matters, we find a similarly complex and convoluted situation. In this case, given that we speak of particularly coercive norms, the principles of legal security and predictability play an even greater role. Moreover, the former Criminal Code was adopted during the totalitarian age and, even if it has been substantially amended either as a result of the legislator’s will (acts that amended and supplemented the 1968 Criminal Code: D.L. nr. 12/1990, D.L. nr. 112/1990, L. nr. 20/1990, L. nr. 65/1992, L. no 88/1992, L. no 104/1992, L. no 140/1996 – amended punishments and increased their amount, L. no 197/2000, Emergency Ordinance of the Government no 207/2000, Emergency Ordinance of the Government no 295/2000, Emergency Ordinance of the Government no 10/2001, Emergency Ordinance of the Government no 89/2001, L. no 456/2001, L. no 61/2002, Emergency Ordinance of the Government no 58/2002, Emergency Ordinance of the Government no 93/2002, Emergency Ordinance of the Government no 143/2002, L. no 85/2005, L. no 278/2006, L. no 58/2008, L. no 27/2012)

or as a result of the unconstitutionality of certain provisions (title IV – crimes against public wealth, was repealed as a result of the decisions of unconstitutionality no 32/1993, no 33/1993, no 49/1993, no 18/1994; decision no 81/1994 regarding the unconstitutionality of the provision which incriminated homosexual relationships forewent the decriminalisation of homosexual acts in 2000), these amendments have not succeeded in altering the philosophical stand.

In this context of legal unpredictability, the need for the repeal of old regulations and for the recodification of the civil and criminal fields has become more obvious. However, in order to do so, we would require the affirmation and adherence to a philosophy that would manage to overcome the past in order to create a coherent, unitary, systematised, clear and rational legislation (Putinei (Dănișor), 2011: 83-94). There is no indication from the general analysis of the new codes that their drafters have any philosophical coherence, or that the new codifications are apt to achieve specific objectives. Thus, codification should unify and systematise the norms pertaining to a particular field. Just as the first codes initially gathered all customary legal practices and made them accessible through the centralisation and standardisation of law, perceived now as a system, the new codes should have assembled all the special laws around certain clear principles and should have regulated coherently. The recodification should have simplified the legislation through the suppression of all infra-legislative regulations. Unfortunately, this is not the case with civil law, due to the fact that commercial law aspects (L. no 31/1990 regarding companies; L. no 85/2006 regarding the procedure of insolvency; L. no 249/2005 for the amendment of L. no 64/1995 regarding the procedure of judiciary reorganisation and bankruptcy; Emergency Ordinance of the Government no 54/2016 regarding the compulsory insurance against civil liability in respect of the use of motor vehicles for damage caused to third persons through motor vehicle and tram accidents, which amended L. no 136/1995 regarding insurances and reinsurances in Romania) have not been introduced in the new Civil Code, leaving this domain exposed to amendments which, be they even inadvertent, have become a habit in the Romanian legislative landscape. This has also been the situation in criminal law, where the new Code has yet failed to unify legislation, numerous criminal norms still being found in special laws (L. no 78/2000 regarding the prevention, discovery and punishment of corruption acts, amended by L. no 187/2012; L. no 143/2000 regarding the fight against illicit drug trafficking and consumption; L. no 196/2003 regarding the prevention and fight against pornography).

This is not an argument for the repeal of all special laws that also have criminal provisions, as they are not incompatible with the existence of a criminal code, but only for the repeal of those laws that are essentially criminal. Taking into account the fact that the standardisation of legislation has not occurred, the new codes are merely compilations of texts that decided to incorporate certain regulations, so that others may remain the subject of special regulations. “A criminal regulation made up only of special laws would fragment the system and would possibly introduce foreign logic, attacking individuals’ security and the principle of minimal intervention which are still constitutionally guaranteed” (Blanco, 1998: 523).

The incapacity of the new codes to attain the objectives of systematisation, simplification and creation of a coherent legislation is also highlighted by the case-law of the constitutional court. Thus, on the basis of this already rich case-law regarding the control of the constitutionality of the new codes, we notice the invalidation of a large number of provisions pertaining to both the Civil Code or the Code of Civil Procedure

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and, particularly, to the Criminal Code and the Code of Criminal Procedure (Decisions of the Constitutional Court of Romania: no 712/2014; no 17/2017; no 625/2016; no 169/2016; no 44/2016; no 866/2015; no 839/2015; no 603/2015; no 485/2015; no 11/2015; no 508/2014). The obligation of the body issuing the unconstitutionally declared normative acts to align the provisions in question with the provisions of the Constitution has generated a series of new problems for the coherence and predictability of the codes. Therefore, although the constitutionality vice has been covered through the intervention of the Parliament or, as appropriate, through that of the Government, we cannot but ask ourselves in what way the internal logic of the codes thus amended is affected, once the legislator has had a certain idea concerning the realisation of criminal politics, into which have been subsequently implanted new provisions in accordance with the decisions of the Constitutional Court.

