DO WE NEED TODAY LEGAL HISTORY? FOR WHAT PURPOSE?

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Abstract

In general, nowadays history as a science is viewed somewhat with scepticism. For many, history is only a science of the past and only of the past. In the same way, many relate to the history of law. On the one hand, an argument in support of this conduct would be that the too complex problems that today's law indicates are little inclined to be solved by resorting to the past. On the other hand, a large part of the judges in Western Europe and not only regard Roman law as the last solution in establishing the balance and moderate rules in the private law space. The truth is placed probably in the middle. The old law should not be idolized or mythologized, but it should be regarded as an object of reference and understood as a product of a certain historical epoch. However, we do not exclude that through its study we will obtain useful conclusions to redress the legislation in force. The present study tries to synthesize certain aspects of the millennial evolution of the partnership contract in order to see if the main ideas and mechanisms are still valid, can be adapted or perhaps useless.

Keywords: *legal history, partnership contract, corporation, Roman law, French Civil Code, Romanian Civil Code, BGB.*

1. Introduction

At present, in most law textbooks or even of some extensive treatises on commercial law, the introductory chapter on the history of commercial law has disappeared to a large extent, if not entirely. It would seem that due to the rapidity of life and the need to quickly know what interests us or what really matters, the history of law has become an unimportant subject.

Even in academic environments in countries known for their traditional approach to the history of law, this seemingly pragmatic vision seems to have prevailed in recent decades. At most, a few ideas are presented that fail to form even a general image for the reader, not to arouse critical reflections[1].

Those who want to know more must turn to studies on the history of law, studies that are currently not very attractive especially due to the pragmatic approach that students currently have.

As a result, in the absence of readers, scholars in this field publish articles in specialized journals that are, on the one hand, a very technical and unfriendly language and approach, and on the other hand, fall under the label of research activities without obvious practical effects.

In reality, in our opinion, the history of law is as relevant as possible, as it allows us to understand the context in which various institutions and rules were born, while allowing us to understand whether they are still validated by the context in which we live and whether a reform of the law is necessary,

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[1] See e.g. Francesco Galgano, *Diritto commerciale*, Zanichelli Publishing House, Bologna, 2013, pp.1-5.

in which directives that reform should be addressed.

In this regard, we try to outline some considerations having as the object of our analysis the partnership or company contract.

2. The Legal History of Company Contract

2.1. Civil Partnership in Roman Law

The study of ancient periods of Roman law determines assumptions rather than real facts or certain conclusions. Most likely unknown during the early centuries of Roman society, the contract of partnership, as it took shape at the dawn of the modern era, gradually emerged as the need for cooperation within the community became increasingly pressing.

According to the assumptions of twentieth-century scholars, its origins appear, in reality, to lie in common ownership. In this regard, one of the earliest attested forms was the societas omnium bonorum, namely the universal partnership of all present and future assets[2]. This form seems rather to have been an institution arising upon the death of a pater familias, a critical situation in which his descendants would remain in a state of consensual co-ownership, initially referred to as consortium.

Subsequently, as the exchange economy developed, various forms of association became established in practice, such as societas unius rei, involving the contribution of a single asset; societas omnium bonorum, based on the pooling of certain assets; and societas quaestus (or lucri), which concerned the sharing of future profits.

Eventually, associations also pursued what would today be described as 'professional' purposes, involving the use of contributed assets for the production and commercialization of goods (societas alicujus negotiationis).

In conclusion, according to an opinion apparently accepted until today, during the consolidation of Roman law, the partnership contract could be reduced to several essential elements, closely interconnected:

the contribution of each partner, which could consist of property rights, sums of money, or even personal activity;

a common interest, namely the pursuit of material benefits by all partners;

the intention to form a partnership (affectio societatis), without which the situation would merely amount to co-ownership; and

a lawful purpose.

More concise, according to the British scholars the partnership may be defined as a bonae fidei contract whereby two or more persons agree to associate in a common activity with the aim of obtaining mutual benefit[3].

2.2 The Issue of Civil Partnership During the Period of Economic Revival

Obviously, with the decline of Roman civilization, the contract became rarely used in most of Europe. However, beginning with the 11th century, when the incursions of northern peoples ceased or were contained and monarchies consolidated their power, Western Europe experienced a revival of the exchange economy.

Participation in commercial operations often took place through associations, typically among family members, which

[2] See Paul Frédéric, Girard, *Manuel élémentaire de droit romain*, Rousseau Publishing House, Paris, 1929, p. 611 *et seq*.

