University of Bucharest
Faculty of Law

Field: Romanian Law - Civil Law

Habilitation Thesis: Civil law between universalism and particularism. For the refunding and recovery of lost heritage of civil law

Summary

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Cuprins

I. Introduction

The entry into force of the new civil codes - the Civil Code (Law no. 287/2009, republished, with subsequent amendments) and the Code of Civil Procedure (Law no. 134/2010, republished, with subsequent amendments) - represented, indisputably, a major historical event for Romanian law, because, leaving behind some of the longest-lived European civil codes - the Civil Code of 1864 and the Code of Civil Procedure of 1865, succeeds in achieving a broad, major and spectacular recoding of Romanian law, especially of Romanian private law, inspired by a *new legal philosophy* (respect for fundamental rights and freedoms, freedom and human dignity and the harmonization of private interests with the requirements of contractual and non-contractual justice, on the one hand, and free access to justice and the right to a fair trial, on the other) and thus laying the foundations of a new private order, of substantive law and of civil procedural law.

Practically, in the context of the entry into force of the two civil codes – **The New Civil Code** (hereinafter also "NCC" or "*C.civ.")* and **The New Code of Civil Procedure** (hereinafter also "NCPC" or "C.*pr.civ.*") – the future of our legal research, carried out either individually, or in teams or, *in fine*, as a possible coordinator of doctoral theses in the fields of academic consecration - in particular the general civil law (general theory), the law of persons and the property law, including the civil procedure (application of civil procedure rules, theory of civil action, arbitration procedure, enforcement) - is and will certainly be directly dependent on the in-depth analysis of new legal regulations, on the one hand, and on the investigation of their compatibility with similar regulations national and European standards, on the other hand.

In essence, our intention aims at, first of all, an in-depth study of the general institutions of civil law and civil procedural law (elements of the civil legal relationship, sources of civil legal relationship, civil legal act and the extinctive prescription; civil action, arbitration and enforcement), and secondly, an in-depth study of the institution of the land book in the NCC system and of Law no. 7/1996 of the real estate cadastre and publicity, both categories of research also doubled by the analysis of the application and interpretation of the norms of civil law and civil procedural law, especially of the problem of intertemporal law and the creative role of law of judicial practice.

Indeed, as the NCC has diversified the sources of civil law, reconfigured the general principles of civil law and resized the rules on the interpretation and application of civil law rules, while the NCPC has laid the cognitive and executive civil process on new foundations; the above research must be supplemented by an in-depth analysis of the sources, principles, application and interpretation of the rules of civil law and civil procedural law.

II. Romanian civil law at the beginning of the third millennium: between universalism and particularism or between European private law and national law? Scientific and professional achievements

A. Doctoral Thesis. Extinctive prescription[1]

One of the fundamental civil institutions, of positive law (and not of natural law), is the extinctive prescription that was the subject of an ample doctoral research, with inter and trans-disciplinary character, as well as of several studies and articles, both through the prism of the old civil regulations, as well as of the new civil regulations.

As noted, among all civil law institutions, the extinctive prescription, also called liberatory, is "the most necessary to the social order" (Bigot-Préameneu), because it is intended to provide the removal of uncertainty from the civil circuit, to allow "the adequacy of the right to deeds" (G. Marty, P. Raynaud): the state of passivity of the holder of the subjective civil right and the opposition of the holder of the correlative obligation produce either liberating or exonerating effects from civil liability.

It is also the case of the extinctive prescription in the Romanian civil law, under the rule of Decree no. 167/1958: *the non-exercise of the material right to action within the time limit established by law* – time limit considered by the legislator long enough to restore the violated, contested or disregarded subjective civil rights - entails its extinction and, therefore, consequently, *the removal of civil liability of the passive subject.*

Therefore, the holder of the corresponding civil obligation can no longer be held liable and obliged to bear the legal consequences provided by law or stipulated by the parties, as a result of committing an illegal act. From the fact that the prescription extinguishes only the "right to action" (in the material sense), removing the civil liability of the passive subject of the legal relationship of coercion, follows the following legal consequence: *the survival, in principle, of the subjective right, as well as of correlative obligation*, but, of course, only in an incomplete, imperfect legal form, because they remain protected only by the defensive way of the exception. A confirmation of this fact can be found in the provisions of art. 20 para. 1 of the Decree no. 167/1958, which stipulate that the debtor who executed the obligation after the

[1] *Vide* M. Nicolae, *Prescripţia extinctivă* (prefaţă Corneliu Bîrsan), Teză de doctorat, Ed. Rosetti, Bucharest, 2004, (work awarded with the "Istrate Micescu" Prize for 2004 by the Romanian Lawyers Union and the Titu Maiorescu Academic Society); Idem, *Tratat de prescripţie extinctivă*, Ed. Universul Juridic, Bucharest, 2010 (work awarded with the "Traian Ionaşcu" Prize for the best book of 2010 on private law topics of the Romanian Journal of Private Law and of the National Union of Executors from Romania). For particular aspects, such as doctoral and postdoctoral studies, v. *specialiter*: M. Nicolae, *Probleme speciale privind domeniul prescripţiei extinctive*, in AUB Supliment 1999, pp. 11-54; Idem, *Repunerea în termenul de prescripţie*, in Dreptul no. 11/1999, pp. 46-63; Idem, *Prescripţia extinctivă în dreptul procesual civil (Prescripţia dreptului de a cere executare silită)*, in the homage volume „*In honorem* Ion Deleanu. Culegere de studii", Supliment „Pandectele române", 2004, pp. 193-237. Also see M. Nicolae, *Prescripţia extinctivă şi procedurile FIDIC (1999) de soluţionare a litigiilor în dreptul privat român*, in RRDP no. 5/2011, pp. 97-151, and also in Revista română de arbitraj no. 1/2013, pp. 1-38. Adde M. Nicolae, *Discuţii privind unele aspecte legate de aplicabilitatea în dreptul concurenţei a prevederilor legale în materie de prescripţie a contravenţiilor*, in RRDP no. 6/2009, pp. 86-127.

creditor's right to action has expired, does not have the right to request the return of the benefit, even if at the date of execution, it did not know that the prescription time limit was fulfilled.

Since the object of the extinctive prescription consists only in the extinction of the right to action (art. 1 paragraph 1 of Decree no. 167/1958), not only the material, substantial subjective right remains untouched, but also, of course, the procedural right to action, i.e. the right to bring an action, to refer the matter to the court and to try the case, as access to justice is free and cannot be restricted in this respect (Article 21 of the Constitution; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

B. Monographic works

1) Conflict of laws in time (in civil matters)[2]. For a (new) normative theory of intertemporal law

Intertemporal law (also improperly called "transitional law"), i.e. the set of legal rules governing the conflict of laws in time, as a result of the successive regulation of the same matter by both the old law and the new law, is one of the most complex matters of law in general, and of constitutional law, in particular.

Given the obvious insufficiency of the theory of immediate application of the new law and the need to adopt solutions of intertemporal law, in the spirit of legal security of the civil circuit and respect for fundamental human rights, we paid special attention to issues of intertemporal law, in a postdoctoral research materialized in a monograph and several studies and articles specifically dedicated to this purpose.

Thus, after analyzing, critically, the main theories of intertemporal law - the theory of earned rights[3], the theory of the consumed fact[4] and the theory of immediate application of the new law[5] –, as well as the question of the incidence of the new law in certain particular situations[6], we came to the conclusion that, *de lege lata*, in the light of the constitutional

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[2] *Vide* M. Nicolae, C*ontribuţii la studiul conflictului de legi în timp (în materie civilă)*, Ed. Universul Juridic, Bucharest, 2013 (work awarded with the "Andrei Rădulescu" Prize for 2013 of the Romanian Lawyers Union).

[3] *Vide* M. Nicolae*, Soluţii la conflictul de legi în timp. În căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă (I) – Teoria drepturilor câştigate*, in RRDP no. 6/2012, pp. 154-206.

[4] *Vide* M. Nicolae, *Soluţii la conflictul de legi în timp. În căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă (II) – Teoria drepturilor câştigate*, in RRDP no. 1/2013, pp. 137-172.

[5] *Vide* M. Nicolae, *Soluţii la conflictul de legi în timp. În căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă (III) – Teoria aplicării imediate a legii noi*, in RRDP no. 2/2013, pp. 23-90.

