If you really want it… then you must! On the will that generates mandatory obligations and the instruments for strengthening the force of the promise under Romanian civil law

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= SUMMARY =

Lately, every time I was invited to present a paper in a conference, I was told "Just say something about security interests". I was "the mortgage guy". The label is due to the fact that for most of the 20 years during which I wrote in the legal field, I wrote on topics related to security interests. My first book was on the security interests over personal property (a comment on articles of the special law that was brand new at that time). The PhD thesis was on the principles on which the law of secured transactions is based. The post-doctoral paper analysed the security agreement…

However, what these commentators missed was that the field of the security interests created for securing the payment of monetary obligations is very large, since it provides the link between the general theory of obligations and the one of the *in rem* rights through the (civil) deeds and the special contracts. In practice, by writing on security interests, I was forced to analyse most of the fabric of the civil law. As a consequence, in order to clarify the notion of security interest, I studied the blueprint of *in rem* rights and I forayed into the concept of object of (*in rem*) right. I thus sketched a new configuration of the notion of "goods" which had entered (almost unobserved) in the new (Romanian) Civil Code and I could identify a general theory of intangible assets.

Also in attempting to identify the legal nature of the security interests I was forced to venture into the field of the general theory of obligations. After all, the security interests are seen as (simple) accessories of an obligation (considered as the "principal"). Hence, the study of the typology of this obligation seems to be a *sine qua non* condition in sorting up the manner in which the nature of the obligation reflects on the security associated to the (non)performance thereof. By following this idea, I noticed that the relation is rather between the security and the right to action (i.e. the remedy in substantive sense) than between the security and the actual debt. This conclusion is visible especially in the field of personal guarantees, where the guarantor has no debt towards the creditor, but solely undertakes an obligation (*stricto sensu*) to secure (another person's debt). In the security interest field, this division of the (paucital) relation that is an obligation in an inter-personal relation between debtor and creditor (*debitum*) and one sanctioned by the state (*obligatio*) justifies the specific legal regime of the mortgagee's remedies. We observe, therefore, a veritable archaeology of the idea of obligation, being thus able to re-sketch (on deconstructivist coordinates) the history of the Roman obligation, deciphering in the same time the meanings and effects brought by such historical construct to the present norms.

As the main source of (civil) obligations is the legal deed (and especially the contract), I ventured in the study of this source to see how the simple will of the individual can lead to such a strong connection and, especially, why the state supports such will by its protection. I reached the conclusion that the "standard" obligation to which we usually associate a "general liability" is exactly this obligation derived from the debt. Maybe this is the reason why the textbooks on the general theory of obligation are divided into two chapters with very few connections between

them – the contractual obligation and the torts. In the second case, the initial source is a (simple) (generic) duty – *neninem laedere*, and the connection point seems to be only the consequence of the infringement of such duty. Although here the liability theory seems to tarry in a dualism between the liability for torts and the contractual liability…

But if the main source of obligations is the individual's will and the law give such pre-eminence to the individual freedom (of will), than is there a point in discussing a clear distinction between the objective (i.e. the Law) and the subjective right? In this point of my explorations, I started to ask on the source and meaning of the objective Law. Are rules simple decantation of generally valid cosmic truths or just mere conjectures particularized in time and space derived from the aggregate of individual wills? I reached, until now, the point where I identified an issue of logic: the law as deontic system cannot explain all its own rules and need assistance from outside. Such assistance can be found in philosophy (meaning in the human essence), in politics (meaning in the fight for power) or in morals (meaning in the endeavour to recognize our ontological limitation). I will follow this road to find out from which of these realms we can "import" values depending on which a legal system can be considered as complying with the ideal of rule of law, and the state can be characterised as a "state based on the rule of law".

In all these searches I was and I still am not alone. Some of the ideas mentioned above developed in complex research projects, in which I shall participate together with other fellow jurists. In other cases, I am trying an interdisciplinary approach in which I cooperate with specialists in the fields of philosophy, formal logic, history or religion. But always the main catalyst of these researches are the students. After all, an important component in the study of these issues is given by the attempt to understand the fundamental principles of the legal (civil) system in order to be able to explain them to my students. It is said that one only really knows something when one is capable to explain it to other people. Well, from the discussions with my students I myself discover the areas of the legal theory need to be (re)read. The first year students have the innocence of those who know they don't know and are addressing questions convinced that the teacher holds all the answers just like a "Jeopardy" answering machine. The postgraduate students, on the other side, want to understand what they can find beyond the rules learned during the bachelor studies and how can such rules be used in their practical activity. Both approaches are useful in clarifying my own research topics.

At the end of this stage of my career I can say that I have more questions the answer of which I can't wait to find, than answers which I already discovered.