[3] See Paul du Plessis, *Borkowski's textbook on Roman Law*, Oxford University Press, Oxford, 2010, p. 285 *et seq*.

gave rise to the term compagnia, derived from the Latin cum (with) and panis (bread). This term would later be adopted in both English[4] and continental legal systems. Such an association represented a close union in which everything was shared: daily bread and risks, as well as capital and labour. Over time, this form evolved into what became known as the general partnership, whose members were jointly and severally liable, in principle without limitation, extending beyond their respective shares to all their assets.

2.3. Emergence of Commercial Companies

The era of the Crusades, characterized by the expansion of Western society on multiple levels, significantly accelerated economic growth, particularly in the Mediterranean basin and in the Italian city-states.

This led to what historian Roberto Lopez termed a "commercial revolution," gradually transforming the rigid estate-based society of the Middle Ages. Trade between East and West expanded exponentially, generating substantial profits for merchants in port cities such as Venice, Genoa, Pisa, and Amalfi.

Despite relatively favourable political and economic conditions, maritime trade required constant and substantial financing to sustain exchanges and increase profits.

However, medieval European society was fundamentally structured around social estates, which imposed rigid behavioural norms and limited social mobility. As a result, commerce was largely restricted to certain urban groups, while nobles and clergy—despite their wealth—were precluded from engaging in such activities due to status-based incompatibilities.

Moreover, with the exception of Jewish communities, Christians were, at least in theory, prohibited from lending money at interest, as this would have violated religious precepts.

2.4. Recourse to Legal Fiction

Beyond any kind of debate, regardless of social constraints, it is clear and relevant that the desire for financial gains and the opportunity for trade have significantly determined the search for legal forms to be able to participate in the large exchanges of goods.

Unlike the partnership contract under Roman law, the new contracts implied a differentiation of economic roles.

In this setting, contractual arrangements such as the societas maris or commenda emerged in Genoa, while analogous forms developed in Venice under the designation collegantia. Despite variations in terminology, these agreements generally involved two parties entering into a temporary association.

The analysis of the mechanism of the new contract indicates that, in principle, both parties bore the risks inherent in an international commercial business, but at the base one of the parties had the quality of debtor and the other of debtor.

The success and spread of these contractual forms seems to have their cause in the fact that the underlying lending operation overlapped with the association and a fair assumption of potential risks.

It should therefore come as no surprise that within a few decades the forms of association described above spread throughout most of Europe, from the shores

[4] See Stephen W. Mayson, Derek French and Christopher L. Ryan, *On Company Law*, Oxford University Press, Oxford, 2019, p. 3 *et seq*.

of the Italian peninsula to the north of the Holy German Empire.

2.5. Obligations of the Parties and the Relevance of Risk

The risks as I mentioned were assumed in a fair manner. On the one hand, the person who contributed most of the capital did not take any particular risks. Obviously, there is a probability that the business will be damaged, but in the worst case it could lose the invested capital.

On the other hand, the merchant or the person who is directly involved in carrying out the commercial operations assumes all the risks since he was the person visible from the outside and the creditors had only a legal relationship with him.

This structure seems to have constituted a mechanism that did not lead to internal conflicts between partners that did not have the quality of merchants[5].

3. Civil Partnership under the Nineteenth Century Civil Codes

As we know, the modern regulation of the partnership contract was first made by the French Civil Code adopted in 1804.

According to Article 1832 'la société est un contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter'.

The French Civil Code, also known as the Napoleonic Code, has been a source of inspiration for many European codes, including those adopted in the twentieth century or even recently.

In the case of Romania, as far as the nineteenth century is concerned, it is widely accepted that the civil code adopted during the regime of Alexandru Ioan Cuza was the French one. The Commercial Code— essentially a faithful reproduction of its French counterpart and applicable at least in Wallachia since 1840— has no definition for the civil partnership.

The provisions governing civil partnerships contained in the Civil Code were also applicable to commercial companies, in the absence of contrary legal norms.

Article 1,491 of the 1864 Civil Code reproduced the text of the French Civil Code. According to this provision, a partnership was defined as 'a contract whereby two or more persons agree to contribute something in common, with the aim of sharing the benefits that may result therefrom.'

More, Article 1,492 para 2 stated that 'each member of a partnership must contribute either money, other assets, or their industry.'

This definition was rightly criticized in earlier doctrine for failing to acknowledge the possibility of losses arising during the performance of contractual obligations. No one could guarantee the achievement of the objectives pursued at the time of concluding the contract, particularly when such objectives depended not only on the parties' performance but also on the actions of third parties or on events beyond their control.

In the event of losses, such losses—and the inherent risks—should, evidently, be borne by all partners.

Compared to the French regulation, the German one seems broader.