[6] *Vide*, *principaliter*: M. Nicolae, *Discuţii cu privire la aplicarea în timp a art. 35-36 din Legea nr. 33/1994 privind exproprierea pentru cauză de utilitate publică*, în Dreptul nr. 11/2000, pp. 23-34; Idem, *Probleme de drept tranzitoriu. Legea aplicabilă nulităţii actului juridic civil (I)*, in RRDP no. 6/2007, pp. 94-129; Idem, *Probleme de drept tranzitoriu. Legea aplicabilă nulităţii actului juridic civil (I)*, in RRDP no. 1/2008, pp. 100-138; Idem, *Este posibilă revendicarea imobilelor preluate fără titlu aflate în posesia societăţilor comerciale integral privatizate? – Notă critică şi explicativă la Decizia Curţii Constituţionale nr. 253/2006 referitoare la excepţia de neconstituţionalitate a dispoziţiilor art. 29 din Legea nr. 10/2001 privind regimul juridic al unor imobile preluate în mod abuziv în perioada 6 martie 1945 - 22 decembrie 1989*, in RRDP no. 5/2007, pp. 251-276; Idem, *Din nou despre neconstituţionalitatea art. 29 alin. 1 din Legea nr. 10/2001, republicată, cu mod. ulterioare – Notă critică şi explicativă la Dec. Curţii Constituţionale nr. 830/2008 referitoare la excepţia de neconstituţionalitate a dispoziţiilor*

principle of non-retroactivity of the new law and of the new provisions of intertemporal law contained in the New Civil Code (art. 6)[7], including in the New Code of Civil Procedure (art. 24-27)[8], civil intertemporal law (and civil procedural law) are governed by 3 general or fundamental principles[9]: principle of non-retroactivity (i); the principle of immediate application of the new law (ii); the principle of survival of the old law (iii).

Indeed, if « *the office of laws is to rule the future, the past is no longer in their power*»[10] (s.n., M.N.), and *quod factum est, infectum fieri nequit*, it is beyond any doubt that any true law is meant, by its generally binding, abstract and hypothetical prescriptions, to govern only the future, for only in this way does it respect its status of proper law, and its author, the status of serious and responsible ruler. This is also the case of the New Civil Code, as well as of the New Code of Civil Procedure, which enshrines, as we have tried to demonstrate[11], three general principles of intertemporal law:

– the principle of non-retroactivity of the new civil or procedural law, a principle with constitutional value that must be observed, without reservations, by the ordinary legislator;

– the principle of immediate application of the new civil or procedural law, an expression of *tempus regit factum* principle, which, in turn, is the consequence of the principle of direct and automatic application of the right of legislative origin;

– the principle of survival of the old law, as a guarantee of the principle of respecting legitimate expectations, as well as the principle of respecting legitimately acquired rights and situations.

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art. I pct. 60 din titlul I al Legii nr. 247/2005 privind reforma în domeniile proprietății și justiției, precum și unele măsuri adiacente (cu opinie separată de Aspazia Cojocaru), in RRDP no. 3/2011, pp. 210-254.

[7] *Vide*, for details, M. Nicolae, *Contribuții la studiul conflictului de legi în timp în materie civilă (în lumina Noului Cod civil)*, cit. *supra* [note 2], în special no. 108 *sqq*., p. 300 *sqq*.; Idem, *Drept civil. Teoria generală*, vol. I, *Teoria dreptului civil*, Ed. Solomon, Bucharest, 2017, no. 203 *sqq*., p. 421 *sqq*. Adde M. Nicolae, *Principiul neretroactivității și Noul Cod civil*, in AA.VV., Noile Coduri ale României. Studii și cercetări juridice, Ed. Universul Juridic, Bucharest, 2011, pp. 82-105; Idem, *Principiul aplicării imediate a legii noi și Noul Cod civil*, în Revista de științe juridice nr. 1/2012, pp. 9-48. For particular aspects, *vide*: M. Nicolae, *Uzucapiunea tabulară în Noul Cod civil. Aspecte de drept material și de drept tranzitoriu (intertemporal)*, in Dreptul nr. 3/2013, pp. 13-48; Idem, *Despre retroactivitatea așa-zisei legi de dare în plată*, in AA.VV. Legea dării în plată. Argumente și soluții (coord. Valeriu Stoica), Ed. Hamangiu, Bucharest, 2016, pp. 74-97 (also available at *http://www.juridice.ro/465212/despre-retroactivitatea-asa-zisei-legi-de-dare-in-plata.html*); Idem, *Aplicarea în timp a așa-zisei Legi de dare în plată. Despre retroactivitatea Legii nr. 77/2016 și neconstituționalitatea Deciziei Curții Constituționale nr. 623/2016*, in M. Nicolae, I.-Fl. Popa (coord.), „Credite pentru consumatori. Provocări legislative și tensiuni constituționale românești", Ed. Solomon Bucharest, 2017, pp. 1-111; Idem, *Tempus regit contractum: Legea aplicabilă contractelor definitive sau de formație progresivă*, in RRDP no. 1/2021, pp. 56-112.

[8] *Vide infra*, note 40.

[9] *Vide*, for details: M. Nicolae, *Contribuții la studiul conflictului de legi în timp în materie civilă (în lumina Noului Cod civil)*, cit. *supra* [nota 2], no. 108 *sqq*., p. 300 *sqq*.; Idem, *Teoria generală*, I, cit. *supra* [note 7], no. 204 *sqq*., p. 425 *sqq*.

[10] «*L'office des lois est de régler l'avenir; le passé n'est plus en leur pouvoir*» (Portalis, *Discours préliminaire sur le projet de Code civil* [Exposé des motifs du titre 1er du Code civil], apud Merlin, vo *Effet rétroactif*, *in* «Répertoire universel et raisonné de jurisprudence», 5e éd., t. X, H. Tarlier, Libraire-Éditeur, Bruxelles, p. 1). V. and G. Mârzescu, *Maximele dreptului roman cu aplicațiune la Codicele nostru civil*, Partea I-A, Jassy, Tipo-Litografia H. Goldner, 1880, p. 41.

[11] *Vide*: M. Nicolae, *Contribuții la studiul conflictului de legi în timp în materie civilă (în lumina Noului Cod civil)*, cit. *supra* [note 2], nr. 108 *sqq*., p. 300 *sqq*.; Idem, *Comentariu general ad art. 24-28*, in „Noul Cod de procedură civilă comentat și adnotat" (coord. Viorel Mihai Ciobanu, Marian Nicolae), vol. I (Art. 1-526), 2nd edition, revised and enlarged, Ed. Universul Juridic, Bucharest, 2016, p. 98 *sqq*.

The fundamental problem of intertemporal law (*pietra di saggio*)[12] remains that of determining the law applicable to current situations *(facta pendentia)*, of resolving the dispute between the old law and the new law for governing these situations. The need to respect legitimate expectations and forecasts, as well as the recognition of legitimately acquired rights or situations provides, as we have shown several times, the primacy of the old law, not the new law, which becomes applicable only by way of exception.

All three principles above also apply to the *ratione temporis* application of the very provisions of the New Civil Code, which entered into force on October 1, 2011 (except, mainly, those concerning the translational or constitutive effect of rights to record registration rights), as it results, without a doubt, from the particular intertemporal provisions provided in Law no. 71/2011 for the implementation of Law no. 297/2009, with subsequent amendments and additions[13],but also for the application of the provisions of the New Code of Procedure, which entered into force on February 15, 2013, according to Law no. 76/2012 for the implementation of Law no. 134/2010, with subsequent amendments and additions[14].

2) Publicity of rights, acts and legal facts[15]

Another field still insufficiently explored, but capital for the security – both static and dynamic - of the civil circuit, in Romanian law is that of publicity of rights, acts and legal facts, this complex matter being the subject of extensive and in-depth research on our part, especially in the field of real estate (land) registration.

Thus, after the entry into force of Law no. 7/1996 of the real estate cadastre and publicity, we firmly expressed our opinion in the sense of its immediate application and the opening of temporary (*non-definitive*) land books, at the request of the interested person[16], pursuant to the former art. 61, we analyzed, in detail, the regime of the new land books in a remarkable monograph[17], and then in an extensive treaty on real estate (land) registration,

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[12] In this respect, G. Pace, *Il diritto transitorio con particolare riguardo al diritto privato* (con prefazione del prof. Mario Rotondi), Casa Editrice Ambrosiana, Milano, 1944, n° 77, p. 260. *Cf*. G. Broggini, *La retroattività della legge nella prospettiva romanistica*, *in* «Coniectanea. Studi di diritto romano», Milano, Dott. A. Giufrrè Editore, 1966, pp. 391-392.

[13] *Vide*, for details, M. Nicolae, *Contribuţii la studiul conflictului de legi în timp în materie civilă (în lumina Noului Cod civil)*, cit. *supra* [note 2], nr. 202 *sqq*., p. 510 *sqq*.

[14] *Vide*, for details, M. Nicolae*, Comentariu general ad art. 24-28*, cit. *supra* [note 8], in „Noul Cod de procedură civilă comentat şi adnotat" (coord. Viorel Mihai Ciobanu, Marian Nicolae), vol. I (Art. 1-526), 2nd edition, revised and enlarged, Ed. Universul Juridic, Bucharest, 2016, pp. 103-106.

[15] *Vide*: M. Nicolae, *Publicitatea imobiliară şi noile cărţi funciare*, Edit Press Mihaela, Bucharest, 2000; Idem, *Tratat de publicitate imobiliară*, 2 vol., Ed. Universul Juridic, Bucharest, 2006 (work awarded with the „Mihail Eliescu" Prize of the Romanian Lawyers Union for the year 2006 and the "Andrei Rădulescu" Prize of the Romanian Academy); Idem, *Tratat de publicitate imobiliară*, 2 vol., 2nd edition, revised and enlarged, Ed. Universul Juridic, Bucharest, 2011.

