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Private Law in Transylvania after 1945 and to the Present Day

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Abstract. Following the Second World War, a major transformation of Romanian private law occurred, whence also the private law applicable in the geographic region known as Transylvania was transformed under the Soviet-type dictatorial regime, which would rule the country between 1948 and 1989. Suppression – akin to abolition – of private property, wide-scale nationalization, and collectivization are presented in this study through the legal norms by which the socialist transfiguration of the national economy was meant to be achieved, along with that of personal rights and attitudes. Following the regime change of 1989, a reversion to historical patterns of regulation and then the gradual evolution of Romanian private law took place. We examine the legislative measures for the restoration of the rule of law and for achieving a transition to a market economy. We present in detail the private law implications of the (incomplete and imperfect) restitution of nationalized property and of privatization. We also show that the structure of Romanian private law was altered by the transition to the monist system of regulation, commercial law being apparently (but not in practice) merged into civil law.

Keywords: Romania, private law, codification, communism, state property, collectivization, privatization, monist system of regulation, dualist system of regulation, 20th century

1. The Soviet-Type Dictatorship and Private Law Relations (1945–1989)

1.1. Overview: The Construction of the Soviet-type Dictatorship and Its Regulatory Schema

The private law of the Soviet-type dictatorship in Romania is at the same time characterized by continuity (the Civil Code remained in force) and by some radical fracture lines (suppression of private property, abolition of the market economy based on competition, introduction of the planned economy). For this reason, the following statement was only partially correct:

> By overthrowing the capitalist system through revolution, the continuity between the laws of the bourgeois-landlord system was broken and socialist law newly established. The first was the exponent of the will of the bourgeoisie and of the remnant of the estate holders, their interests intertwined with the former, while the second is a means of dictatorship of the proletariat, so it expresses the will of that class which is in constant and irreconcilable opposition with the exploiting classes and which fought and continues to fight against them.[1]

The Soviet-type legal and economic regime constituted isolated systems until the end of the Second World War; however, in the post-war period, the Soviet Union extended its policies of forced industrialization, collectivization, megalomaniacal public works, and the institution of centralized economic planning to the states in its sphere of influence.[2] 'The state under single-party rule, in addition to direct control of the political, administrative, and military apparatus, also became the master of the economy. The imposition of this system meant at the same time the establishment of an economy dominated by the state.'[3]

The question of whether there has ever been a legal family comprised of socialist law is one of the defining topics of comparative law. In our opinion, the answer must be a negative one: the socialist legal family can be considered as a subcategory of the continental legal family. This statement is based on the partial continuity of the regulation of private civil law in this period as well on the one hand and on the technique of implementation and use of 'revolutionary' innovations or transformations (exclusivity by written, statutory law, the lack of law based on precedents) on the other.

1 Fekete 1958a. 6. [Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.]

2 Berend 2008. 152.

3 Berend 1999. 104.

Although the continuity of private law regulation is signalled by the conservation of the Civil Code of 1864, the significance of this norm, its character as a fundamental source of private law has diminished since the regulation of private law relationships was achieved through numerous special norms (for example, by Decree no 31 of 1954 concerning Natural and Legal Persons or Decree no 167 of 1958 regarding the Statute of Limitations). During the Soviet-type dictatorship, no new Civil Code was enacted according to the spirit of the times; however, this state of affairs was interpreted as merely apparent, a mere oversight due to the fact that the country had not acquired a new Civil Code in the sense of an act by the legislator. 'To the contrary, the revision of the old civil laws – and, where this proved insufficient, replacing them with new laws having a socialist content – was surprisingly broad and began even before the adoption of the first popular democratic constitution.'[4]

1.2. Nationalization, SOVROMs, the Legal Nature of the State-Owned Enterprise

The cornerstone of the project to transform society implemented by the Soviet-type dictatorships was nationalization.[5] The abolition of the 'dominant' bourgeois class – in addition to the physical elimination of real or potential opponents – included the economic abolition of people perceived as bourgeois, and the basic tool of this policy was nationalization. According to the Communist Manifesto (1848):

> But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products that is based on class antagonisms, on the exploitation of the many by the few. In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property. [6]

Thus, the fundamental thesis of communist ideology is the nationalization of private property and its utilization by the state in the interest of all, without allowing for this kind of exploitation. This purpose was served by nationalization, collectivization, and restriction of private property to personal property. Nationalization cannot be qualified otherwise than as unrightful expropriation of property, in which case both any real public interest and any fair compensation were completely lacking.