Section 705 of the German Civil Code (BGB) emphasized the pursuit of a common purpose within the partnership: 'Through the partnership agreement, the partners mutually undertake to promote the achievement of a common purpose in the manner determined

[5] See Mario Rotondi, *Inchieste di diritto comparato*, vol. 5/II, CEDAM Publishing House, Padua, 1976, p. 1033.

by the contract, in particular by making the agreed contributions.'[6]

The regulation was subsequently supplemented to clearly distinguish between civil partnerships and those engaged in relations with third parties.

The nature of the legal act was not contested so long as the mechanism created by the assumed obligations was easily understood and did not raise interpretative difficulties in practice.

As previously noted, the limited partnership was regarded as a contract, since it constituted a legal act concluded between two parties, and the rights and obligations arising from it had a clearly defined material object.

However, over the course of the modern era, the involvement of an increasing number of persons in the creation and operation of commercial companies—parties who simultaneously held both common and individual legally grounded interests—significantly altered the general perception of the legal nature of the company.

The contractual theory has remained, to this day, the simplest means of explaining this legal construction, which has become one of the central pillars of commercial law.

In line with 19th-century French doctrine and jurisprudence, which were predictably grounded in the aforementioned legal provisions, Romanian legal thought likewise regarded both civil and commercial companies as contracts—a form of civil legal act.

At a basic level, the company was understood as an agreement between two or more persons who assume obligations in order to achieve a clearly defined objective.

4. Legal Nature

Certain obvious elements cannot be denied: a company is established through the agreement of two or more parties; the parties assume obligations and acquire rights; there is a common objective; and the legal act—commonly referred to as a "contract"—is recognized as such by the major European civil codes.

However, a more in-depth analysis of the partnership contract reveals a number of features that clearly distinguish it from other contractual forms. As such, a traditionalist might regard it as an "atypical" contract, while a more innovative scholar might consider it an as yet undefined variety of civil legal act.

First, the partnership is an agreement concluded by at least two parties. Article 942 of the 1864 Civil Code defined a contract as an agreement concluded "between two or more persons in order to create or extinguish a legal relationship between them," while Article 943 provided that a contract is "bilateral or synallagmatic when the parties bind themselves reciprocally to one another."

Second, the partnership does not constitute a legal act whose essential obligations—or even a single essential obligation—can be performed immediately.

Third, the partnership entails obligations not only toward the other partners, as in typical civil contracts, but also toward the partnership itself. Notably, Chapter III of the 1864 Civil Code is, in our view, misleadingly entitled "On the obligations of partners among themselves and in relation to others," since Article 1,503 provides that "each partner, in relation to the partnership, is considered a debtor for everything he has promised to contribute." In other words, the legislator implicitly

[6] For a comparative analysis see Kestin Peglow, *Le contrat de société en droit allemand et en droit français comparés*, LGDJ Publishing House, Paris, 2003, *passim*.

acknowledges—albeit ambiguously—that obligations initially assumed toward the other parties are ultimately regarded as obligations toward the partnership itself.

Fourth, in all European states, the establishment of commercial companies was subject to administrative or judicial authorization, even if such authority was often limited to verifying the formal and substantive conditions of the contract. Consequently, the mere will of the partners could not, in itself, give rise to a legal entity endowed with legal personality[7].

Finally, the creation of a company generates rights and obligations of a diverse nature, particularly in the case of commercial companies. This is evident even from the analysis of authors adhering to the traditional theory. Thus, from the interpretation of Articles 1,832 and 1,855 of the French Civil Code, it follows that "any partnership contract presupposes the convergence of four essential elements: (1) a contribution from each partner; (2) the intention to obtain profits for distribution; (3) the participation of all partners both in profits and, in the event of failure, in losses; and (4) affectio societatis, that is, the intention to form a partnership"[8].

The organic link between the second and fourth elements outlines a pattern of social behaviour not encountered in other contractual frameworks.

Whereas in civil contracts the rights granted to parties are primarily patrimonial and economically quantifiable, in the case of a company, the partner or shareholder acquires a complex set of rights of a diverse nature—both patrimonial and non-patrimonial—many of which are essential for the effective exercise of the former and are not found in other types of civil contracts.

The theory of the institution began to take shape alongside the criticism directed at the traditional theory, a criticism supported at the beginning of the 20th century first by Otto von Gierke in German legal scholarship, and later by Lorenzo Mossa in Italian legal scholarship.

The interwar period, through its economic crises and the new challenges posed to liberalism, became fertile ground for such a debate. It had become evident that the so-called partnership contract shared similarities with various other civil contracts, but at the same time displayed a number of unique features.