[16] *Vide* M. Nicolae, *Note* to the civil sentence no. 4203/1995 of the District 5 Court in Bucharest, in Dreptul no. 11/1996, pp. 108-113.

[17] *Vide* M. Nicolae, *Publicitatea imobiliară şi noile cărţi funciare*, cit. *supra* [note 15], *passim*. For particular aspects of real estate (land) registration in Romanian law, see also: M. Nicolae, *Căile de atac care pot fi exercitate împotriva încheierilor birourilor de carte funciară din zonele ţării în care încă este aplicabil Decretul-lege nr. 115/1938 (II)*, in Dreptul no. 10/1999, pp. 53-62; Idem, *Uzucapiunea în sistemul noilor cărţi funciare*, în SUBB nr. 1/2003, pp. 56-68; Idem, *Discuţii în legătură cu înţelesul şi sfera de aplicare a art. 28 din Legea nr. 7/1996 a cadastrului şi publicităţii imobiliare (II)*, in Dreptul no. 4/2005, pp. 74-100; Idem, *Publicitatea materială a cărţilor*

published in two successive editions[18], in which we also briefly presented - in the 2011 edition –, the specificity of real estate (land) registration in the light of the New Civil Code, emphasizing the need and usefulness of coding and modernizing real estate (land) registration rules and showing the main novelties of the new higher regulation and, especially unitary ones, meant to replace the old real estate (land) registration systems, both the system of registers of transcriptions and real estate inscriptions, applicable both in the Old Kingdom and the land book system, applicable in the old land book regions (Transylvania, Banat, Crisana, Maramures and Southern Bukovina).

3) Unification of civil and commercial obligations[19]

As it is known, on October 1, 2011 the New Romanian Civil Code entered into force, and on January 15, 2013, the New Code of Civil Procedure.

The first completed and formalized the disappearance of the distinction between civil and commercial obligations, the second, the distinction between civil and commercial litigation.

The fusion of civil and commercial law was, as we tried to demonstrate in a monographic paper specially written for this purpose[20], a historical necessity, which could only be postponed, but by no means avoided.

In response to these historical imperatives, the New Civil Code, in line with the modern trend of unifying domestic private law[21], has abolished the distinction between civil and commercial obligations and adopted a new law of obligations, unitary, modern and general, regardless of the quality of the parties, the source of the obligations and their effects.

However, especially in doctrine, but also in practice, for objective and/or subjective reasons, the question of the fate of commercial law and the so-called «commercial jurisdiction» was raised.

As in Italy[22], which has achieved the unification of private law since 1942, for example, the turmoil in the literature, especially among commercialists, revolves around the survival or non-survival of commercial law, if not as a legal branch (so-called « normative autonomy»), at least as a legal science and academic discipline (the so-called « scientific and didactic autonomies»).

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funciare, in AA.VV., *In honorem* Corneliu Bîrsan ◊ Liviu Pop. Culegere de studii, Ed. Rosetti, Bucharest, 2006, pp. 44-100; Idem, *Acţiunile de carte funciară*, in Buletinul INPPA no. 1/2006, pp. 5-59; Idem, *Spre o legislaţie unică de carte funciară sau despre odiseea unificării regimului român de publicitate imobiliară*, in Revista de ştiinţe juridice nr. 2/2018, pp. 44-77; Idem, *Despre terţi în materie de carte funciară*, in RRDP no. 1/2020, pp. 80-96.

[18] *Vide supra*, note 15.

[19] *Vide* M. Nicolae, *Unificarea dreptului obligaţiilor civile şi comerciale*, Ed. Universul Juridic, Bucharest, 2016. Vide also M. Nicolae, *Les conséquences de l'unification du régime juridique des obligations dans le Nouveau Code civil*, in AA.VV., Le colloque international «Le nouveau Code civil roumain: Vu de l'intérieur – Vu de l'extérieur» (Flavius-Antoniu Baias, Răzvan Dincă, eds.), vol. I., Faculté de Droit de l'Université de Bucarest, EUB, 2014, pp. 317-333.

[20] *Vide*, for details, M. Nicolae, *Unificarea dreptului obligaţiilor civile şi comerciale*, cit. *supra* [previous note], especially no. 81 *sqq*., p. 398 *sqq*.

[21] For examples, *vide* M. Nicolae, *op. ult. cit*., no. 88, p. 441 *sqq*.

[22] *Ibidem*, nr. 74 *sqq*., p. 346 *sqq*.

Once the unification of the law of civil and commercial obligations has been achieved by the entry into force of the New Civil Code, however, for many traders, this unification does not mean at all the formal disappearance of commercial law, which is said to be impossible because, in essence, The NCC is incomplete and non-unitary, the NCC is the source of the new commercial law, based on criteria other than those of the previous commercial law: the professional trader and the commercial enterprise (s) and the NCC have only altered, at most, the normative autonomy of commercial law, and not its scientific and didactic autonomy (iii).

In fact, as I have shown at length in the paper mentioned[23], these criticisms are due either to a superficial reading of the New Civil Code, with flagrant ignorance of the legislator's will, or to a malicious and biased reading, also contrary to the letter and spirit of the new "fundamental law" of civil legal relations.

C. Legislative comments and coordination of collective legal work

1) The general regime of non-profit legal entities[24]

In the matter of non-profit legal entities (also called non-profit legal entities), their status was established by special regulations, of a general or sectoral nature, as the case may be.[25] The first general, unitary and systematic regulation of non-profit associations and foundations appeared in 1924. Known as the Mârzescu Law, after the name of the Minister of Justice at that time, **Law no. 21/1994 for legal persons (Associations and Foundations)**[26], with subsequent amendments and additions, it was, arguably, one of the most modern and successful regulations, managing to withstand, despite historical vicissitudes, to this day, when it was repealed by G.O. no. 26/2000 on associations and foundations, the new regulation being the subject of a brief, but dense comment in a remarked work[27], under the auspices of the Association for the Defense of Human Rights in Romania - Helsinki Committee, realized together with Marieta Avram, Horaţiu Dumitru and Bogdan Dumitrache and in which the experience/contribution of the authors to the elaboration of this important normative act was valued.

2) Restitution of properties abusively taken over by the state between March 6, 1945 - December 22, 1989 [28]

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[23] *Vide*, for details, M. Nicolae, *Unificarea dreptului obligaţiilor civile şi comerciale*, cit. *supra* [note 19], no. 114 *sqq*., p. 525 *sqq*.

[24] *Vide* M. Avram, M. Nicolae, H. Dumitru, B. Dumitrache, *Ghid legislativ pentru organizaţiile neguvernamentale*, Asociaţia pentru Apărarea Drepturilor Omului în România – Comitetul Helsinki, 2002.

[25] For details, *vide* M. Avram, M. Nicolae, H. Dumitru, B. Dumitrache, *Introducere*, in „Ghid legislativ pentru organizaţiile neguvernamentale", cit. s*upra*, p. 5 *sqq*.

[26] Publ. in M. Of. no. 27 of February 7, 1924.

[27] M. Avram, M. Nicolae, H. Dumitru, B. Dumitrache, *Introducere*, in „Ghid legislativ pentru organizaţiile neguvernamentale", cit. s*upra* [note 24], p. 11 *sqq*.

[28] *Vide*: Fl.A. Baias, B. Dumitrache, M. Nicolae, *Regimul juridic al imobilelor preluate abuziv*, vol. I, *Legea nr. 10/2001 comentată şi adnotată*, second edition, revised and enlarged, Ed. Rosetti, Bucharest, 2002; Iidem,

In 2001, after more than 10 years since the Revolution of December 1989 and after it had been promised by the post-December legislator[29], Law no. 10/2001 regarding the legal regime of some real properties abusively taken over between March 6, 1945 - December 22, 1989[30], with the stated purpose of finally resolving the problem of repairing the damages caused to Romanian and / or foreign citizens by taking over their properties by the communist power established on March 6, 1945, which subsequently generated, in judicial doctrine and practice, multiple discussions, often controversial, and an abundant judicial practice, but not infrequently divergent, a situation censored by the ECHR, requiring a pilot decision, *Maria Atanasiu and Others v. Romania Judgment of October 12, 2010*[31], the intervention of the High Court in United Sections, by Decree no. 33/2008[32], as well as a new special complementary law regarding the measures necessary to complete the restitution, Law no. 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of real properties abusively taken over during the communist regime in Romania[33], with subsequent amendments and additions.

These problems have been anticipated, in principle, since the date of publication of Law no. 10/2001 and for many of them, we offered adequate, pertinent and useful answers, which constituted important landmarks in the judicial practice, especially those formulated within a special comment of Law no. 10/2001[34], completed with an overview of the legal regime of the real properties abusively taken over in Romania[35] and of the situation of the properties abusively taken over in Romania[36], showing at the same time the legal significance of Law no. 10/2001 and its limits of application[37].

