WHAT KIND OF THEORY FOR WHAT LAW?

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Abstract

In this article, I take aim at a number of interesting claims made by the Director of the Centre for Legal Studies at the Romanian Academy, Mircea Duțu, namely that, for expediency and political reasons, Romanian jurists have never developed a critical culture that would allow for elegant theoretical developments and the integration of foreign imported law with local customs and traditions. In addition to developing and nuancing some of these assertions, I put forward a number of arguments. First, that there is no great integration of local customs and traditions with legal theorisation in the long nineteenth century, as Mircea Duțu seems to suggest. On the contrary, it is useful to see the classical legal tradition of the long nineteenth century as an invented tradition. This tradition was less preoccupied with the integration of local legal customs into modern law and more interested in producing a unified theory of the 'free will', which would ultimately further the economic interests of the bourgeoisie, still emerging as class in continental Europe during that century. Following on from this proposition, and this is the second argument I advance, the discrepancy between local custom or tradition and imported law discussed by Duțu is actually nowadays a discrepancy between the instrumentalism and political opportunism of those who govern and the many unintended consequences in the social and economic spheres that such instrumentalism often produces. Therefore, and this is my main argument, what mainstream Romanian jurisprudence lacks is a theory of the social, in the sense defined by Duncan Kennedy in his analysis of the three waves of globalization of legal thought since the nineteenth century, and not a theory of the integration of ancient local customs into modern law. Such a theory of the social, rather than a theory of the integration of local customs and traditions into imported law, would allow Romanian comparativists to provide more nuanced and sophisticated assessments of the implications of imported legal models.

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Keywords: *Romanian Civil Code of 1865, Classical legal theory, Romanian legal culture since the adoption of the Civil Code, Comparative law, Comparative legal theory, American Legal Realism*

Résumé

*Dans cet article, je vise à discuter un certain nombre d'affirmations intéressantes mais problématiques faites par le directeur du Centre d'études juridiques de l'Académie roumaine, Mircea Duțu, selon lesquelles, pour des raisons d'opportunité et politiques, les juristes roumains n'ont jamais développé une culture critique qui permettrait des développements théoriques élégants ou l'intégration du droit importé de l'étranger aux coutumes et traditions locales. En plus de développer et de nuancer certaines de ces affirmations, j'avance un certain nombre d'arguments. Premièrement, il n'y a pas d'importante intégration des coutumes et traditions locales dans la théorisation juridique au cours du long XIX*ème *siècle, contrairement à ce que Mircea Duțu semble suggérer. Au contraire, il est utile de considérer la tradition juridique classique du XIX*ème *siècle comme une tradition inventée, moins préoccupée par l'intégration des coutumes juridiques locales dans le droit moderne et plus intéressée par la production d'une théorie unifiée du "libre arbitre", qui servirait en fin de compte les intérêts économiques de la bourgeoisie laquelle émergeait encore en tant que classe en Europe continentale au cours de ce siècle. Dans le prolongement de cette proposition, et c'est le deuxième argument que j'avance, le décalage entre la coutume ou la tradition locale et le droit importé dont il est question ici est en fait aujourd'hui un décalage entre l'instrumentalisme et l'opportunisme politique de ceux qui gouvernent et les nombreuses conséquences involontaires dans les sphères sociales et économiques qu'un tel instrumentalisme produit souvent. C'est pourquoi, et c'est mon principal argument, ce qui manque à la théorie juridique roumaine dominante est une théorie du social, au sens défini par Duncan Kennedy dans son analyse des trois globalisations de la pensée juridique depuis le XIX*ème *siècle, et non une théorie de l'intégration des anciennes coutumes locales dans le droit moderne. Une telle théorie, plutôt qu'une théorie de l'intégration des coutumes et traditions locales dans le droit importé, permettrait aux comparatistes roumains de fournir des évaluations plus nuancées et sophistiquées des implications des modèles juridiques importés.*