Moreover, it could no longer be denied that the organization and functioning of companies generated numerous practical issues, which led the legislator to intervene successively and increasingly "densely" in regulating the partnership contract.

Particularly in the case of commercial companies, the amendments to the Civil Code had already become noticeable since the second half of the 19th century, so much so that one may state, without fear of error, that the company is the contract whose regulation is in a continuous and often unpredictable process of change and evolution.

As a result, already in the first half of the 20th century, the partnership contract—especially the commercial one—was governed by a substantial body of supplementary and mandatory rules.

Furthermore, while in the previous century at most three forms of commercial companies were regulated, later historical developments and the experience accumulated in major European economies required the emergence and regulation of new corporate forms.

[7] See in common law space Susanna Kim Ripken, *Corporate Personhood*, Cambridge University Press, Cambridge, 2019, pp. 22 *et seq*.

[8] Charles Houpin and Henri Bosvieux, *Traité général théorique et pratique des sociétés civiles et commerciales et des associations: avec formules*, vol. I, Sirey Publishing House, Paris, 1925, p. 60.

Consequently, in this context, the autonomy of the parties appears to lose substance, as associates or shareholders conclude a contract shaped within numerous legal limits. In other words, associates or shareholders have a reduced role in drafting the constitutive acts.

While they retain greater autonomy with respect to the partnership contract itself, regarding the company's statute they undertake to comply with an already established set of rules governing the organization and functioning of the commercial company.

"When a contract is concluded, the parties freely determine the obligations that bind them, within the limits of public order. By contrast, we are dealing with an institution when the parties accept or reject as a whole a body of rules without being able to modify them, unless the law expressly allows it."[9]

From another perspective, the theory of the institution explains why the rights of associates are not definitively established by the constitutive act, but may be modified by a majority decision if the life or prosperity of the company so requires, and why the administrators or directors of the company are not mere agents of the associates, but represent the authority responsible for achieving the common objective.

Initially, the institutional theory was used to provide the existence of the company with a more flexible framework; later, when regulation became too abundant, the contractual theory regained prominence even from the legislator's perspective.

It has sometimes been said that this theory is imprecise, without explaining the reasons underlying such a conclusion.

It is true that the theory of the institution tends to overshadow, at least apparently, the agreement of the associates, which becomes rather a preliminary stage to the emergence of patrimonial and non-patrimonial relations that will unfold continuously or at least at key moments in the company's evolution.

However, the will of the associates is by no means eliminated, whether we consider the initial will or its subsequent expression, and comparisons with the institution of marriage must be made with great caution, since despite multiple similarities, associates may introduce numerous changes to the company, even if these must comply with various limits and conditions.

5. Discussions and conclusions

It should not surprise or prove the assertion or claim that the partnership contract under Roman law, the contract of 'commenda' of the Middle Ages or the contract by which the large shipping companies were formed at the beginning of the seventeenth century – the forerunners of the joint stock companies of the nineteenth or twentieth century – are legal constructions that correspond to the economic context, should not be surprising, nor should it be proved.

At present, we believe that the theory of society needs to be reconstructed almost from scratch because the context has changed essentially[10].

As arguments for a new definition of the concept of contract, we can point to the numerous disputes related to the conflicts between shareholders, between the majority and the minority, on the nature of the shareholders' rights as well as on the responsibility of the corporate bodies.

[9] Yves Guyon, *Droit des affaires*, vol. I : *Droit commercial général et sociétés*, Economica Publishing House, Paris, 1995, p. 91.

[10] See the recent German reform enacted in 2021 (Personengesellschaftsrechtsmodernisierungsgesetz - MoPeG).

If we make an inventory of these still unsolved problems, we will notice that the definitions of the codes of the past centuries no longer have anything to do with what the commercial company represents.

These definitions focused on issues such as the creation of share capital, or the social interest of the partners in setting up the company, on formalities and very little on aspects related to the long-term functioning of the company.

It is becoming increasingly clear that a company contract is not just a simple contract with easily defined obligations, that it is a contract by which a group of people is organized rather than rules are established regarding the formation of the share capital and the earnings.

As such, the problems of the future corporate law, truly autonomous from commercial law, will no longer be those related to the share capital but those related to the organization of the company, to corporate governance.

Can we in this context still see the company as a contract by which several partners pool various goods as in Roman law, when the majority of partners do not participate in the social life?

Can we look at today's joint-stock companies from the perspective of 400 years ago when they were few throughout Western Europe and were strictly regulated and controlled by the monarch and his officials?

From this point of view, I believe that we should not reiterate those notions and definitions that are appropriate to the context of a historical moment. Today's commercial society requires a profound reform starting from its adaptation to the historical moment we are living in.

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