3) Civil Procedure[38]

Regimul juridic al imobilelor preluate abuziv, vol. I, *Legea nr. 10/2001 comentată și adnotată*, și vol. II, *Legislație și jurisprudență* (with notes by Marian Nicolae), Ed. Rosetti, Bucharest, 2001 (work awarded the "Copy - Ro" Prize in 2001 by the Society for Collective Management of Copyright attached to the Writers' Union of Romania).

[29] *Vide* art. 77 of Law no. 58/1991 on the privatization of trade companies, publ. in M. Of. no. 169 of August 16, 1991.

[30] Publ. in M. Of. no. 75 of February 14, 2001 and republished in M. Of. no. 798 of September 2, 2005.

[31] Publ. in M. Of. no. 778 din November 22, 2010.

[32] Publ. in M. Of. no. 108 of February 23, 2009.

[33] Publ. in M. Of. no. 278 of May 17, 2013.

[34] *Vide* M. Nicolae, in *Regimul juridic al imobilelor preluate abuziv*, vol. I (2002), cit. *supra* [note 28] (author of the Chapters: III, pp. 205-244, IV, pp. 245-247, V, pp. 248-251, and VI [Considerații generale și comentarii la art. 46-52], pp.263-286, 293-323).

[35] *Vide* Fl.A. Baias, in *Regimul juridic al imobilelor preluate abuziv*, vol. I (2002), cit. *supra* [note 28], no. 1 *sqq*., p. 9 *sqq*.

[36] *Vide* M. Nicolae, *Situația bunurilor preluate abuziv în România*, in „Regimul juridic al imobilelor preluate abuziv", vol. I (2002), cit. *supra* [note 28], no. 15 *sqq*., p. 19 *sqq*.

[37] *Ibidem*, no. 31 *sqq*., p. 49 *sqq*.

[38] *Vide* V.M. Ciobanu, M. Nicolae (coord.), *Noul Cod de procedură civilă comentat și adnotat*, vol. I (Art. 1-526), ed. a II-a, revăzută și adăugită, Ed. Universul Juridic, Bucharest, 2016; *Idem*, *Noul Cod de procedură civilă comentat și adnotat*, vol. II (Art. 527-1.134), Ed. Universul Juridic, Bucharest, 2016. This work was awarded the "Mihail Eliescu" Prize in 2016 by the Romanian Lawyers Union and the "Traian Ionașcu" Prize in 2016 for the best book of the year in the field of private law of the Romanian Journal of Private Law and the Romanian National Union of Bailiffs.

The link between civil law and civil procedural law is not only natural, but also absolutely necessary, because, while civil procedure is the means of realizing civil law, guaranteeing the reality and effectiveness of subjective civil rights and legitimate interests of any natural or legal person, civil law is the very raison d'être of civil procedure.

That is why the study of civil law norms cannot ignore the existence and effectiveness of civil procedure norms.

For this reason, but also by virtue of the direct involvement in the reform of the civil legislation, as a member of the commissions for the elaboration of some important normative acts, such as G.E.O. no. 138/2000 for the amendment and completion of the Code of Procedure and, especially, of the New Code of Civil Procedure - Law no. 134/2010, republished, with subsequent amendments and additions -, we paid special attention to the in-depth analysis of some institutions or issues of civil procedural law.

In this context, it is worth mentioning first of all the collaboration, as coordinator, with Mr. Dean Viorel Mihai Ciobanu, on the one hand, and co-author, on the other hand, of an extensive commentary on the New Code of Civil Procedure[39], in which we carried out the analysis of some important and innovative legal provisions regarding the principles and rules governing the new civil process: **arts. 24-28** (application of the law of civil procedure)[40]; **arts. 548-554** (arbitration agreement)[41], **arts. 622-631** (purpose and object of enforcement)[42]; **arts. 706-711** (prescription of the right to obtain enforcement)[43].

D. Studies, articles, notes and comments on judicial and constitutional practice

A significant part of the scientific research activity was focused on the analysis of theoretical and / or practical legal issues related to the interpretation and application of legal provisions in various matters of civil law, including civil procedure, both under the old Civil Code and in the light of the new Civil Code and special civil law, and the results of this

[39] *Vide* note 38.

[40] *Vide*: M. Nicolae, *Comentarii sub art. 24-28*, in „Noul Cod de procedură civilă comentat şi adnotat", vol. I, cit. *supra* [previous note], pp. 98-146*;* Idem, *Legea aplicabilă proceselor şi executărilor silite în curs în lumina Noului Cod civil şi a Noului Cod de procedură civilă*, in vol. „Conferinţa Internaţională Procedura civilă – Procedura execuţională civilă. Fundamente ale procesului civil în Uniunea Europeană, 5-9 sept. 2012, Constantă", Ed. Universul Juridic, Bucharest, 2012, pp. 153-176; Idem, *Curtea Constituţională şi principiul supremaţiei dreptului (Rule of Law). De la garantarea supremaţiei Constituţiei la denaturarea şi rescrierea acesteia: Tempus regit processum*, in AA.VV., Le colloque international «Le nouveau Code de procédure civil roumain: Vu de l'intérieur – Vu de l'extérieur» (sous la direction de Traian C. Briciu, Paul Pop), Faculté de Droit de l'Université de Bucarest, Ed. Hamangiu, Bucharest, 2021, pp. 118-146, and in Revista de note şi studii juridice, 2019, available at the address: https://www.juridice.ro/essentials/2824/curtea-constitutionala-si-principiul-supremacy-dreptului-rule-of-law-de-la-garantarea-supremacy-constitutiei-la-denaturarea-si-rescrierea-acesteia-tempus-regit-processum.

[41] *Vide* M. Nicolae, *Comentarii sub art. 548-554*, in „Noul Cod de procedură civilă comentat şi adnotat", vol. II, cit. *supra* [note 38], pp. 86-150.

[42] *Vide* M. Nicolae, *Comentarii sub art. 622-631*, in „Noul Cod de procedură civilă comentat şi adnotat", vol. II, cit. *supra* [note 38], pp. 289-346.

[43] *Vide* M. Nicolae, *Comentarii sub art. 706-711*, in „Noul Cod de procedură civilă comentat şi adnotat", vol. II, cit. *supra* [note 38], pp. 581-646.

research have materialized in several studies, articles, notes and comments on judicial practice that can be grouped thematically (sources, application and interpretation of civil law[44]; the role of *ius commune* of the civil law[45]; the law of persons[46], the property law[47], the law of real estate advertising[48], the law of obligations and contracts[49], civil procedure[50] etc.), many of them being noticed and capitalized both by the doctrine and by the judicial practice.

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[44] *Vide specialiter*: M. Nicolae, *A comenta este o artă dificilă*, in AA.VV., *In honorem* Alexandru Bacaci & Ovidiu Ungureanu. Culegere de studii, Ed. Universul Juridic, Bucharest, 2012, pp. 398-402; Idem, *Recursul în interesul legii și dezlegarea, în prealabil, a unei chestiuni de drept noi de către Înalta Curte de Casație și Justiție în lumina noului Cod de procedură civilă*, in Dreptul nr. 2/2014, pp. 13-73; Idem, *Legea dării în plată:* Lex authentica sau simulata?, in AA.VV., *In honorem* Ion Lulă (Abuzul de drept), Ed. Universul Juridic, Bucharest, 2016, pp. 214-240; Idem, *Noul Cod civil și sfârșitul absolutismului juridic*, in the homage volume „Liber amicorum *Ioan Leș*" (ed. coord.: Teodor Bodoașcă, Călina Jugastru, Eugen Hurubă, Verginel Lozneanu), Academia de Științe juridice din România & Ed. Universul Juridic, Bucharest, 2017, pp. 197-213; Idem, *Buna-credință și echitatea în Noul Cod civil*, in RRDP nr. 4/2020, pp. 70-110.

[45] *Vide*: M. Nicolae, *Noul Cod civil între dreptul comun și dreptul privat comun*, în vol. omagial „*In honorem* Corneliu Bîrsan", Ed. Hamangiu & Revista Dreptul, Bucharest, 2013, pp. 29-112; Idem, *Noul Cod civil și drepturile speciale*, in vol. colectiv „Conferința Internațională Reforma statală prin prisma noilor coduri juridice", Constanța, 3-4 aprilie 2014, Ed. Universul Juridic, Bucharest, 2015, pp. 9-37; Idem, *Dreptul comun al contractelor nenumite*, in AA.VV, Contractele nenumite în afaceri (ed. Lucian Bercea), Ed. Universul Juridic, Bucharest, 2017, pp. 15-31, disponibil și la adresa www.juridice.ro (ultima accesare: 25 mai 2017); Idem, *Dreptul comun al contractelor*, in AA.VV., *Hic et nunc*: Alexandru Athanasiu, Facultatea de drept, Centrul de drept social comparat, Ed. C.H. Beck, Bucharest, 2020, pp. 148-168.

