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Article

The Evolution of Contractual Freedom Under the Romanian Civil Code: Between Tradition and Modernity

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Abstract

In this work I would like to analyze how the Romanian Civil Code balances traditional civil law principles with modern needs for contractual flexibility, especially in light of European harmonization trends. This work highlights a foundational principle in civil law, positions Romania in the wider European legal context and involves comparative analysis with French, German, or Italian codes.

Keywords: contractual freedom; autonomy of will; Romanian civil code; civil law tradition; good faith; hardship; abuse of rights; judicial control of contracts; contract law reform; comparative civil law; European private law; draft common frame of reference (DCFR); contractual autonomy limitations; legal modernization; Romanian legal system; contractual justice

1. Introduction

Contractual freedom stands as one of the foundational pillars of private law in civil law systems, deeply rooted in the classical liberal tradition and the autonomy of will. It embodies the principle that individuals are free to create and shape legal relationships according to their own interests and values, provided they remain within the boundaries of the law. In Romanian private law, this principle has historically been influenced by the French legal tradition and Roman law, particularly as codified in the 1864 Civil Code. However, the adoption of the Romanian Civil Code¹ marked a turning point, not only in legislative technique but also in the philosophical and functional approach to private autonomy.

The 2011 Civil Code reflects a deliberate shift: from a rigid, formalistic conception of contracts toward a more balanced model that incorporates notions of good faith, fairness, and public interest. This evolution is not isolated. It occurs in a broader European and global context where contractual freedom is increasingly moderated by mechanisms of control—be they judicial, legislative, or arising from European Union law. Consumer protection, standard form contracts, imbalance of bargaining power, and the digitalization of contractual processes all pose contemporary challenges to classical theories of contractual autonomy.

This article aims to critically examine the transformation of contractual freedom in Romanian civil law, highlighting the tensions between tradition and modernity. Specifically, it seeks to answer the following questions:

a) To what extent does the current Romanian Civil Code maintain or limit the classical principle of contractual freedom?

b) How do newly introduced legal concepts (e.g., hardship, good faith, abus de droit) reshape contractual autonomy?

c) How does Romanian doctrine and jurisprudence interpret and apply these developments?

¹ 2011

d) In what ways does the Romanian experience align with or diverge from broader European trends?

Methodologically, the study employs a doctrinal analysis of legal texts and principles, complemented by a comparative perspective involving French and German civil law systems, as well as relevant developments in European private law (e.g., DCFR, EU directives). Case law from Romanian courts will be examined to illustrate how the judiciary balances contractual freedom with other legal and societal interests.

Through this approach, the article contributes to a deeper understanding of how a modern civil code navigates the delicate balance between individual liberty and regulatory constraints—ultimately questioning whether the Romanian model represents a continuation, a rupture, or a hybridization of the classical civil law tradition.

2. The Concept of Contractual Freedom: Theoretical and Historical Foundations

2.1. *Autonomy of Will and the Classical Civil Law Tradition*

Contractual freedom—often framed through the principle of autonomy of will—is a foundational element of private law in civil law jurisdictions. At its core, it reflects the idea that legal subjects, viewed as rational and autonomous individuals, are free to enter into agreements and determine the content of their obligations, so long as they do not violate public order or mandatory legal norms. This concept, deeply rooted in Roman law, was reasserted and systematized in 19th-century codifications, particularly the French Civil Code of 1804, which became the model for the Romanian Civil Code of 1864².

In the classical liberal tradition, the contract was seen as a voluntary expression of will, and the law merely played a facilitative role—providing form, enforcement, and remedies. This was aligned with laissez-faire economic theories dominant at the time, where state interference in private relations was minimal. The emphasis was on freedom to contract, freedom to choose the contract partner, and freedom to define the content of the contract.

2.2. *Contractual Freedom in the Romanian Civil Code of 1864*

The Romanian Civil Code of 1864, heavily influenced by the Napoleonic model, embraced this paradigm. It recognized contractual freedom as an essential expression of individual liberty. Legal scholars of the time placed strong emphasis on the sanctity of the contract (*pacta sunt servanda*), interpreting it as a manifestation of a pre-existing moral and social order³.

However, the 1864 code offered limited mechanisms for judicial or legislative intervention in the event of unfairness or imbalance. Remedies were scarce in cases of economic duress, inequality of bargaining power, or unforeseen circumstances—issues that were only later addressed in both doctrine and jurisprudence⁴.