This problem of legislative instability caused by the multiplication of amending norms is recurrent in all legal branches, but the situation in the coercive fields is worse. A clear example is given by Law no 227/2015 regarding the Fiscal Code, which entered into force on January 1st 2016 and has undergone an impressive number of amendments and additions so far, especially through emergency ordinances of the Government, four of which having brought changes in the Fiscal Code even before its entry into force (Emergency Ordinances of the Government: no 41/2015; no 50/2015; no 57/2015; no 50/2015; no 8/2016; no 41/2015; no 32/2016; no 46/2016; no 84/2016; no 3/2017; no 9/2017; L. no 2/2017; L. no 57/2016). This exceptional state of emergency that constantly resumed several times during one calendar year, has transformed it from being the exception to becoming the rule. Punctual regulations give birth to legal instability and unpredictability in the field of fiscal constraint and deny the idea of ‘code’.

The Crisis of Legitimacy and the Need for a Change of Paradigm

The Romanian legislative system is in crisis. Its core structure is being mined. Moreover, the entire legal system suffers from the loss of legitimacy, because the principles that should fundament its functioning have lost their significance and rank, being transformed in simple norms, left at the disposal of the original or delegated legislative power. The solution to the legitimacy crisis lies in awarding the codes a special constitutional statute in the normative hierarchy, in the context in which “the legal scheme inherited from Kelsen is being questioned today. The pyramidal law is replaced with ‘a type of law in network’ produced by dispersed power centres, inspired by political and technocratic reasons” (Blanco, 1998: 529).

The loss of the symbols and authority of the codes has happened as a result of the lack of procedural protection provided by the fundamental law, which could acknowledge the existence of a new category of normative acts, superior to organic and ordinary laws, and which could be removed from the power of manoeuvre held by the circumstantial political majority. This change of paradigm is necessary due to the fact that the lack of protection procedures has led to the birth of a normative system which is devoid of guiding principles and which is, consequently, irrational, fragmented, incoherent, unstructured, caused by normative inflation.

Current codes are nothing else but laws. Even their title reflects this conclusion, as it contains the formulation “*Law regarding the Code...*”. Only the interpretation of constitutional provisions, which reserves organic law certain fields of regulation leads to the conclusion that the codes are generally organic laws, when they intervene in these fields. The procedure, overwhelmed by the amendment and supplementation of organic

law, does not represent a real protection for the stability of the codes, due to the fact that, in Romania, the emergency ordinances of the Government can intervene in the field of organic law as well, according to the interpretation of article 115 (5) and (6) of the Constitution and to the case-law of the Constitutional Court. Moreover, the limits imposed to regulation through emergency ordinances provided by article 115 (6) of the Constitution are inefficient, because they were invalidated in practice when the Government adopted ordinances, thus affecting the rights and liberties provided in the Constitution, but what prevailed was the extraordinary situation which justified, in the light of the Government, the emergency of the regulation.

The situation was similar in respect of the Civil and Criminal Codes, and the Codes of Civil and Criminal Procedure alike, because their adoption was hastened and, hence, the opportunity, necessity and normative content of the provisions were rapidly debated. Thus, the Criminal Code was adopted through government liability, according to article 114 (3) of the Constitution, it was then amended after the adoption, but before its entry into force. Likewise, the other codes were amended and supplemented, and their unconstitutionally declared provisions were put into compliance with the Constitution. A special case is represented by the Law regarding the Fiscal Code, where instability has already reached other dimensions. Another problem is also the way in which state organs have decided to fulfil the constitutional obligation to align the unconstitutionally declared provisions with the provisions of the Constitution. Article 147 (1) of the Constitution clear establishes that the obligation is incumbent upon the issuing body, i.e. the Parliament or, as appropriate, the Government. This principle was not taken into consideration because, although the body which issues the codes is the Parliament, regardless of the fact that the legislative procedure has been finalised in the Parliament or through government liability, the Government has frequently aligned the unconstitutional norms with the Constitution through emergency ordinances. Actually, this obligation has not been executed in a valid way, which underlines the idea that the unconstitutionally declared norms and for which the Parliament has not intervened in order to align them with the Constitution, loose their legal effects, according to article 147 (1) of the Constitution. One of the possible solutions for breaking this vicious circle of legislative patchwork presupposes awarding the codes a different constitutional statute.