Mots-clés: *Code civil roumain de 1865, Théorie juridique classique, Culture juridique roumaine depuis l'adoption du Code civil, Droit comparé, Théorie juridique comparée, Réalisme juridique américain*

1. Introduction. A Legal Nation of Glossators and Commentators of Foreign Law?

In an article circulated on *Juridice*, Professor Mircea Duțu, the Director of Research at the Romanian Institute of Legal Research affiliated to the Romanian Academy, made a number of interesting claims, which I believe are of interest to Romanian comparativists.[1] If I correctly understand these claims, he argues that since the dawn of the modern Romanian law in the nineteenth century there has been a constant divorce between the traditions and customs of the governed and the foreign legal models imported by those governing the Romanian people. In other words, there was a huge distance between the forms of social life of the people and the law enacted by Romanian elites under the influence of foreign models, a dissonance that would predate the reproduction of the Romanian Civil Code from the Code Napoleon in 1865. Second, the impact of these quick fixes is that there is no sustained theoretical effort among Romanian jurists, of the kind we can see in Western Europe, particularly in France and in Germany, to connect the imported modern legal form to the traditions and customs of the country where the law is introduced. Third, Duțu claims that such an intellectual legal culture, oriented towards pragmatism and politically convenient quick fixes has primarily produced commentators and glossators in Romanian law, but not a very profound juridical science of the type we can see already in early nineteenth century. Such science was visible in France, for example, in the *travaux préparatoires* of the draft commission of Napoleonic Code, or later in the debates of various German schools predating the adoption of the BGB (*Bürgerliches Gesetzbuch*). Fourth, it is maintained that this Romanian cultural milieu did not improve greatly after the First World War, for political and expediency reasons. During the interwar period, it did not improve because Romanian jurists were dedicated to the political and pragmatic project of Romanization.[2] During the communist era, when the Institute of Juridical Research was finally

[1] Mircea Duțu, *Tragedia "științei juridice" românești. Condamnați a rămâne pentru totdeauna "glosatori și/ori comentatori"?* (The tragedy of the Romanian legal science. Condemned to remain forever glossators and commentators?), in *Juridice*, 21.02.2024 <https://www.juridice.ro/essentials/7542/tragedia-stiintei-juridice-romanesti-condamnati-a-ramane-pentru-totdeauna-glosatori-si-ori-comentatori?> last accessed February 2024.

[2] Lucian Boia, *Cum s-a românizat România* (How Romania Romanised) (Bucharest: Humanitas, 2015).

organized by George Maurer under the aegis of the Romanian Academy and quickly managed to group there probably one of the most distinguished team of Romanian jurists of all times,[3] it did not improve, mostly because solutions that would align theoretical insights with traditions and customs of the people were off limits. Lastly, Dutu's article makes two implicit but more general claims: first, that here could be a link between imports from other legal systems, deep theoretical reflections and the local customs and traditions. The second is that, in the absence of all these connections, what we are left with is only a 'legal nation' of glossators and commentators, jurists who comment on the imported law but make no effort to eventually eliminate the inconsistencies and contradictions of that law with the local customs through theoretical constructs. Since the 'legal nation' of glossators and commentators thus produced has no great appetite for theory, we cannot expect significant theoretical breakthroughs in the future, even when we are confronted to the dystopian realities of postmodernism, but only imports of western legal forms further divorced of the social and local cultural traditions.

Now, the more direct claim that the Romanian legal culture has some aura of superficiality, at least in relation to the theorisation of the state, is confirmed by other authors and probably goes undisputed.[4] Other claims of professor Duțu are, however, relatively vague, although perhaps these assertions could not be otherwise, given the inherent limitations of the format in which he published. For example, despite the importance of this explanation for his overall claim, Mircea Duțu does not expound what legal form would have been better for the incorporation of local traditions and customs into the modern law than the outright copying of the Napoleonic Code into Romanian law. Similarly, he does not explain what form of legal thought and theorisation would do justice to ancient Romanian local customs and traditions, although in his text he appears to acknowledge some influence of the German nineteenth-century ideas of Savigny. From here we can infer that, by extension, a better incorporation of Savignian ideas, or of the ideas of Jhering or Geny into codification,

[3] The Institute was founded by Council of Ministry Decision (HCM nº 419/14 December 1953), at the end of 1953.