[46] *Exempli gratia*: M. Nicolae, *Considerații generale asupra calității de subiect de drept civil a statului român*, in PR nr. 3/2002, p. 211 *sqq*.; Idem, *Considerații asupra calității de subiect de drept a unităților administrativ-teritoriale*, în Dreptul nr. 5/2002, p. 26 *sqq*.; Idem, *Discuții privind calitatea și reprezentarea procesuală a unităților administrativ-teritoriale*, în Dreptul nr. 6/2002, p. 75 *sqq*.

[47] *Exempli gratia*: M. Nicolae, *Legea nr. 54/1998 privind circulația juridică a terenurilor*, in Dreptul no. 8/1998, p. 3 *sqq*.; Idem, *Considerații asupra Legii nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia*, in Dreptul no. 6/1999, p. 3 *sqq*.; Idem, *Discuții privind interdicțiile legale de înstrăinare a unor bunuri imobiliare*, III, in Dreptul no. 7/2001, p. 44 *sqq*.; Idem, *Strămutarea ipotecii imobiliare conform Noului Cod civil*, in Dreptul nr. 12/2014, p. 61 *sqq*.: Al.-G. Ilie, M. Nicolae, *Discuții în legătură cu natura juridică a dreptului de preempțiune*, II, in Dreptul, no. 1/2004, p. 34 *sqq*.

[48] V. *supra*, note 17.

[49] *Exempli gratia*: M. Nicolae, *Nulitatea parțială și clauzele considerate nescrise în lumina noului Cod civil. Aspecte de drept material și drept tranzitoriu*, în Dreptul nr. 11/2012, pp. 11-39; Idem, *Publicitatea cesiunii de creanță*, in AA.VV., Liber Amicorum Liviu Pop. Reforma dreptului privat în contextul federalismului juridic european (ed. coord.: Dan Andrei Popescu, Ionuț-Florin Popa), Ed. Universul Juridic, Bucharest, 2015, pp. 586-653; Idem, *Natura juridică a „remediilor" (sancțiunilor) contractuale*, in AA.VV., *In honorem* Valeriu Stoica, Drepturi, libertăți și puteri la începutul mileniului al III-lea (ed. coord.: Marian Nicolae, Radu Rizoiu, Laura-Toma Dăuceanu), Ed. Universul Juridic, Bucharest, 2018, pp. 582-613; Idem, *Curtea Constituțională și impreviziunea. O altă lectură tot constituțională a Deciziei nr. 623/2016*, in AA.VV., *In honorem* Dan Chirică. Între dogmatica dreptului și rațiunea practică (ed. principal Dan Andrei Popescu), Ed. Hamangiu, Bucharest, 2018, pp. 529-614; Idem, *Despre declarația unilaterală de rezoluțiune și reziliere. Probleme teoretice și practice*, in M. Nicolae (coord.), „Actul juridic în Noul Cod civil. Probleme teoretice cu implicații practice", Ed. Solomon, Bucharest, 2020, pp. 185-256.

[50] *Vide*: V.M. Ciobanu, G. Boroi, M. Nicolae, *Modificările aduse Codului de procedură civilă prin Ordonanța de urgență a Guvernului nr. 138/2000*, in Dreptul nr. 1/2001, pp. 3-22 (part I); Idem, *Modificările aduse Codului de procedură civilă prin Ordonanța de urgență a Guvernului nr. 138/2000*, in Dreptul no. 2/2001, pp. 3-41 (part II); Idem, *Modificările aduse Codului de procedură civilă prin Ordonanța de urgență a Guvernului nr. 138/2000*, in Dreptul
no. 4/2001, pp. 3-37 (part III).

III. For the refunding and recovery of lost heritage of civil law. Proposals and directions for future research and development (future projects)

A. The theory of civil law

1) Quo vadis ius civile?

What is civil law (*Quid ius civile*)? What is its object and content (*Quid iuris civilis*)? What is the foundation, *recte*, what are the foundations of civil law (*Quæ fundamenta iuris civilis*), What is the purpose of civil law (*Quod finis iuris civilis*)?

The answers to these questions have been different over time and ages.

As we have shown, on another occasion[51], at present, in the light of the new Civil Code, which reconfigured many of the institutions of Romanian law, achieving the unification of the so-called "private law" by abolishing the formal distinction between civil and commercial obligations, reinstated the common law role of the provisions of the new Civil Code not only for so-called "private" matters, but also for those claimed by the so-called "public law", and at the same time proclaimed the preeminence of the individual, the dignity and freedom of the person, in relationship not only with various groups or communities or social, political, cultural or religious communities, but also with the state itself, the status of civil law, its role and place in the law as a whole is no longer and cannot remain the same.

Even if this status is not, perhaps, fully defined, one thing is already certain, in our opinion: civil law is no longer a simple right subordinated to public law or, as the case may be, a simple general private law, i.e. a residual common law.

Indeed, nowadays, in the conditions of the declaration of man's preeminence, of its fundamental civil rights and freedoms, on the one hand, and of the continuous erosion, of the "collapse" (Hanoch Dagan) obviously, if not even of the very disappearance of the continental distinction between the so-called "private law" and the so-called "public law", civil law is (no longer) either *ius privatum* (as in modern times), or *ius proprium civitatis* (as in Roman times), but *ius commune civitatis* or, more precisely, the law itself of civil society (*ius proprium societatis civilis*). It is more than *ius privatum*, because it also applies to relations between the state and individuals or even between public authorities and institutions, but it is less than *ius civile Romanum*, as it represents only *ius commune substantiale*, without including also *ius commune processuale* (civil procedural law) and, even less so, the so-called *ius publicum* (constitutional law, administrative law, criminal law, etc.).

Therefore, at least *de iure condito*, civil law is, nowadays, the fundamental right of patrimonial or non-patrimonial relations between any natural or legal persons, of private law and of public law, regardless of their condition, status, quality or state.

The object and content of civil law, the finalist and by no means neutral nature of civil law, the guiding and correcting principles of civil law, as well as the current role of civil law, including its transnational character, are to be the subject of an in-depth and systematic

[51] M. Nicolae, *Argumentum: Pentru refondarea și recuperarea eredității pierdute a dreptului civil*, in *Teoria generală*, I, cit. *supra* [note 7], p. XXX *sqq*.

analysis in the first volume, entitled "*Introducere generală/Caracterizare generală a dreptului civil"* in tome I (Partea Generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae)[52].

2) Is civil law autonomous?

What is the place of civil law in the normative system, in the national legal order? What is the place of Romanian civil law in Romanian law? Is it an autonomous or heteronomous right? If so, what does the autonomy of civil law mean? If not, what does the heteronomy of civil law mean?

As we have shown on another occasion[53], the answer depends not only on clarifying the concepts of autonomy and heteronomy "in" law, but also on the philosophical-political conception of the role and functions of different branches/ sub-branches of law, especially on the relationship between so-called «Public law», and so-called «Private law», respectively of the dependence or not of private law on public law.

All these aspects will also be the subject of special investigations, both from the perspective of domestic law and from the perspective of comparative law, in the very first volume, entitled "*Introducere generală/Caracterizare generală a Dreptului civil*," in tome I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.

3) Sources of civil law. Application of civil law. Interpretation of civil law

The new Civil Code stipulates that the law, customs (custom and professional usages) and general principles of law are sources of civil law (art. 1). Therefore, civil law is no longer reduced, as it is considered in current doctrine, to positive civil law, *i.e.* to normative acts - sources of civil law. At the same time, not only national laws are sources of civil law, but also international regulations that are, *ipso iure*, part of domestic law. These regulations, in this case European Union law and international human rights treaties, apply as a matter of priority in relation to national regulations (arts. 4 and 5).

The problem that arises is therefore not only that of the relationship between written and unwritten sources[54], but also that between written sources issued or sanctioned by national authorities and those issued or sanctioned by international authorities.

It results not only in a pulverization of the sources of civil law, but, above all, in an undermining, if not a suppression of the myth of the supremacy of national law, and thus a disintegration of national sovereignty, to the extent that they are in accordance with international regulations or, as the case may be, provide for more favorable solutions.

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[52] The Draft **Tratat de Drept civil** (12 volumes, about 90 volumes), launched on the occasion of the 160th anniversary of the founding of the Faculty of Law of the University of Bucharest, November 21-22, 2019, the Palace of the Faculty of Law, which will appear under the general coordination of Prof. Valeriu Stoica and Marian Nicolae, can be consulted on the website of the Center for Natural Law Studies and Normative Analysis at the address www.csdnan.ro.

[53] *Vide* M. Nicolae, *Teoria generală*, I, cit. *supra* [note 7], no. 25, p. 66 *sqq*.

[54] *Cf.* art. 1 para. (3) NCC ("In matters governed by law, customs shall apply only in so far as the law expressly refers to them").