2.3. *Theoretical Limits of Contractual Freedom*

Despite its foundational status, the principle of contractual freedom is not absolute. Legal theory and comparative doctrine recognize several intrinsic and extrinsic limitations:

² Pop, L., Popa, I.-F., & Vidu, S. I. (2015). *Tratat de drept civil. Obligațiile* (Vol. I: Regimul juridic general).

Bucharest: Universul Juridic, p. 75.; Ghestin, Jacques. (2018). *Traité de droit civil – La formation du contrat*. 4th ed. Paris: LGDJ, p. 44

³ Boroi, Gabriel, & Angheliescu, Lucian. (2012). *Curs de drept civil. Partea generală*. Bucharest: Hamangiu, p. 208.

⁴ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile*. Vol. II: Contractul. Bucharest: Universul Juridic, p. 183.

- a) Public policy and morality (ordre public et bonnes mœurs): No contract may contravene core societal values or legal prohibitions⁵.
- b) Good faith: Especially in civil law systems, contracts are increasingly subject to an overarching duty of good faith during negotiation, performance, and termination⁶.
- c) Inequality and abuse of rights: Modern private law seeks to prevent contractual abuse, particularly where there is a disparity in power or access to information⁷.

These theoretical critiques laid the groundwork for reforms in many civil law jurisdictions, including Romania, which eventually culminated in the comprehensive overhaul represented by the 2011 Civil Code.

2.4. Evolution of Contract Theory in Comparative Perspective

As comparative doctrine shows, the rigid model of absolute contractual freedom has been reshaped over the 20th and 21st centuries. For example, the German BGB, though initially formal and autonomy-focused, evolved through jurisprudence to include concepts such as *Treu und Glauben* (good faith) and unconscionability (§138 BGB)⁸. Similarly, France's reform of the law of obligations (2016) codified many judge-made principles, notably regarding *imprévision*, contract renegotiation, and fairness⁹.

Romania's reform was part of this broader European trend. The drafters of the 2011 Civil Code drew inspiration from both continental doctrine and the Draft Common Frame of Reference (DCFR), which advocates a balanced vision of freedom and fairness in contract law.

The evolution of contractual freedom is not merely a historical curiosity but a window into the shifting philosophical foundations of private law. From its classical roots in autonomy and minimal state intervention, the principle has been increasingly recalibrated to accommodate social justice, market regulation, and judicial oversight. In Romania, this tension between tradition and modernity remains central to both doctrinal interpretation and judicial practice, as will be explored in the following sections.

3. The 2011 Romanian Civil Code: A Shift in Paradigm

3.1. Legislative Reform and Context

The adoption of the 2011 Romanian Civil Code marked the most significant reform in the country's private law since the 1864 Civil Code, bringing it in line with contemporary legal, economic, and social realities. This reform was not merely cosmetic or terminological—it represented a paradigm shift from a classical, formalistic model of contractual autonomy to a more nuanced, regulated and principle-based approach¹⁰.

The Code's drafters sought to harmonize Romanian private law with European standards, integrating elements from the Quebec Civil Code, German BGB, Swiss CO, and the Draft Common

⁵ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. I: Regimul juridic general*. Bucharest: Universul Juridic, pp. 120–124.

⁶ Ghestin, Jacques. (2018). *Traité de droit civil – La formation du contrat*. 4th ed. Paris: LGDJ, pp. 291–305.

⁷ Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, pp. 23–45.

⁸ Zimmermann, Reinhard. (1996). *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Oxford University Press, Collins, Hugh. (2008). *The European Civil Code: The Way Forward*. Cambridge: Cambridge University Press, p. 92.

⁹ Ghestin, Jacques. (2018). *Traité de droit civil – La formation du contrat*. 4th ed. Paris: LGDJ, p. 410.

¹⁰ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. I: Regimul juridic general*. Bucharest: Universul Juridic, p. 15.

Frame of Reference (DCFR), while retaining certain aspects of the French and Romanian legal tradition¹¹.

The Explanatory Memorandum of the Code explicitly recognized the need to balance contractual freedom with new mechanisms for fairness, judicial control, and adaptation to unforeseen changes¹². The reform thus reflects a shift in legal philosophy: from absolute autonomy of will to a relational and contextual view of contracts.