The Constitutionalisation of the Codification Procedures and of the Matters

Under the circumstances in which organic law is left at Government's disposal, which can amend it through emergency ordinances, the constitutionalisation of codification procedures and matters is equivalent to the cutting of the Gordian knot. Considering that "a code, like a constitution, is founded on the unified national will and translates the main options of general consensus" (Blanco, 1998: 523), it should also enjoy special adoption and amendment procedures, apt to confer it stability and predictability.

Firstly, the Constitution should provide, within the normative hierarchy, a separate category of normative acts, i.e. the codes, and a special adoption and amendment procedure which should presuppose the presence of a qualified majority, superior to the majority required for the adoption of organic laws, eventually a majority of two thirds of the number of the members of each chamber, which is required for the review of the Constitution. "Actually, [...] in as far as it regards the constitutionally protected fundamental rights, the Code should be consequently approved by special majority" (Blanco, 1998: 513). We should also mention the opinions sustaining that the codification procedure should not lead to the creation of a new category of normative acts, because

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“codification is not magically gifted: it does not operate any transmutation” (Cerdas-Guzman, 2011: 140).

Secondly, as supplementary protection, the fundamental law should establish certain fields which should be reserved to the codes, in order to limit regulation through special laws. Of course, the constitutionalisation of codification procedures and matters cannot be efficient unless a revision of the regime of emergency ordinances is made, in order to impede the Government from encroaching on the legislative competences of the Parliament. From this point of view, the Government would not enjoy, under any circumstance, the competence to regulate in the fields reserved to the codes, either through liability actions or through the adoption of emergency ordinances for the amendment or supplementation of the codes. Of course, such a solution requires the review of the Constitution, both for the consecration of a new category of normative acts, of its competence fields, as well as for the reconfiguration of the legal regime of the acts issued by the Government, as delegated legislator.

From the analysis of the Romanian legislative system, it transpires that such procedures similar to the ones described above as solution to legislative instability have been inefficient, due to the fact that institutional practice has invalidated them many times. Therefore, taking view of the fact that current constitutional regulations concerning the competences of state authorities have been conceived by the constituent body within the logic of the principle of the separation and equilibrium of powers, it is necessary that the compliance with these procedures be guaranteed by an intrinsic and extrinsic constitutionality control of the codification, which would allow the Court to rule on codification, decodification or recodification.

Conclusions

The legislative instability and inflation, the lack of legal security, of clarity, structure and predictability of current normative systems cannot be contested. The most convenient solution seems to be the attempt to decelerate the rhythm of law-making and to increase the quality of the norms, with the help of codification. Any codification is originally a technical response to a need of legal security. This need of legal security translates concretely into the search for a rationalisation of law, its most elaborate form being that of the codification (Molfessis, 2000: 661).

Despite the many advantages that codification brings along, the perverse effects of the objective of law rationalisation cannot be ignored. A legal system that seeks only the rationalisation of the rules of law may eventually privilege form over substance and create a ‘beautiful law’ in the detriment of a ‘good law’. Thus, we can already notice that, many times, “we have lost sight of the search for a just law in order to adhere to the simple expression of the codified norm” (Oppetit, 1996: 17). A further risk which we must take into account concerns the fact that, if the exhaustive regulation of law is the sole goal of codification, the consequence will then be a too rigid legal system, ossified around certain values which can hardly be changed. In this regard, Max Weber observed that the code tends to lean towards completeness and towards the creation of a closed system: “the codification has a tendency towards exhaustiveness and believes it can achieve it” (Weber, 1986: 204). On the other hand, the opposite idea of an open system cannot be fully upheld: “we can always dream of an open, mobile code which would follow the flux of history relentlessly. But it is not therein that the genius of codification lies” (Carbonnier, 1996). A period of legislative respite is consequently necessary. “Codification must always be accompanied by a period of respite which isolates the completed work so as to better allow

it to detach itself amidst an ever-moving legislative whirlwind and which gives the legislator time to breathe, just like the Creator who, once He had finished His work, allowed Himself a day of rest” (Cabrillac, 2002: 120). This is why only the principles that guide codification should be perennial, so as to allow the legal system to be sufficiently malleable to integrate social changes and yet stable enough to avoid turmoil caused by redundant regulations.

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