It was and is very delicate, even in the context of the new regulations [art. 124 para. (3), art. 126 para. (3), art. 147 para. (4) of the Constitution; art. 1, 4, 5, 9 C.civ .; art. 5, art. 517 para. (4), art. 521 para. (3) C.pr.civ.], The status of the judicial practice, in particular the decisions of the Constitutional Court and of the High Court of Cassation and Justice given in the appeals in the interest of the law or, as the case may be, in the notifications for resolving in principle a legal issue we, regarding the general effects (*erga omnes*) of court decisions in relation to the traditional conception according to which the judge resolves, based on the law, disputes between individuals or between them and public authorities, and does not create the law to resolve them.

However, it is obvious that sometimes the judge does not limit himself to applying the law, but contributes to its interpretation and application, when the text of the law is unclear or contradictory, and other times even replaces the legislator, when the regulation is incomplete or completely missing [art. 5 para. (2) and (3) C.pr.civ.]. Moreover, the judge - in this case the "constitutional judge" or the one of administrative contentious - has the power to control the constitutionality or legality of the acts of the legislative or executive power, as the case may be, fulfilling, as it was excellently said, the role of negative legislator.

In all these hypotheses, court decisions are binding *erga omnes*, but without being, in our opinion, primary and true sources of law (civil, public), since they do not enshrine or give rise to new rules of law, of a prescriptive, generally binding nature, since, by hypothesis, these rules pre-existed already (violated constitutional norms, norms interpreted by the High Court, primary norms violated by public administration authorities, etc.), being only clarified or reaffirmed, as the case may be.

However, the role of judicial practice as a complementary source of law is huge and deserves a thorough and interdisciplinary analysis, and cannot be ignored by the doctrine of civil law.

Apart from the delicate issue of the hierarchy of sources of civil law, another issue of civil constitutional law is that of the application in time and space of the rules of civil law, whether written or unwritten.

It is true that, in general, the resolution of conflicts of laws in time in civil matters was resolved quite simply, in the sense that the new law, having no retroactive effect, because art. 15 para. (2) of the Constitution prohibits the retroactivity of the new civil law, has, instead, immediate effect, in the sense that it is applicable not only to future acts and facts (*facta futura*), but also to acts, facts and situations in progress (*facta pendentia*), according to the principle of immediate application of the new law. Or, as we have shown, in a recent work[55], the resolution of the conflict of laws in time is solved, in reality, in the light of three (*not* two) general principles: the principle of non-retroactivity of the new law, the principle of immediate application of the new law and the principle of survival of the old law.

Indeed, if the past escapes the action of the new law (*quod factum est, infectum fieri nequit*), instead, the new civil law applies immediately to all future acts, facts and situations (*facta futura*), because the office of law is to regulate the future, not the past (Portalis).

[55] *Vide* M. Nicolae, *Contribuţii la studiul conflictului de legi în materie civilă (în lumina Noului Cod civil)*, Ed. Universul Juridic, Bucharest, 2013, as well as the works *cited supra*, note 7.

Naturally, current acts, facts and situations (*facta pendentia*) remain subject to the old law, as the new law cannot deceive the parties' trust, but must respect their legitimate expectations and forecasts, as well as the rights and situations legitimately gained, not being it is permissible for the legislature to interfere in private affairs only exceptionally, for serious reasons of general interest and only in compliance with fundamental civil rights and freedoms, as well as the requirements of justice and fairness.

If these are the principles of intertemporal civil law, their effective application remains no less problematic, which is why an in-depth analysis of these principles, as well as the formulation of firm and reliable criteria for their delimitation, constitute tasks of the doctrine in the matter.

It is the reason why our researches initiated through the mentioned monographic work must be continued and corroborated with the researches from other neighboring subjects (procedural intertemporal law, public intertemporal law, etc.).

In fine, besides the question of the hierarchy of sources of civil law and the application of civil law norms, another equally delicate issue is the interpretation of civil law norms, and within it the application, by analogy, of legislative norms. Or, in the latter regard, the NCC prohibits, *in terminis,* the application by analogy of laws that derogate from a general provision, that restrict the exercise of civil rights or that provide for civil sanctions, those laws applying only in the express and restrictive cases provided by law.[56] Is this ban absolute? If so, under what conditions? If not, what are the limits of this ban? An answer, at least in contractual matters, is provided by the New Code itself[57], but the issue must also be investigated in other general areas (property law, personal law) or particular (family law, labor law, guarantee law, etc.) of civil law.

On the other hand, the issue of the temporal effectiveness of judgments that produce *erga omnes* effects (decisions of the Constitutional Court, decisions rendered in appeals in the interest of the law or in the settlement of new legal issues, etc.) should also be analyzed, as well as those that lead to a jurisprudential reversal, as the retroactive application of these effects clearly and seriously affects the legal security of the parties, violates won rights and ignores their legitimate expectations, which in a state of law is subject to the principle of the rule of law, the need to respect human dignity and the demands of justice cannot, in our opinion, be tolerated.

All these issues are to be the subject of a complex investigation in a future work dedicated to the sources of civil law, the application of civil law and civil procedure, as well as the interpretation of civil and civil procedure provisions.

First of all, we intend to develop the analysis of the sources of civil law made in volume I of Teoria generală a dreptului civil, from 2017, by allocating a special volume, vol. II, entitled "*Izvoarele (sursele) dreptului civil*" (in collaboration with Prof. Ionuţ-Florin Popa), in tome I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[58], in which will be addressed the general issue of these sources

[56] Art. 10 NCC.

[57] Art. 1.168 NCC. *Acc*. art. 1.651 (the application of rules from the sale of other nominate or innominate contracts that are translating rights).

[58] V. *supra*, note 52.

(regulation, typology, legal regime), as well as the special issue, respectively the issue of other sources of civil law (good morals, judicial practice, public order), conditions and effects of judicial reversal, hierarchy of sources civil law, including the issue of the legal nature of the decisions of the Constitutional Court and international courts (ECHR, CJEU, etc.).

Secondly, the complex issue of the conflict of civil and civil procedural laws - one of our constant concerns in the last two decades of research - is to be fully reviewed and we will try at the same time to propose a more complete version of the new normative theory (structuralist) of intertemporal law, to which we have already acceded (*supra*, II.B.1), answering, on the one hand, the most delicate question of intertemporal law - the law applicable to the so-called "legal situations being established, amended or extinguished", as well as the future effects of past or current situations (*facta pendentia*), but also the question of whether or not the constitutional principle of non-retroactivity of the new law has an absolute value, as claimed by the Constitutional Court (and not only). These two fundamental issues, as well as the other current issues of intertemporal law, will be dealt with, first of all[59], in volume IV, entitled "*Aplicarea în timp a normelor de drept civil (Dreptul intertemporal civil)*", in tome I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[60]

Thirdly, in terms of the interpretation and application of the rules of civil law and civil procedure, we propose the double treatment of general clauses (i.e. of open legal rules, usually general principles or legal standards, such as public order, good faith, equity, *bonus pater familias* etc.), namely:

– in sources of civil law, on the occasion of the analysis of legal principles - sources of civil law and research of the issue of other sources of civil law (good faith, public order, etc.), on the one hand, and the interpretation and application civil law, on the other hand, respectively in the two volumes of t. I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[61]: vol. II. *Izvoarele (sursele) dreptului civil* (in collaboration with Ionuţ-Florin Popa) and vol. III. *Interpretarea şi aplicarea dreptului civil*;

– in specific matters, given the close connection of these clauses with those matters, such as the issue of abuse of rights (see infra, III.B.3), intended to be dealt with in Vol. VII, entitled "*Apărarea drepturilor subiective civile şi a altor situaţii juridice civile*" (in collaboration with Prof. George-Alexandru Ilie and Ionuţ-Florin Popa), in t. I (Partea generală; coord. Marian Nicolae) of the same Tratat de Drept civil (gen. coord: Valeriu Stoica, Marian Nicolae), *præcit*.

B. Theory of subjective civil rights

[59] We say, first of all, because some particular aspects of the application of civil law in time will be treated separately, if their specificity or other technical or practical requirements require it. V., e.g., the proposal to analyze the issue of the law applicable to advertising in civil law, in „Tratat de Drept civil" (gen coord.: Valeriu Stoica, Marian Nicolae), cit. *supra*, note, t. XII (Publicitatea drepturilor, actelor şi faptelor juridice; coord. Marian Nicolae), vol. I. Introducere în dreptul publicităţii (in collaboration with Dan Andrei Popescu), and for *lex temporis tabularum*, *ibidem*, vol. III/1. Publicitatea imobiliară. Noile cărţi funciare (in collaboration with Dan Andrei Popescu).

[60] *Vide supra*, note 52.

[61] *Vide supra*, note 52.

1) Personality rights

The new Civil Code, for the first time, also includes regulations on fundamental rights and freedoms, the drafters of the Civil Code preferring, for reasons of unity and homogeneity of regulation, to place them in Cartea I (*Despre persoane*), following the *Québécois* model (art. 10-49)[62], devoting a special chapter to the respect due to the human being and its inherent rights (personality rights), in the title reserved to "Natural person" (art. 58-81), as well as a special title on the protection of personality rights and other non-patrimonial rights (art. 252-257)[63].