[4] See e.g. Adrian-Paul Iliescu and Simina Tănăsescu, *Legal Philosophy and Theories of the State in 20th-Century Romania*, in E. Pattaro, C. Roversi (eds.), A Treatise of Legal Philosophy and General Jurisprudence: Volume 12: Legal Philosophy in the Twentieth Century: The Civil Law World, Tome 1 (Springer, 2016), pp. 690-95.

would probably do justice to the local customs and traditions for the Romanian kingdom. However, we do not have *longue durée* analyses of such local customs and traditions to determine which ancient traditions survived the frequent political changes in Romanian territory.[5] We do not know whether the customs and traditions of Roman Dacia, for example, remained the same when the Romanian territories became Christianised. We do not know if the local customs at the dawn of the first millennium stayed the same when the Romanian principalities were established some three hundred years later. We know, however, from historical analyses that social obligations of the peasantry were less burdensome at the founding of the principate of Vallachia than they were three centuries later, after the reign of Michael the Great, and that these obligations became even worse when the Phanariot regime was imposed by the Ottomans. Thus, local customs changed over time and were clearly influenced by an ever-changing political situation, but it is difficult to speak of ancient customs and local traditions based on documentary material. In a society that has been largely illiterate for two millennia, it is often difficult to find written traces that encapsulate the local tradition in time. Where we do find traces, we can expect them to reflect the interests of ruling political elites who codified them, rather than those that developed as custom in the villages and to govern, among other things, relations between peasants in relation to property. Moreover, if we accept the brilliant demonstration made about four decades ago by the late historian Arno Mayer, namely that in Western Europe we have a persistence of social forms and of the political and economic dominance of great landlords and nobles up until the end of First World War,[6] then the Kingdom of Romania does not look like the outlier it did in the writings of Romanian intellectuals of the late nineteenth and early twentieth century, which clearly inspired Duțu's article.[7] The great

[5] It is also useful to use in this context the distinction made by Eric Hobsbawm between custom and tradition in Eric Hobsbawm and Terence Ranger (eds.), *The invention of tradition* (Cambridge: Cambridge University Press, 2012), 2) where the object of traditions (invented or otherwise) is 'invariance', while custom functions as 'the motor and fly-wheel', not precluding innovation on and change up to appoint, although limited in the requirement that it 'must to be compatible or even identical with precedent').

[6] Arno Mayer, *The Persistence of the Old Regime: Europe to the Great War*, Verso (reprint), 2010.

[7] This vision as well as the romantic vision of the peasantry as recipient of ancient wisdom and custom, which Duțu uses, has its roots in the late 19th and early 20th century reaction of intellectuals to the superficial Westernization of Romania, and it was further developed during the interwar period for reasons described e.g. by Sorin Radu and Oliver Jens Schmitt (eds)., *Politics and Peasants in Interwar Romania: Perceptions, Mentalities, Propaganda*,

monuments of Western legal thought at either end of the long nineteenth century, the French Civil Code at the beginning and then the German BGB at the end,[8] do not appear to be the perfect fusion of legal form with social customs and traditions either, even if Professor Duțu does not directly claim that they were, but one can deduce it implicitly. Both monuments of legal thought look more like legal texts pushed from 'above', by political and cultural elites, exactly as it was in the case of the Romanian Civil Code in 1865, or the earlier Romanian codifications of the nineteenth century.[9] These were fundamental, quasi-constitutional documents adopted by a