4 Demeter 1985. 214.
5 For details, see Veress 2015. 125–137.
6 Original text: https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf. 22. (last accessed: 11.10.2020).

An agreement on cooperation was signed on 8 May 1945 in the field of reciprocal movement of goods between Romania and the Soviet Union. On the basis of this agreement, the so-called SOVROMs – Soviet–Romanian joint ventures in the property of the signatory states – were established in shares of 50% each in the legal form of joint-stock companies such as *Sovrompetrol*, *Sovromgaz*, *Sovromtransport*, or the company responsible for uranium mining, which operated covertly under the name Sovrom Cvarțit (Sovrom Quartzite), uranium mining being carried out secretly, for example, in Băița, in Bihor county. The SOVROMs served in reality as means for the despoliation of the Romanian economy in the interest of the Soviet Union and were operated until 1956. (Uranium exports to the Soviet Union, however, would continue even after this time.)

Until 1948, there were no major changes in the structure of private property. The foundation of the abolition of private property was laid down by the Constitution of 1948. According to Art. 11 of this normative act: 'When the general interest demands, the means of production, the banks and insurance companies, which are privately owned by natural persons or legal entities, can become the property of the State, i.e. the goods of the people, under the conditions provided by law.' In June of the year 1948, the nationalization law was adopted (Act 118 of 1948), which was followed by numerous other nationalization norms: Decree no 197 of 1948 on the Nationalization of Banks and of Credit Institutions, Decree no 302 of 1948 on the Nationalization of Private Sanitary Institutions, Decree no 303 on the Nationalization of the Cinematographic Industry and Regulation of Trade in Cinematographic Goods (for example, in Cluj County 9, in Mureş County 4, and in Arad County 16 cinemas were nationalized), Decree no 134 of 1949 and Decree no 418 of 1953 for the Nationalization of Private Pharmacies, Decree no 92 of 1950 for the Nationalization of Certain Immovables (which had as its object the nationalization of buildings belonging to former industrialists, former bankers, former merchants and other elements of the haute bourgeoisie and tenement buildings, hotels, and the like), etc. In 1948, the Bucharest Stock Exchange was disbanded: due to the twilight period for joint-stock companies and the nationalization of the capitalist trade in goods, there was no more need for a stock market. In Transylvania, all defining industrial installations for the region's economy were dissolved.

At the end of 1948, there were already 18,569 state-owned companies in Romania (of which 193 SOVROMs). State enterprises of the Soviet-type dictatorship were an integrated structure in state administration, subordinated to the relevant ministry and having a role in production, distribution but also in the field of public administration, with a character closer to public law entities than to private law companies. At the level of larger enterprises, party bodies and

organizations were also active. State-owned enterprises also served to control, supervise, and discipline the workforce.

According to the official line, the industrial and financial bourgeoisie was abolished as a social class as a result of nationalization, and the socialist sector in production was established. 'Through this revolutionary gesture, we have taken out of the hands of the bourgeoisie the main means of production.'[7] Part of the urban housing inventory was also transferred to the property of the state.

The Constitution decreed the principle of an economy based on central planning (Art. 15). On 2 July 1948, the State Committee for Planning was established. Plans were drawn up for 1949 and 1950 annually, and then, beginning with 1951, five-year plans were implemented.

The plan (1949)

> The plan is not a white paper
> on it numbers and points.
> The plan is a banner-crimson
> by our party unfurled.
> The plan is only for one year,
> but a decade it prepares.
> My new coat the plan tailors,
> by now which is a decade late.
> The plan is just a plan, if we dream,
> if we realize it, it's life!
> Comrades –, life
> is now going according to plan!
> (Zoltán Hajdu, 1924–1982)

The goal was to implement the Soviet model: a forced march towards industrialization. Propaganda reported tremendous success, glorified the competition in socialist work and the overachievement of planned production targets. This economic organization led to development and certain advantages in the short-term, but it proved to be dysfunctional in the long run. The following was written about the plan for 1949: 'in the middle of enthusiastic work, under the leadership of the Romanian Workers' Party and with multilateral assistance received from the Soviet Union, the workers of our country have completed the plan in a proportion of 108% and 20 days before the closing of the year.'[8] By highlighting the latest achievements on a daily basis, propaganda became part of everyday life under the Soviet-type dictatorship.