As far as we are concerned, an overall analysis of the nature, identity and regime of personality rights will be made in vol. V, entitled "*Drepturile subiective civile și alte situații juridice*", in t. I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[64]

2) The issue of secondary rights

As we have shown on other occasions[65], depending on their direct, direct object (or their legal function), a distinction is made between the primary subjective civil rights, origin and the secondary secondary civil rights, derived.

Unlike the main categories of subjective primary civil rights, which give holders direct advantages over property or persons - personality rights, personal or compulsory rights, real rights and intellectual rights - the category of so-called «secondary subjective civil rights» is nowadays, if not controversial, at least problematic. These are, it is argued, certain legal prerogatives that can also be qualified as subjective civil rights, even if they have certain particularities that individualize them and configure them as special, atypical subjective rights or *sui generis* rights. Such individual legal prerogatives - usually called "secondary" or "potestative"[66] rights – far from being a homogeneous, well-defined category, are now the subject of increasingly applied research in order to develop a unitary legal theory. In the case of these rights, not only their existence as such is discussed, but also, for those who admit this category, their object, legal content, and also the ways of exercising and realizing them, including their prescriptibility or imprescriptibility.

This eclectic category of subjective civil rights requires in-depth research, both at the principle[67], and at the application level in the various fields of civil law ((personal law, family law, property law, law of obligations, law of succession, etc.). As far as we are concerned, the

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[62] *Vide*, e.g., É. Deleury, D. Goubau, *Le droit des personnes physiques*, 3e éd., Éd. Yvon Blais, Cowansville (Québec), 2002, p. 61 *sqq*.

[63] For details, *vide* M. Nicolae, *Drept civil. Teoria generală*, vol. II, *Teoria drepturilor subiective civile*, Ed. Universul Juridic, Bucharest, 2018, nr. 24 *sqq*., p. 47 *sqq*. Adde C. Munteanu, *Drepturile personalității. Caractere juridice și limite*, in RRDP no. 6/2011, p. 254 *sqq*.

[64] *Vide supra*, note 52.

[65] *Vide*: M. Nicolae, *Teoria generală*, II, cit. *supra* [note 63], nr. 19, p. 33 *sqq*.; Idem, *Tratat de prescripție extinctivă*, cit. *supra* [nota 1], no. 103, p. 289 *sqq*.

[66] *Vide*, for details, M. Nicolae, *Teoria generală*, II, cit. *supra* [note 63], nr. 59 *sqq*., p. 161 *sqq*.

[67] For details on the notion, characters and typology of secondary rights, v. M. Nicolae, *Teoria generală*, II, cit. *supra* [note 63], no. 61 *sqq*., p. 166 *sqq*.

issue of secondary rights (notion and terminology, typology, legal regime) will be addressed in the context of the general analysis of the typology of subjective rights and correlative civil obligations, including the legal regime of so-called natural obligations, in vol. V, entitled "*Drepturile subiective civile și alte situații juridice*", of t. I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[68]

3) The problem of abuse of law

In principle, the exercise of a subjective right cannot be considered unlawful, even if it would bring certain limitations or shortcomings or cause harm to another: *qui suo iure utitur, neminem lædit*. Consequently, the author of these restrictions or damages is not obliged to repair them, unless the right is "exercised abusively" (art. 1,353 Civil Code).

So, *abuse of law* is not allowed. But what happens when a right is exercised *abusively*?

The new Civil Code expressly enshrines the principle of prohibition of abuse of rights, resolving at least at the legislative level the controversy over the issue of the abusive exercise of the right (art. 15), but despite the express regulation of the prohibition of abuse of law, it is still a open problem, because the abuse of law is defined in an eclectic manner, the criteria of abuse of law are generic, art. 15 constituting a general clause (*Generalklauseln*, *clausole generali*, *general clauses*, *clauses générales* etc.), and the scope, as well as the sanction of abuse of right, are not determined *a priori*. Therefore, as far as we are concerned, in order to develop a theory of abuse of law in civil law, we will try to address and resolve these issues, for the time being at the level of principle, at least in Volume VII, entitled, "*Apărarea drepturilor subiective civile și ale altor situații juridice*" (in collaboration with Prof. George-Alexandru Ilie and Ionuț-Florin Popa), in t. I (Partea generală; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[69]

C. Institutions of civil law and civil procedure

1) The civil legal act

Is there, in normative terms, a general institution of the civil legal act? Or, on the contrary, is there only a general institution of the contract (mainly, art. 1.166-1.395 Civil Code), as well as particular regulations for certain unilateral legal acts (recognition of filiation, will, bequest, etc.)?

The New Civil Code does not contain a general part containing, *inter alia*, provisions of principle regarding the civil legal act. However, it is provided that, unless otherwise provided by law, the legal provisions on contracts shall apply accordingly to unilateral acts.[70] Consequently, starting from the common law of contracts, a general theory of the civil legal act can be founded and elaborated, including, *inter alia*, the notion, typology, foundation and

[68] *Vide supra*, note 52.

[69] *Ibidem*.

[70] Art. 1.325 NCC („Unless otherwise provided by law, the legal provisions on contracts shall apply accordingly to unilateral acts.").

regulation of the civil legal act, the principle of autonomy of will (or freedom of civil legal acts), the formation of the civil legal act (conditions of existence and validity, the nullity and annulment of the invalid legal act concluded), the interpretation of the civil legal act, the effects of the civil legal act (obligation and enforceability civil legal act, i.e. *inter partes and erga tertios effects*) the assignment of the legal act, the execution of the legal act and the termination of the civil legal act, including the also delicate question regarding the delimitation of the civil legal act from the act of public law and the acts of civil procedure.

In this perspective, a monograph or a treaty containing a general theory of the civil legal act in our civil law, under the rule of the New Civil Code [71] and the universal (transnational) civil law, is imperative. As far as we are concerned, we would like to dedicate a monograph to this issue (entitled, provisionally "*Teoria actului juridic civil*"), following the above mentioned theme and taking as models at least the following two fundamental theoretical landmarks: Emilio Betti (*Teoria generale del negozio giuridico*)[72] and Federico De Castro y Bravo (*El negocio giuridico*)[73].

2) Real estate (Land) registration

Title VII – Cartea funciară (art. 876-915) enshrines the real system of real estate (land) registration based on cadastral works and the registration in the land book of real rights and other rights related to real estate. As already mentioned, registration rights, *i.e*. the real rights registered in the land book are acquired, modified or extinguished only by the entry in the land book, based on the act or fact that justified the registration[74].

Along with the principle of the translative or constitutive effect of real estate rights, the principle of priority of registrations[75] and the principle of the acquisition in good faith of a registration right by third party beneficiaries for consideration[76], being at the same time

[71] In the field of the old Civil Code, only one monograph is notable. *Vide* D. Cosma, *Teoria generală a actului juridic civil*, Ed. Științifică, Bucharest, 1967. For partial approaches, *vide*: O. Căpățînă, *Titlul gratuit în actele juridice* (prefață Al. Vällimărescu), Teză de doctorat (1947), Ed. Rosetti, Bucharest, 2003; P. Vasilescu, *Relativitatea actului juridic civil. Repere pentru o nouă teorie generală a actului de drept privat* (prefață Dan Chirică), Ed. Rosetti, Bucharest, 2003; M. Avram, *Actul unilateral în dreptul privat* (prefață Valeriu Stoica), Ed. Hamangiu, Bucharest, 2006. V. and: I. Deleanu, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice*, Ed. Rosetti, Bucharest, 2002; Fl.A. Baias, *Simulația. Studiu de doctrină și jurisprudență*, Ed. Rosetti, Bucharest, 2003; Cr.E. Zamșa, *Teoria impreviziunii. Studiu de doctrină și jurisprudență*, Ed. Hamangiu, Bucharest, 2006; J. Goicovici, Formarea progresivă a contractului, Ed. Wolters Kluwer, Bucharest, 2009; I.-Fl. Popa, *Rezoluțiunea și rezilierea contractelor civile în Noul Cod civil* (prefață Liviu Pop), Ed. Universul Juridic, Bucharest, 2012; George-Al. Ilie, *Riscurile în contracte, de la vechiul cod la noul Cod civil* (preface Corneliu Bîrsan) Ed. Universul Juridic, Bucharest, 2013; Cr. Paziuc, *Răspunderea contractuală. O analiză juridică și economică* (preface Corneliu Bîrsan), Ed. Universul Juridic, 2019.

[72] *Vide* E. Betti, *Teoria generale del negozio giuridico*, ristampa corretta della II ed. (Introduzione di Giovanni B. Ferri), Edizioni Scientifiche Italiane, Napoli, 1994. *Cf*. L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano*, Edizioni Scientifiche Italiane, Napoli, 2011.

[73] *Vide* F. De Castro y Bravo, *El negocio jurídico* (Introducción de Juan Vallet De Goytisolo), reimpresión, Ed. Civitas, Madrid, 1997.