(Cambridge: Cambridge Scholars Publishing, 2017). From a longer historical perspective, going back to the 18th century and the Enlightenment's influence on the development of law, what probably distinguishes somehow the Romanian principalities under Ottoman influence is the lack of enlightened absolutist rulers of the type of Frederick the Great or Maria Theresa, and the degradation of political and social conditions by contrast to the German lands [see e.g. Constanţa Vintilă-Ghiţulescu, *Evgheniti, ciocoi, mojici. Despre obrazele primei modernitati romanesti (1750-1860)*, (Bucharest: Humanitas 2013)], impeding on the development of Enlightenments' absolutist legal projects and legal thinking that we see in Western Europe (see e.g. Antonio Padoa-Schioppa, *A history of law in Europe: from the early Middle Ages to the twentieth century*, (Cambridge: Cambridge University Press, 2017). Nevertheless, we lack large scale investigations on the impact of this absence on legal theory to support the point that this was a fatal flaw of Romanian legal thought, which pushed this thinking on a path of underdevelopment that cannot be recovered by the synchronization of the late nineteenth century. Conversely, if we look at the impact of enlightened absolutist monarchs' projects of 'modernization' on the other side of continent, respectively in Russia, we see as a result a legal culture of landowning nobility and officials based on a 'statist' perception of the law, distinct of the mass legal culture of peasantry and other social strata based on generally accepted precepts of truth and morality (see Anton, *infra*). We do not have investigations of these cultures similar to those realized in Russia so as to know what the legal traditions, customs an beliefs of peasantry in the Romania principalities were, but it is interesting to note that when Tsarist Russia occupied the Romanian principalities in the early 19th century and attempted to impose the first quasi constitutional regulations there (*Regulamentele Organice)*, there was a constant subversion by the local elites either of the required approval by Romanian noblemen, or of the implementation of such statutes (Vintilă-Ghiţulescu, *Evgheniti*, *supra*) as this legal modernization interfered with the local noblemen political privileges and arrangements. From a more scientific perspective of ancient legal tradition, see e.g. the recent ethnological legal studies of Professor Valerius Ciucă at the University of Iasi: Valerius M Ciucă, *Senioriile Florei. Exercitii comparative de etnologie juridică*, vol.1 (Iasi: Sedcom Libris, 2022).

[8] For the point that this was a political project see e.g. Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Oxford: Clarendon Press, 1989).

[9] See e.g. Manuel Guțan, *The Legal Transplant and the Building of the Romanian Legal identity in the Second Half of the 19th Century and the beginning of the 20th Century*, in 2017 (8) *Romanian Journal of Comparative Law,* pp. 62 *et seq.*

local elite that wanted to obtain a legal codification favourable to the bourgeoise,[10] a 'class' that did not dominate the social and economic life in Romanian principalities any more than it dominated these spheres in Western Europe at that time, in spite of different economic developments. In other words, what we seem to have in the Western half of the European continent in the long nineteenth century is a totally invented legal tradition, which we could call 'classical legal theory' for convenience, furthering the interests of a class that does not exist, and that has relatively little connections with the local customs and traditions that it purports to regulate, and a vague connection with the Roman law that it pretends to follow. From a more modern or contemporary perspective, it would therefore make more sense to say that what we lack in the Romanian Kingdom is not the connection of the Civil Code with the popular customs and traditions of the people, but rather the social and economic theorisation and reflection of the type we can see, for example, in the debates leading to the adoption of the BGB.[11]

2. Legal Global Theory Since the Long Nineteen Century

This fundamental issue aside, in order to nuance a bit professor Duțu claims and make them applicable to the study of comparative law and Romanian legal culture, we should see first what a 'theory' is. If we take *Oxford dictionary's* explanation, theory is a "system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained",[12] a definition further refined by the *Oxford Dictionary of Philosophy* as, "in science, a way of looking at a field that is intended to have explanatory and predictive implications."[13] Theory then appears as an intellectual artifact and a way of looking at reality based on a set of pre-existing ideas or assumptions about reality. But what were these pre-existing ideas during the elaboration of the 'classical' invented tradition in the long nineteenth century?