7 Roller 1952. 806.
8 Roller 1952. 811.

1.3. Collectivization

According to the communist ideology, in addition to state-owned enterprises active in agriculture (called 'sovkhoz' in the Soviet Union), collective farms based on the Soviet 'kolkhoz' model also had to be set up and implemented in the Soviet Union under the name of collective farms (later renamed agricultural production cooperatives).

According to Stalin,

> the agricultural commune of the future will be realized when in the farms of the production cooperative plenty of seeds for planting, animals, fowl, fruits, and any other produce will be found, when production cooperatives will arrange and operate mechanized laundries, canteen kitchens, modern bread factories, when the member of the kolkhoz will see that for him it is more advantageous if he receives meat and milk from the farm than to raise farm animals and breed cattle; when the female members of the kolkhoz will see that it is much more to their advantage to have lunch in the kolkhoz canteen and to buy bread from the bread factory and to receive laundry washed from the common laundry than to toil with such things. In this way, members of the agricultural communes of the future will no longer develop auxiliary private labour, but not because the law would prohibit this; instead because, as was the situation in previous communes, it will no longer be necessary to do so.[9]

The basis of the agricultural production cooperative is in theory a voluntary association, a collective socialist farm established and run by the working peasants. In reality, however, collectivization was state policy, and for this reason the state carried out extensive activities of propaganda in favour of the transfer of private property to collective farms. Those who refused to join the collective were qualified as kulaks (large-holders) and persecuted (through violence, by hostage-taking and executions, those who manifested in any way against collectivization often condemned to prison).[10] 'Voluntary accession' was in fact extorted through state violence.

The achievement of collectivization took place between 1949 and 1962[11] and presumed the transfer to the collective farm of the privately owned lots of agricultural land, thus affecting the population of rural Romania in its entirety (at that time, 12,000,000 people out of the total population of about 16,000,000

9 See Farkas 1950. 463.

10 For details regarding persecutions during collectivization, see Kligman–Verdery 2011.

11 For details, see Gheorghiu-Dej 1962, Dobrincu–Iordachi 2005, Oláh 2001.

lived in the countryside).[12] In agricultural production cooperatives, one of the conditions for acquiring membership was to transfer ownership of all agricultural land to the collective farm.[13]

> According to the unanimous interpretation of these provisions, the obligation exists to transfer ownership of lands extended over all lots of land owned by the prospective member of the cooperative as well as those in the property of all family members living in the same household with him, regardless of the destination of the land in question. This interpretation of the subjective side of the assignment obligation of land ownership was necessary because only this interpretation is found to be consistent with the intended goal of socialist transformation of agriculture, its significance being the abolition of small farms and the creation of the foundations of socialist agro-industrial production cooperatives. Hence the interpretation of legal norms in the sense that whichever spouse adheres to the cooperative all lands owned by the family had to be ceded to the CAP [the cooperative] because the awkward situation in which one of the spouses was a member of the CAP and the rest of the family members who lived in the same household would carry out agricultural activities in the conditions of the small peasant household was inconceivable.[14]

A strong reason in favour of collectivization was the lack of efficiency of small farms. However, not economic reasons but instead ideological ones proved to be decisive: as long as private property constantly regenerates capitalism – a system desired to be overcome –, collective management was the right form for the organization of agriculture. According to Gheorghiu-Dej's statement: socialism can be built only if all the important means of production in cities and villages alike are transferred to public ownership, therefore state-owned or co-operative.[15]

Decree with the Effect of Law no 83 of 1949 expropriated the estates with an area larger than 50 hectares. Opposition to expropriation was punished with forced labour between 5 and 15 years and confiscation of property (Art. 4). Previous owners were often forcibly relocated or required to reside at a forced domicile set for them by the authorities.