[74] Art. 885-886 NCC. Regarding the application *ratione temporis* of this rule, see art. 56 of Law no. 71/2011 for the implementation of the NCC.

[75] Art. 891 NCC.

[76] Art. 901 NCC.

perfected the regime of land book actions[77]: the action in registration performance, the action in real estate registration justification and the action in rectification.

The new unique and unitary land book regime, regulated by the New Civil Code and Law no. 7/1996, is meant to provide the static and dynamic security of the civil real estate circuit and the stimulation of the mortgage loan. This regime was only outlined in ed. II of the Real Estate (Land) Registration Treaty of 2011, so that it is naturally necessary, on the occasion of a new edition of this Treaty, for the current real estate (land) registration regime to be fully revised.

To this end, we have proposed that the entire issue of real estate (land) registration, of substantive law and procedural law, be treated *in extenso* in vol. III /1, entitled "Publicitatea imobiliară. Noile cărţi funciare" (in collaboration with Prof. Dan Andrei Popescu) and vol. III/2, entitled "Publicitatea imobiliară. Înscrierile în noile cărţi funciare" of t. XI (Publicitatea drepturilor, actelor şi faptelor juridice; coord. Marian Nicolae) of Tratat de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[78].

3) Extinctive prescription and forfeiture

Extinctive prescription is one of the most remarkable legal institutions of positive civil law, being established for reasons of public order, respectively to provide the security and stability of civil legal relations (*supra*, II.A), so it could not be missing from the New Civil Code (art. 2,500 sqq.).

The issue of extinctive prescription concerns not only its reason and usefulness, seriously shaken by the ECHR in the case of *James et al. V. The United Kingdom (1986*) and in the case *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd V. The United Kingdom (2007*)[79], the legal nature - institution of substantive or substantive law - and, in connection with that, the applicable law *ratione loci*, but also *ratione temporis*, but also the applicable legal regime, of operation, to all these questions the legislator answering sometimes differently, and sometimes incoherently or without a firm and coherent conception.

In turn, the **revocation**, another even more controversial institution, regulated in general only by the New Civil Code (art. 2.545-2.550)[80], must have a different regime from that of the extinctive prescription, in order to justify its existence and legal identity.

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[77] Art. 896, 897, 899 alin. (2), art. 908 *sqq.* NCC.

[78] *Vide supra*, note 52.

[79] For details on the constitutionality and conventionality of the institution of extinctive prescription, *vide* M. Nicolae, *Tratat de prescripţie extinctivă*, cit. *supra* [note 1], no. 16 *sqq*., p. 56 *sqq*.

[80] In **the Italian Civil Code**, the revocation is regulated in the last chapter of this code, which deals with the general rules applicable to it (art. 2964-2969). In Italian law, the term "decadenza" (forfeiture) corresponds to the term „forclusion" in French law and „decădere" in Romanian law; for the French term of «déchéance», in Italian, there is the term "preclusione" (*cf*. Nuovo Digesto italiano, v° *Preclusione*, apud M. Vasseur, *Délais préfix, délais de prescription, délais de procédure*, *in* Revue trimestrielle de droit civil 1950, p. 443, nota 3); v., pentru amănunte: L. Bigliazzi Geri *et alii*, *Diritto civile*, 1.1., *Norme, soggetti et rapporto giuridico*, ristampa, UTET, Torino, 2000, pp. 406-412; F. Roselli, *La decadenza*, *in* "Trattato di diritto privato" (diretto da Pietro Rescigno), vol. 20,

However, it should be noted and emphasized that the issue of extinctive prescription and revocation in the New Civil Code system is extremely wide, the common law regime must be articulated with special prescriptions and revocations, in order to establish the scope of both categories of regulations.

Consequently, in this matter, our research directions aim, on the one hand, at the in-depth analysis of the current common law regime of prescription and forfeiture, in the light of legal provisions, but also of the already quite rich cases arising in the 10 years since the entry into force of the New Civil Code, and, on the other hand, the inter and transdisciplinary investigation of the extinctive prescription, respectively of the extinctive prescription in common law and of the extinctive prescription in criminal law and other special rights (contravention law, administrative law, fiscal law, criminal procedural law, fiscal procedural law, etc.).

The first research direction will be approached in vol. VII, entitled "Apărarea drepturilor subiective civile şi ale altor situaţii juridice" (in collaboration with Prof. George-Alexandru Ilie), in t. I (Partea generală; coord. Marian Nicolae) al Tratatului de Drept civil (gen. coord.: Valeriu Stoica, Marian Nicolae), *præcit*.[81].

IV. Instead of conclusions. For the refunding and recovery of lost heritage of civil law

The short radiograph of scientific and professional achievements (section II) and the presentation of the principles of future projects (section III) have as common denominator the research and study of civil law, seen as a component part of Romanian law, but also as transnational autonomous law because, although it is the main part of Romanian law, it cannot remain isolated, but interacts with other civil rights, given the fact that, by its nature - right of freedom and legal equality - and by its vocation (finality) - right of patrimonial and

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„Tutela dei diritti", t. II, UTET, Torino, 1985, p. 477 *sqq*. Adde: Daniela Leban*, Prescrizione e decadenza nel diritto privato*, CEDAM, Padova, 2003, p. 553 *sqq*.; *G. Travaglino*, *Decadenza e prescrizione nell' elaborazione dottrinale*, *in* AA.VV., La prescrizione e la decadenza. Struttura e funzioni. Rassegna completa di giurisprudenza, 3ª ed., IPSOA – Gruppo Wolters Kluwer, 2008, p. 377 *sqq*.

Also, recently, **in the French civil law**, through the prescription reform of 2008, a text of principle art. 2220: «Les délais de *forclusion* ne sont pas, sauf dispositions contraires prévues par la loi, régis par le présent titre [*titre vingtième*: De la prescription extinctive – n.n., M.N.]», applicable to limitation periods, as well as three common rules, *i.e.* incidents in the case of both categories of terms, regarding the application in time of the new law (art. 2222) and the interruption of the course of prescription or revocation by the request for summons (art. 2241) or by an act of forced execution (art. 2244).

In some legislative systems, such **as Portuguese and Spanish civil law** „expiration is called, either in positive law or in the literature and judicial practice, "caducity" (*caducidade*, *caducidad*). V. art. 328-333 C.civ. port. (1966) regarding expiry (*cf*. A. Menezes Cordeiro, *Tratado de Direito civil português*, I, *Parte geral*, t. I, 3.ª ed., Livraria Almedina, Coimbra, 2007, nr. 98, p. 207 *sqq*., for the different meanings of the term "caducity": caducity in a broad or narrow sense, simple caducity and punitive caducity). On the difference between prescription and caducity in Spanish law, v. *L. Diez-Picazo* y A. Gullón, *Sistema de derecho civil*, vol. I, *Introducción. Derecho de la persona. Autonomía privata. Persona jurídica*, 11ª ed., Ed. Tecnos, Madrid, 2005, p. 66 *sqq*.

[81] *Vide supra*, note 52.

non-patrimonial relations between any person, regardless of their condition, status, quality or status, is a universal and universalist, transnational right.

Civil law is not a purely instrumental, neutral right, but a finalist right, the promoter of universal principles and values - human dignity, freedom, equality (formal and substantial) - and the guarantor of individual security (personal and patrimonial).

That is why the New Civil Code has refounded civil relations by laying them on new legal bases - the principles of dignity, equality, private autonomy and private property - in the light of a new legal philosophy: respect for the fundamental rights and freedoms of every person, first and foremost freedom and human dignity, the primacy of the individual (and civil society) over the state.

In addition to refounding the law and science of civil law on a pluralistic, rationalist and universalist basis, it is necessary to reconnect them with the legal tradition (*traditum iuris*), with the eminently Romanist and canonical science and doctrine, in order to recover the lost heritage. Law, in general, civil law, in particular, were not born with us, the postmoderns, nor with the moderns, with the national codifications of the twentieth century. XIX-XX, but were and constitute a multisecular legal experience (Alessandro Giuliani). Moreover, if we really want a unified European private law, a European Civil Code above all, then only by resorting to tradition, *to utrumque ius*, as has been excellently noted, could a solid, secure and lasting foundation of a such a right, even if this *novum ius civile Europæum* will differ, in content, from *vetus ius commune* (*ius romanum canonicumque*).

Civil law, also, like the entire law, in order to get out of the almost lethal crisis produced by legal positivism, needs today, as if more than ever in its millennial history, a refoundation, a new theoretical conceptual, analytical and programmatic establishment, and this refoundation, above all, presupposes, we believe, a return to its ancient values: *bonum* and *æquum*. But also the fact that the true law and, especially, the civil law is not created by the legislator, but by the jurisconsults (*iuris prudentes, iuris periti*), as Pomponius said now approx. 19 centuries ago (*proprium ius veni compositum a prudentibus*), was apparently forgotten by all the great legislators, from Justinian to Napoleon I (and by all their descendants and pseudo-descendants).