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[10] Bart Wauters and Marco de Benito, *The bourgeois age*, in Wauters, De Benito (eds.), The History of Law in Europe (Cheltenham: Edward Elgar Publishing, 2017), pp. 113-143.

[11] See e.g. Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen: eine Kritik des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reich* (H. Laupp, 1890).

[12] ' Theory' , in *Oxford English dictionary*, (Oxford: Oxford University Press, 2022) Retrieved Feb. 28, 2024.

[13] Simon Blackburn, *The Oxford dictionary of philosophy*, (Oxford: Oxford University Press, 2005).

One way to look at how these particular assumptions about the world made by the jurists during the elaboration of the classical theory in the nineteenth century is through the history of ideas prism and the impact of this intellectual history on legal teaching. In the United States, for example, this means going back to the transformation of 'law' from a purely practical and non-systematic endeavour during the first decades of the long nineteen century into a recognisable modern academic discipline in the final decades of this century.[14] For the engineers of this remarkable

[14] The discussion of the transformation in the United States I selected here is not random. Even if the United States came late to the grand transformation of law that took place in continental Europe or the Western legal world in the 1800s, first in France and then in Germany, what we see at Harvard under the influence of Langdell is paradigmatic of what we see on the western side of the European continent. And even if Germany was the legal hegemon in terms of ideas at the end of nineteenth century, the road was already paved for the US to become the legal hegemon in the second half of the twentieth century of until nowadays. See on this point e.g. esp. Ugo Mattei, *Why the Wind Changed: intellectual leadership in Western law*, in (1994) 42 *American Journal of Comparative Law*, pp. 195 *et seq.* and Laura I Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, in (2004) 39 *New England Law Review*, pp. 21 *et seq.* Also, on the more general point of German legal science influence on further development of American law, e.g. Albert Bernhardt, *The German Element in the United States with special reference to its political, moral, social, and educational influence*, vol. 1, (Boston: Houghton Mifflin, 1909); Michael Hoeflich Faust, *Law & geometry: Legal science from Leibniz to Langdell*, in (1986) 30:2 *American Journal of Legal* History, pp. 95-121; James E. Herget and Stephen Wallace, *The German free law movement as the source of American legal realism*, in (1987) 73 *Vanderbilt Law Review*, pp. 399 *et seq.*; Michael H Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, in (1987) 35 *American Journal of Comparative Law,* pp. 599 *et seq.*; David S Clark, *Tracing the roots of American legal education–a nineteenth-century German connection*, in (1987) 51 H.3 *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law,* pp. 313-333; Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, in (1989) 37 *American Journal of Comparative Law*, pp. 1 *et seq.* ; Mathias Reimann, *Continental Imports-The Influence of European Law and Jurisprudence in the United States*, in (1996) 64 *Tijdschrift voor Rechtsgeschiedenis*, pp. 391 *et seq.*; Ugo Mattei, Three patterns of law: taxonomy and change in the world's legal systems, in (1997(45) *The American Journal of Comparative Law*, pp. 5 *et seq.*; Bruce A Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, in (2007) 25:2 *Law and History Review,* pp. 345-399; Bruce A. Kimball, *The Inception of Modern Professional Education: CC Langdell, 1826–1906* (University of North Carolina Press, 2009); Andrew Charles Forsyth, *Common Law and Natural Law: A Case Study: The Changing Shape of American Legal Education from the Puritans to the Legal Realists* (Yale University, 2017). For the 'classical American law' see also Duncan Kennedy, *The rise & fall of classical legal though* (Washington, D.C: Beard books, 2006); Morton J Horwitz, *The transformation of American law, 1870-1960: The crisis of legal orthodoxy* (Oxford: Oxford University Press, 1992).