The implementation of the cooperative agrarian policy was achieved through Decree with the Effect of Law no 133 of 1949 of the State Council.[16] This norm provided the general framework for organizing various forms of cooperatives in the

12 Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România 2007. 238.
13 Lupán 1972. 445.
14 Lupán 1972. 446.
15 Gheorghiu-Dej 1955. 213.
16 See Lupán 1971. 1025; Lupán 1974. 563.

agricultural sector.[17] In 1949, the first model statute of collective farms was elaborated, being replaced later with a new statute adopted by peasant delegations in 1953 (the latter being adopted by the Joint Decision of the Central Committee and the Cabinet no 1650 of 1953), followed by the adoption of another statute in 1966. Agricultural production cooperatives established during the Soviet-type dictatorship cannot be considered civil law companies or associations as the cooperatives existing in the capitalist environment, the former being specifically socialist organizations with a distinct socio-economic nature. Subsequently, multiple special legal rules were adopted in the field of cooperatives, as follows: Act 14 of 1968 on the Organization and the Functioning of the Cooperation of Craftspeople or Act 6 of 1970 on the Organization and Functioning of Consumer Cooperation (the former cooperatives for the production, purchase, and sale of goods).

The stated principle of establishing collective farms and other enterprises was free initiative and voluntary accession (Decision of the Council of Ministers no 308 of 1953), but in fact the process was characterized by forced collectivization.

Decree with the Effect of Law no 115 of 1959, which had as its object of regulation 'the liquidation of the remnants of any form of exploitation of man by his fellow man in agriculture in order to continuously raise the material standard of living and the cultural development of the working peasantry and the development of socialist construction', prohibited the partial cultivation or leasing of agricultural land lots, and lots that could not be cultivated by a single family were nationalized. Lots of agricultural land thus 'liberated' were handed over for the use of collective farms or other socialist organizations.

Cooperative ownership (of land) was a form of socialist property on par with public property, but it was also a form of communal property with a narrower object. Agricultural production cooperatives were considered as collective enterprises based on the notion of socialist property. The owners of properties transferred to the cooperative were all cooperating members, and they had a theoretical right to dispose of the collective property, but the right to dispose of cooperative property could not infringe upon the general social interest, so that any veritable right of disposal was non-existent.[18]

> Starting from the relation of democracy to this form of property, we can determine that in the relations between members of production cooperatives who had put their means of production to common use the same [rules] were applicable as in the relations between citizens who had state-owned means of production. The difference is that the former perform, at the level of cooperating members, a degree of socialization of the means of production, and the latter achieve all this at the level of the entire people... Cooperative

17 Lupán 1987. 85.

18 See Lupán 1971. 1025; Lupán 1974. 563.

> ownership allows in cooperatives in principle the full economic equality of the cooperating members, creating an identical situation for each member in their relations with the means of production.[19]

Cooperatives could acquire in use (possession) also state-owned land.

With the establishment of collective farms, small-holdings and peasant agricultural production were abolished. Land ownership in favour of collective farms was acquired primarily through the process of collectivization itself, which was considered an original way of acquiring socialist property. Following collectivization, the lands thus socialized were passed into the ownership of the collective farm without any encumbrances, and thus the collective farm could no longer be required to comply with the obligations that had arisen in connection with the land which was in this way socialized.[20] (Obligations arising towards the state from contracts of acquisitions were exempted from under this provision, of course.) At the end of the collectivization process, 96% of the total area of arable land and 93.45% of the land area intended for agricultural production was transferred to the property of state-owned enterprises or collective farms (agricultural production cooperatives). However, collectivization was not accomplished in the mountainous areas unfavourable to agro-industrial production.

Cooperative law has become an autonomous source of law in Romania and a distinct branch of law.[21]

1.4. The Basic Questions Raised by the Change in the Concept of Property as a Result of Nationalization and Collectivization

The Soviet-type dictatorship operated with the principle (fiction) of the right of socialist property, of public property: the quasi-totality of the means of production was in socialist ownership (the majority in the property of the whole people, a smaller part in the property of cooperatives). In this conception:

> the state is just a tool in the hands of the working class and the whole people to achieve in an organized way economic and social development based on socialist property. The state exercises control, it watches over the way the property of the people is managed so as not to be wasted but amplified, developed. The subject of socialist property rights is therefore not the state but the whole working people.[22]

19 Lupán 1971. 1026.
20 Lupán 1972. 446.
21 Lupán 1980. 875; Lupan 1977.
22 Lupán 1986. 172. For a similar reasoning with regard to lots of land, see Lupán 1988a,b.