3.2. *New Principles Limiting Contractual Autonomy*

While contractual freedom remains a cornerstone of Romanian civil law, the 2011 Code embeds several structural limits and principles of moderation that alter its application:

(a) *Good Faith and Fair Dealing*

The principle of good faith (*bona fides*) now operates as a general rule in all contractual stages—negotiation, formation, performance, and termination. This marks a significant departure from the 1864 Code, where good faith had limited direct application¹³. Good faith now serves not only as an interpretive tool but also as a source of obligations, which courts have begun to invoke with increasing frequency¹⁴.

(b) *Abuse of Rights and Judicial Control*

The 2011 Code codifies the doctrine of abuse of rights in art. 15, allowing judges to moderate or invalidate clauses or behaviors that constitute excessive or malicious use of contractual prerogatives. This represents an institutionalization of equity and corrective justice, departing from the classical view that a contract's lawfulness derives solely from consent and formal legality¹⁵.

(c) *Hardship (Impreviziunea)*

Another innovation is the formal recognition of hardship under Article 1271, which allows for judicial renegotiation or even termination of contracts if an unforeseeable event makes performance excessively burdensome for one party. This provision, which echoes similar mechanisms in French and German law, signals a movement toward contextual justice and economic realism in contractual obligations¹⁶.

3.3. *A Functionalist and Modernized Legal Culture*

The new Civil Code shifts from a purely dogmatic system toward a functionalist model of law, where principles are intended to adapt to changing social and economic needs¹⁷. Instead of focusing

¹¹ Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, pp. 25–45, von Bar, Christoph, & Clive, Eric M. (Eds.). (2009). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Munich: Sellier.

¹² Romanian Ministry of Justice, 2011

¹³ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. I: Regimul juridic general*. Bucharest: Universul Juridic, p. 220.

¹⁴ Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, pp. 30–31.

¹⁵ Ciobanu, V. M. (2014). “Aspects Regarding Contractual Freedom in the New Civil Code.” *Revista Dreptul*, no. 4, pp. 47–68.

¹⁶ Boroi, Gabriel, & Angheliescu, Lucian. (2012). *Curs de drept civil. Partea generală*. Bucharest: Hamangiu, pp. 246–248.

¹⁷ Bîrsan, Cătălin. (2015). *Drept civil. Contracte. Sub regimul Noului Cod civil*. Bucharest: Hamangiu, p. 39.

on the rigid application of formal norms, the Code encourages interpretation based on purpose, equity, and contractual balance.

This shift is visible in both:

- Substantive provisions (e.g., contract adaptation, standard form control),
- And in interpretive rules (e.g., broader scope of judicial intervention, discretionary powers of judges).

Such reforms also reflect the growing influence of European private law instruments, especially the DCFR, which promotes a model of "regulated freedom of contract"—balancing autonomy with fairness, transparency, and solidarity¹⁸.

3.4. Contractual Freedom Revisited: Continuity or Rupture?

The 2011 Civil Code does not abolish contractual freedom but reconceptualizes it within a modern socio-legal framework. Freedom to contract still exists, but it is no longer untouchable or absolute. Instead, it coexists with countervailing principles, such as: the protection of weaker parties, good faith as a source of obligations and the possibility of judicially-imposed fairness corrections.

This represents a partial rupture with classical liberalism, but also a continuity of civil law logic, insofar as it evolves through internal doctrinal development rather than radical external imposition¹⁹.

The 2011 Romanian Civil Code embodies a deliberate move away from a rigid conception of contractual freedom toward a modern, principle-driven, and socially responsive contract law. It reflects Romania's legal integration into the European space while preserving core civil law traditions. As such, it offers a model of legal reform that balances national identity with transnational legal harmonization.

4. Between Tradition and Modernity: Practical Challenges

Judicial Interpretation and Case Law Trends

How Romanian courts apply principles of good faith, fairness, and balance in The 2011 Romanian Civil Code embodies a deliberate effort to modernize private law while preserving the foundations of the civil law tradition. However, this dual objective generates a number of practical challenges in interpretation and application, particularly as Romanian courts and legal practitioners navigate the tensions between traditional doctrinal concepts and modern regulatory imperatives.

One of the most prominent challenges lies in the judicial balancing of contractual freedom with the principles of good faith and equity. Although the new Code enshrines good faith as a general rule (art. 14, 1170), its application often requires judicial discretion and context-sensitive reasoning, which can create inconsistency in case law²⁰.

Similarly, the introduction of hardship (*impreviziunea*) under art. 1271 has opened the door to judicial renegotiation of contracts, a concept largely foreign to classical contract theory. Courts have

¹⁸ Introduction von Bar, Christoph, & Clive, Eric M. (Eds.). (2009). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Munich: Sellier, Introduction.