transformation, the law was destined to occupy an essential place in academia which itself, under the influence of Humboldt's ideas, underwent a massive shift in the nineteenth century from a medieval institution to a modern enterprise.[15] This period corresponds to the phenomenon described by Duncan Kennedy (one of the most well-known contemporary American legal theorists and a critical legal scholar) as the first globalisation of law occurring in the second half of the long nineteenth century, with the law professor occupying centre stage.[16] According to Kennedy, what was globalised during this period was a mode of legal consciousness that saw the law as a 'system' with a solid internal structural coherence based on the exhaustive elaboration of the distinction between private and public law, 'individualism,' and commitment to legal interpretative formalism.[17] These traits were brought together in the 'will theory', where private law rules were understood as a set of rational deductions from the idea that governments should protect the rights of legal persons, which meant assisting them in realising their wills, interfering only as necessary to allow others to do the same.[18] The theory of will attempts to identify the rules that should follow from consensus in favour of individual self-realisation. However, it was not a political or moral philosophy justifying this goal, nor a positive historical or sociological theory. What the theory of will offered instead was a specific, volitional, and deductive interpretation of the interdependence of tens or hundreds of relatively concrete norms of existing national legal orders and the legislative and judicial institutions that generated and applied these norms.[19] As it could be seen from the description above, there is nothing in

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[15] Appleman, *op. cit., supra.*

[16] Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in D. Trubek and A. Santos (eds.), The New Law and Economic Development. A Critical Appraisal (Cambridge: Cambridge University Press, 2006). Such Weberian ideal type or idealised descriptions of historical periods, although heuristically useful, widely cited or accepted, do not go of course without criticism (See e.g. Karlson Preuß, *Legal Formalism' and Western legal thought,* in (2023) 14:1 *Jurisprudence*, pp. 22–54).

[17] Kennedy, *op. cit., supra,* note 16, pp. 22-26; Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought*, in (1980) 3 *Res. in Law and Soc*, pp. 3–24.

[18] See e.g. Gonçalo de Almeida Ribeiro, *The Decline of Private Law, A Philosophical History of Liberal Legalism* (Hart, 2019) (for more detailed explanations and a large-scale historical reconstruction of what the author calls 'liberal legalism, for the classical period, and of the intellectual currents which followed), inspired by the ideas and the periodization provided by Duncan Kennedy.

[19] Kennedy, *op. cit., supra,* note 16.

this elevated intellectual scaffolding leading to the elaboration of the theory of will in the nineteenth century, which would impinge its authors even remotely to willingly incorporate 'popular' customs and traditions into the written law.

This 'classical' mode of thought came under increased attack after 1900 in a period that lasted until the World War II (identified by Kennedy as the second wave of globalisation). The 'social' became the determinant of legal consciousness under the influence of the work of preeminent jurists such as Jhering, Gierke, or Ehrlich in Germany and Saleilles, Geny, Duguit, Lambert, Josserand, or Gounod in France.[20] The legal science during this period became one of legal categories and the science of the techniques of law. These techniques were to be imported from related but different fields such as sociology, economics, and psychology. One of the key elements of legal science produced during this period became the 'study,' supporting regulatory regime on 'public interest' rather than partisan political grounds.[21] The will theory as expressed in the classical theory came also under increased scrutiny during this period, as its individualism ignored the interdependence created by the social and economic transformations of late nineteenth-century life, and endorsed particular legal rules that permitted antisocial behaviour of many kinds. The social critique of classical legal thought was also directed to the maintenance of an appearance of objectivity in classical legal interpretation through an abuse of deduction as preferred logical method to argue for the soundness of a legal interpretation. Such an abuse of deduction was seen as a major

