

# EUROPEAN CIVIL CODE BETWEEN DESIDERATUM AND REALITY

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## **Abstract**

*The principle of priority and direct application of European rules in relation to the provisions that we find in the national legislation, once assumed at European level, it has generated debates and concerns about the usefulness of a single legal act in private law matters. The idea of European Civil Code, appeared somewhere in the early 80s, is becoming more current and triggers a justified and sustained interest. Considering that the civil legislation of Community Member is a legislation dominated by tradition and peculiarities of culture, religion and temper, the issue of a European Civil Code forms as a project generating discussions, restraints and even rejections of the Member States in relation to this proposal. The current system of European legislative acts that apply immediately and priority in EU member states remains only a temporary solution and which generates difficulties in interpretation and affects the utility of the enactment. Clarifications on the pros and cons to promote a European Civil Codex will be analyzed primarily in terms of law and, last but not least in terms of political perspective, taking into account the Community objectives undertaken by accession treaties and the need for a legislative norm, especially European, to be predictable, transparent, useful and accessible. This paper intends to submit to debate both current doctrinal arguments, the blocking of such an approach, based on the principle of autonomy and the peculiarities of the legal system of each Member State, but also considering the practical arguments and of simplification of rules met in a European Civil Code assumed and applicable in the European space.*

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**JEL Classification:** K10, K33

## **1. Introductory remarks**

Based on the analysis of multiple meanings of the concept of European identity, taking into account the theory of Furio Cerutti that propose this analysis to be carried out on several levels, among which: the identity generated by political objective, the identity generated by legislative similarities, and a legally phenomenological study<sup>2</sup>, we propose that this paper to focus on an assessment of the identity of the European Union from normative perspective, context in which we will analyze the opportunity to achieve at Community level of a European civil code, taking into account the usefulness of the approach and the potential vulnerabilities caused by it.

Although the approach of European identity concept was multi-disciplinary achieved and sustained, this concept continues to generate disputes depending on the type of approach, based on the achievement of European identity from sociological perspective, continuing with its creation in terms of political and economic relations development and continuing with the development of a regulatory system uniformly applicable throughout Europe. Clearly, regardless the type of approach, we find conflicts between objectivity and subjectivity of the European common approaches between net differences and the existing conceptual approaches between EU Member States and depending on the approach of any project in relation to individual interests vs. collective intellect.<sup>3</sup>

All these contradictions and the permanent social and political development, evolution that forms the legal system in civil law matters in the European space, to mobility and a continuous

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<sup>2</sup> Cerutti Furio *Why political identity and legitimacy matter in the European Union*, in Furio Cerutti and Sonia Lucarelli, *The Search for a European Identity. Values, policies and legitimacy of the European Union*, London/New York, Routledge, 2008 p. 3-22; Dana Irina, Universitatea Babeș-Bolyai, Cluj-Napoca, PhD Thesis *Dimensiunile identității europene* - 193.231.20.119/doctorat/teza/fisier/751 (last visited on 1 October 2015).

<sup>3</sup> Sophie Duchesne, *L'identité européenne entre science politique et science fiction*, Paris, Ed. L'harmattan, nr. 30, p. 7; see Dana Irina, Universitatea Babeș-Bolyai, Cluj-Napoca, Phd Thesis *Dimensiunile identității europene* - 193.231.20.119/doctorat/teza/fisier/751 (last visited on 1 October 2015).

reference to social realities, creates additional difficulties in achieving a European Civil Code and a unique identity from the perspective of private law legislation in this space.

The Commission communication on European Contract Law<sup>4</sup> represents the moment of launching some sustained actions by public consultation which were designed to identify the differences in regulatory approaches of Community Member in civil law generally and mainly in their commercial and contractual matters. If in European commercial law matter, the unifying legislative steps were sustained and constantly existing a strong and permanent pressure from the economic environment, pressures which had as objective that European citizens to take full advantage of the Community market, in respect of a European Civil Code built in a monistic conception, containing rules of private law to consider the rights and duties of citizens even before they are born and after their death, the project is proving to be a more difficult endeavor.

## 2. Issues raised by the scope of the European Civil Code

Starting from the national civil law, respectively the national civil codes are different in terms of states that have adopted the monistic version of it, in comparison with other states and taking into account the different legal systems even within the community area, rises the legitimate question "which should be the scope of this European instrument?". This general question challenges doctrinarians in matter of civil law to rule on a series of subsequent questions, such as: should European Civil Code regulate relations only between private individuals, between natural persons, between natural persons and legal entities of private law, or will be regulated also some reports between natural person or legal person of private law and state institutions that have competence in matters affecting their private law.

Being a European instrument, should cover both cross-border and domestic relations. It should in the context of a European Civil Code to be delineated and approached distinctly between those two categories of reports, respectively cross-border and domestic.

Based on the Commission's Green Paper on policy options towards a European Contract Law for consumers and business<sup>5</sup>, material content of the European Civil Code should relatively restrictive represent the scope to be limited to definitions, procedures and contractual obligations or could address as it would be natural for a broad interpretation of this area, namely focusing on topics such as acquisition and loss of ownership, warranties, restitutions, tort liabilities, inheritances as well as regulations relating family law.