¹⁹ Chelaru, E. (2021). *Drept civil. Drepturile reale principale*. Bucharest: C.H. Beck, p. 55.

²⁰ Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, p. 30, Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. I: Regimul juridic general*. Bucharest: Universul Juridic, p. 220.

struggled to establish a coherent framework for applying this provision, raising concerns about legal certainty and the predictability of commercial relationships²¹.

The growing role of standard form contracts—particularly in consumer and financial sectors—also tests the limits of contractual autonomy. While the Code permits freedom of contract, it imposes increased scrutiny of adhesion contracts, especially where there is a significant imbalance between the parties²². This reflects a broader European trend, as seen in the DCFR and EU consumer protection directives, but it challenges long-standing assumptions about equality and voluntariness in contractual relations.

Moreover, the influence of European private law has introduced interpretive difficulties. Romanian courts must increasingly align their rulings with EU principles while maintaining coherence within the domestic civil law system—a task complicated by the coexistence of national tradition and supranational norms. The practical implementation of the 2011 Civil Code reveals an ongoing negotiation between doctrinal heritage and modern legal demands. Ensuring consistency, predictability, and fairness in contract law requires not only careful jurisprudential development but also a deeper theoretical integration of tradition with contemporary principles.

5. Comparative Legal Analysis

The Romanian Civil Code of 2011 does not exist in isolation; it reflects a broader European trend of modernizing private law by integrating mechanisms of fairness, flexibility, and judicial oversight into traditional contract theory. A comparative analysis with the French and German legal systems—two foundational civil law models—reveals both influences and divergences in how contractual freedom is redefined.

5.1. French Civil Law Influence

France, whose Civil Code served as the model for Romania's 1864 Code, has undergone its own transformation. The 2016 reform of the French law of obligations introduced significant changes, including the codification of hardship and a stronger emphasis on good faith²³. These developments parallel Romania's adoption of hardship (art. 1271) and the expansion of good faith as a general obligation, suggesting a converging legal trajectory aimed at balancing autonomy with equity²⁴.

5.2. The German Model: Structured Control and Judicial Moderation

The German Bürgerliches Gesetzbuch (BGB) has long recognized mechanisms that limit contractual autonomy, such as §138 (contracts against good morals) and §242 (performance in good faith). The Romanian 2011 Code borrows conceptually from this system, particularly in its recognition of abuse of rights and contractual imbalance²⁵. However, unlike the BGB, which

²¹ Boroï, Gabriel, & Anghelescu, Lucian. (2012). *Curs de drept civil. Partea generală*. Bucharest: Hamangiu, pp. 246–248.

²² Bîrsan, Cătălin. (2015). *Drept civil. Contracte. Sub regimul Noului Cod civil*. Bucharest: Hamangiu, pp. 89–91.

²³ Ghestin, Jacques. (2018). *Traité de droit civil – La formation du contrat*. 4th ed. Paris: LGDJ, pp. 410–425.

²⁴ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. II: Regimul obligațiilor în particular*. Bucharest: Universul Juridic, p. 112.

²⁵ Zimmermann, Reinhard. (1996). *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Oxford University Press, pp. 523–530, Boroï, Gabriel, & Anghelescu, Lucian. (2012). *Curs de drept civil. Partea generală*. Bucharest: Hamangiu, p. 251.

developed these principles gradually through jurisprudence, the Romanian Code explicitly codifies them—indicating a more interventionist approach to reform.

5.3. European Harmonization and the DCFR

Romania's legislative reform also aligns with European efforts toward harmonizing private law, especially through the Draft Common Frame of Reference (DCFR). The DCFR promotes a model of "regulated freedom of contract", recognizing party autonomy while embedding protective standards such as transparency, good faith, and proportionality. The Romanian Civil Code reflects this influence, particularly in its embrace of principle-based adjudication and adaptive tools such as hardship and judicial review of unfair terms²⁶.

Through comparative analysis, it becomes clear that Romania's reform aligns with a broader European movement that seeks to modernize private law without abandoning civil law traditions. The 2011 Civil Code is not simply a national innovation, but part of a transnational legal dialogue that aims to reconcile contractual freedom with social justice and legal certainty.

6. Critical Assessment

The reform brought by the 2011 Romanian Civil Code represents a notable evolution in Romanian private law. While it successfully aligns Romania with European legal standards, its implementation has raised several doctrinal and practical challenges that warrant critical evaluation.