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[20] Kennedy, *ibid*. Professor Duțu probably errs in attributing these authors a very high consideration for the local, popular customs and traditions, when these customs appeared in a highly intellectualised debate and were more a social critique of the gilded age. In the United States, preeminent representatives of this legal though mode were the jurists writing in what was later called legal realism tradition. See e.g. Laura Kalman, *Legal realism at Yale, 1927-1960* (The University of North Carolina Press, 1986); John Henry Schlegel, *American legal realism and empirical social science: From the Yale experience*, in (1978) 28 *Buffalo Law Review*, pp. 459 *et seq*.; Michael Steven Green, *Legal realism as theory of law*, in (2004) 46 *William. & Mary Law Review*, pp. 1915 *et seq*.; John Henry Schlegel, American legal realism and empirical social science: From the Yale experience, in (1978) 28 *Buffalo Law Review* 459 *et seq*. For France, see e. g. Marie Claire Belleau, *The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France*, in (1997) *Utah Law Review* , pp. 379 *et seq*.; Marie-Claire Belleau, *Les juristes inquiets: classicisme juridique et critique du droit au début du XX^e siècle en France*, in (1999) 40:3 *Les Cahiers de droit,* pp. 507-544.

[21] The interdisciplinarity insistence of the contemporary legal research has its origins during this period.

obstacle to the adaptation of the law to new conditions, as the inherent gaps in law were adjudicated based on partisan ideologies of the parties to the conflicts, and then rationalised deductively on the basis of impersonal and objective truths of the classical period. From this critique it was derived an 'ought' of an astonishingly successful reform program, in all possible areas, from housing to labour law, from taxation and antimonopolies legislation to what it became later customer contracts.

Finally, with the 1968 moment and the advent afterwards of neoliberalism,[22] the 'social' started losing steam, in a period that Kennedy perceives as the third globalisation of legal consciousness. For him, even if the first and second globalisations could be described as thesis and antithesis in the Hegelian sense, the third globalization does not emerge as synthesis.[23] While it resembles the first two in its foundation on a brutal

[22] I define here neoliberalism following the influential definition of David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press 2005), p. 2, respectively as "a theory of political and economic practices that asserts that human well-being can best be achieved by stimulating liberties and entrepreneurial skills through an institutional framework characterized by strong individual property rights, free markets, and free trade. The role of the state within neoliberalism is to create and sustain the appropriate institutional arrangements to encourage these practices." However, there are other definitions of neoliberalism, in particular that of Pierre Bourdieu, *Neo-liberalism, the Utopia (Becoming a Reality) of Unlimited Exploitation*, in P. Bourdieu, Acts of Resistance: Against the Tyranny of the Market (New York: Free Press, 1998), p. 94 which insists on neoliberalism as utopian project, and also Alfred C. Aman, *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, in (2006-2007) 51 *The New York Law School Law* Review, p. 806; J. Bodnár, *Becoming bourgeois: (post socialist) utopias of isolation and civilization*. in M. Davis and D.B. Monk (eds.), Evil paradises: dreamworlds of neoliberalism (The New Press, 2007), pp. 140–151; David Singh Grewal and Jedediah Purdy, *Introduction: Law and neoliberalism*, in (2014) *77 Law & Contemporary Problems,* pp. 1 *et seq*.; João Rodrigues, *Neoliberalism as a real utopia? Karl Polanyi and the theoretical practice of F. A. Hayek*, in (2008) 15:7 *Globalizations*, pp. 1020-1032; Simon Springer, *Neoliberalism,* in K. Dodds, M. Kuus (eds.), The Ashgate research companion to critical geopolitics (Routledge, 2016), pp. 147-164; Damien Cahill, Melinda Cooper, Martijn Konings and David Primrose (eds), *The SAGE handbook of neoliberalism*, (Los Angeles: Sage, 2018). As utopian project, neoliberalism serves as an instrumental rationality to justify and legitimize 'whatever must be done' to realize this political project. When the two projects are in conflict, the latter, the political one, prevails and this "creative tension" explains the hybridity and variegated complexity of the legal infrastructure produced by *the real existing* neoliberalism, so visible in Romania as well. For an application of neoliberalism to post-communist law see e.g. Bojan Bugarič, *Neoliberalism, post-communism, and the law*, in (2016) 12 *Annual Review of Law and Social Science*, pp. 313-329.

[23] Kennedy astutely observes that "Between 1850 and 1950 (more or less), the plurality of schools of legal philosophy did not produce a diversity of modes of legal imagination,