The debates on the topic of European Civil Code started as specified in this material from the '80s, consultation generated during the period 07.07.2010 and 31.01.2011 and published on the website of the Commission<sup>6</sup> and political or scientific public positions or institutions with expertise in matters, which were formulated in the subsequent period and currently, starts a current sustained in favor of a European civil of monistic conception with regulation of an area as wide and comprehensive in matters of private law.

## 3. Some comments on initiatives to achieve the European Civil Code

Starting with the private initiatives and taking into account the resolutions of the European Parliament on this topic, we notice a constant concern which over time was strengthened, becoming a potential issue that could be assumed as a common strategy of the European states. In this context we recall the common approach of the European Commission and of Christian von Bar started in 1999 by a study conducted with U. Dobnig and J. Basedow endeavor reunited under the authority of "Foundations for a European Civil Code"<sup>7</sup>. This first step reminded by us, was noted because of

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<sup>4</sup> COM(2001) 398 final (11.07.2001).

<sup>5</sup> COOM(2010) 348 final, Bruxelles 1.07.2010.

<sup>6</sup> ec.europa.eu/yourvoice

<sup>7</sup> From Max Planck, "Institute for foreign and international private law", Hamburg.

the contradiction between the existence of the single market, of some Community policies and of legislation and conceptual normative deep differences.

Concerns on such project, we recall in the right of Volkmar Gessener in "Legalists in the Era of globalization" published in 2007 at Hart Publishing Oxford and of Andreea Pinna in "Drafting a Civil Code for Europe: aims and methods"<sup>8</sup>. Right from the start the two papers cited, reveals us the existence of different approaches, approaches whose difference is given by arguments relating to a possible legal uncertainty, of the possible tensions between institutions arising from national traditions and customs but also of the existence, as we mentioned herein, within the same community space of two legal cultural systems. The large number of international treaties to which EU states have joined with other countries in Community or extra-community, which emphasizes respect for legal national identity of legal culture and of legal tradition of each state, represents another topic of discussion in order to find a solutions that leads to achieve the European Civil Code<sup>9</sup>.

The study of the impact on the international legal system, of the European integration and harmonization of each national legal system with European regulations in order to consolidate the Community acquis, subject to extensive doctrinal studies that could be harnessed in building a Civil Code with European character, assumed by all Member States and to become a useful tool, transparent and uniformly applied.

#### 4. Conclusions

Declaration of Community law by the European Court of Justice, as superior to national standards made that the European legislative instruments to intersect and confuse the national legal system and even conflict with its rules. Romanian Constitution art. 20 para. 2 states that "if there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is party, then the international regulations have priority". Topics such as *sedes materiae* that regulates private law matters, the relation between legal rules when the same issues and procedures are regulated by internal and international provisions, procedure for determining the content of a foreign law as well as issues arising from the temporal application of substantive law, the applicability of a report by private law with foreign elements in the situation in which the provisions in matter were amended successively, and verification in matter of the component of the professional or national authority and acceptance of effects the issued documents produce by foreign authorities in procedures prosecuted in national plan represents challenges that EU has responded so far with solutions that we find in the European Commission's regulations or regulations approved by the European Parliament. The multitude of European laws, nationally regulated and the obligations arising from international treaties and conventions to which a Community state has joined, obviously generates different interpretations and uneven applications in relation to custom, tradition, legal culture and legislative system evolution of each individual state.

Along with a series of visionary theorists, in justified approach of achieving a European civil code have joined law professionals representing the interface in relation to litigants, the European citizens, the one that present the main beneficiaries of european and national legislative approaches. In this context the collaboration and common concerns of lawyers, public notaries, judicial executors, judges, prosecutors and legal advisers at the level of the entire Community space for finding some common procedures and uniform interpretation in relation to European laws in private law matters, shows an endeavor with a remarkable useful purpose. We appreciate that exceeding egos and national legal culture, keeping the institutions and procedures that have proven their utility and efficiency through national application, the European Civil Code may become a legal instrument useful from the perspective of EU citizens and represents a test for the European

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<sup>8</sup> Cosmin Stefan Burleanu, *Europenizarea*, vol I, nr. 4, 2010, Probation junior ISSN 2067-0524.

<sup>9</sup> We regard treaties such as the Treaty of Amsterdam directly addressing specified matters, adding the obligation to respect "the organization and the law systems of States Parties."

states of cohesion and subordination of the individual interest of an European higher interest. This approach obviously represents an approach that will take place in time, and which will face with difficulties caused by the differences of conceptual laws of the Member States, but which in a median waiting horizon will be concluded successfully by adopting a single normative act at European level, a European civil codex that regulates all private law relations existing in the Community.

This work aims only to attract the attention of such an approach challenging specialists of law, theorists or practitioners to a deep reflection on the usefulness of an approach that ensures a uniform and translucent application through procedures accessible to all European citizens of every rules governing a report of private law.

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