6.1. A Balanced Model or Doctrinal Ambiguity?

The Code's most significant achievement lies in its shift from formalistic contractual freedom to a principle-based approach that incorporates fairness, good faith, and judicial flexibility²⁷. Provisions such as good faith (art. 1170), abuse of rights (art. 15), and hardship (art. 1271) reflect a clear departure from rigid classical doctrines, moving toward a relational and socially-responsive contract law.

However, these innovations have also generated legal uncertainty. Courts are now entrusted with a broader interpretive role, which increases the risk of inconsistency in jurisprudence, particularly in hardship and standard-form contract cases²⁸. As Bîrsan notes, the new provisions require a refined and uniform interpretive framework—something that Romanian judicial practice is still developing.

6.2. Judicial Intervention: Necessary Safeguard or Erosion of Freedom?

The empowerment of judges to rebalance or even renegotiate contracts, while protecting weaker parties, may also undermine legal predictability and the parties' legitimate expectations.

²⁶ Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, p. 31.

²⁷ Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Tratat de drept civil. Obligațiile. Vol. I: Regimul juridic general*. Bucharest: Universul Juridic, p. 123.

²⁸ Boroi, Gabriel, & Angheliescu, Lucian. (2012). *Curs de drept civil. Partea generală*. Bucharest: Hamangiu, p. 251, Zamșa, C. (2013). „Libertatea contractuală în noul Cod civil: între autonomie și control judiciar.” *Revista Română de Drept Privat (Pandectele Române)*, no. 5, p. 31.

Critics argue that such broad intervention risks diluting the core of contractual autonomy, especially when used to correct perceived imbalances after the fact²⁹.

Comparative models offer more structured frameworks: the German BGB limits intervention through long-standing jurisprudence, while French reforms maintain clearer boundaries between judicial correction and party freedom³⁰. Romania's challenge lies in establishing similar doctrinal boundaries within its evolving jurisprudence.

6.3. Transplanting European Norms: Harmonization or Hybridization?

The influence of European instruments such as the DCFR has brought Romania closer to EU legal trends³¹. Yet, the integration of these models risks creating a hybrid legal system, where imported principles may conflict with the structure and logic of domestic doctrine³². The success of this legal transplantation depends on the ability of Romanian courts, academia, and legal education to internalize and contextualize these principles effectively³³.

The 2011 Civil Code reflects a progressive rethinking of contract law, embracing principles of justice and fairness without discarding the autonomy of will. However, its effectiveness will ultimately depend on how consistently and coherently these principles are interpreted and applied in practice. The Romanian legal system now faces the challenge of building a stable doctrinal foundation that bridges classical theory with modern social and economic demands.

7. Conclusions

The evolution of contractual freedom under the 2011 Romanian Civil Code reflects a profound transformation in the philosophy and practice of private law. While preserving the classical foundations of autonomy of will, the new Code introduces modern corrective mechanisms—such as good faith, hardship, and judicial control—that realign contract law with contemporary social and economic realities.

This shift positions Romanian private law within a broader European movement that seeks to balance individual autonomy with fairness and public interest, drawing on models such as the French reform of obligations, the German BGB, and the principles of the DCFR. Yet, this hybridization process also presents challenges, particularly in ensuring coherence, predictability, and consistency in legal interpretation.

Ultimately, the Romanian experience illustrates the complex tension between tradition and modernity in contract law reform. The continued development of jurisprudence, doctrine, and legal education will be essential to fully realize the potential of a contract law that is both principled and pragmatic—capable of responding to the demands of a dynamic and increasingly Europeanized legal environment.

²⁹ Ciobanu, V. M. (2014). "Aspects Regarding Contractual Freedom in the New Civil Code." *Revista Dreptul*, no. 4, pp. 50–68.

³⁰ Zimmermann, Reinhard. (1996). *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Oxford University Press, Ghestin, Jacques. (2018). *Traité de droit civil – La formation du contrat*. 4th ed. Paris: LGDJ.

³¹ von Bar, Christoph, & Clive, Eric M. (Eds.). (2009). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Munich: Sellier.

³² Collins, Hugh. (2008). *The European Civil Code: The Way Forward*. Cambridge: Cambridge University Press, p. 134.

³³ Chelaru, E. (2021). *Drept civil. Drepturile reale principale*. Bucharest: C.H. Beck, p. 71.

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