In reality, the state was – as far as possible – the subject of property rights, while the fiction of socialist property (of public property) played only a role of providing legitimacy, being meant only to show that the system works in the interest of the people.

However, state-owned companies operated with low efficiency, excessively large staff, limited productivity, contradictory objectives due to political interference, and the wrong allocation of resources, in an inflexible way, in conditions of technological backwardness (decrepit machinery, outdated methods and products), with a severely limited capacity to innovate, with frequent theft, widespread corruption, and to the detriment of the environment due to pollution.[23] In general, it can be established that the market economy, based on competition, which operates under properly regulated conditions (i.e. capitalism), resulted in a more efficient form of economic organization than the planned state-owned economy, implemented in the Soviet-type dictatorships, which had the stated purpose of the abolition of the exploitation of the proletariat by the capitalists but in reality replaced capitalist exploitation with exploitation by the dictatorial state.

As a result of collectivization, private property was abolished as a motivating factor, the peasants were degraded to the status of proletarians in the agricultural sector, and economic efficiency achieved the expected results only in the pompous statements of political propaganda.

1.5. Personal Property

Because in the Soviet-type dictatorship the notion of private property elicits negative connotations, and the main forms of property consist of state property (of the whole people) and collective property, civil law, instead of using the notion of private property, introduced the notion of personal property.

Decree with the Effect of Law no 31 of 1954 recognized the civil rights of natural persons for the purposes of satisfying their personal needs, and thus civil rights – as well as the right to personal property – were restricted to the extent necessary to meet their own needs.

> According to the most spectacular interpretation of socialist property, by its nature, its object should be a means of production, while it is the nature of personal property that its object be a means of consumption. [Only] of their nature, because in both cases we find exceptions: most often the means of production are initially (until the completion of the process of distribution) objects of socialist property, and, on the other hand, only in

23 Savas 1993. 287.

> certain cases does (household) property constitute a non-essential means of production which is the object of personal property.[24]

In the case of immovables, the object of personal property could be composed of the house and the lot occupied by the household. The cultivation of the lots attributed to households was most of the time achieved by methods reminiscent of the Middle Ages, even if these tiny plots were the ones that provided the staple food for many families.[25] In the case of members of agricultural production cooperatives, after the 1965 Constitution recognized their right to personal land ownership, the statute of agricultural production cooperatives – adopted in 1972 – contained a particular provision: the land area occupied by the house, the outbuildings and the yard in the property of cooperating members could not exceed 800 square meters. The agricultural production cooperative could sell – for the purpose of building houses – an area not exceeding 500 square meters to the cooperating members or to its employees.

> As for the house [or apartment] owned in personal property, within the meaning of Art. 60 of Act 5/1973, the owner together with his family members may retain in their property only residential areas that are justified by their needs. When establishing these needs, the following must be considered: for each family member, one room must be available, and in excess of this number at most two other rooms for the entire family. These provisions are applicable only to dwellings in urban areas.[26]

Incidentally, in the case of real estate rented from state enterprises that managed the national housing inventory, the standard housing area allocated to each person was 10 square meters, and if the structure of the building made this impossible, only 8 square meters (Act 5 of 1973, Art. 6). The residential building, found in personal property and located in an urban settlement, which was not used by the owner and his family members, could be rented out by the state.

Act 59 of 1974 regarding Land Management provided that the land constitutes the property of the whole people, and thus all lots of land located on the territory of the Socialist Republic of Romania, regardless of destination and owner, constitute the unitary national land inventory, which can be used and must be protected in accordance with the interests of the whole people. The law completely stopped any transfer of agricultural land by *inter vivos* instruments: the right of ownership over agricultural lands could be acquired exclusively through legal inheritance (Art. 44), but if constant use – for the purpose of agricultural production – was

24 Lupán 1975. 268.
25 Berend 2008. 155.
26 Lupán 1975. 268.

not ensured by the legal heirs, the land was taken over by the state, and if within 2 years of this takeover the heirs did not request restitution and did not initiate agricultural production, the land was passed on to state property.

Land of any kind owned by persons who established themselves abroad would become the property of the Romanian State without any means of compensation (the rule being applied with retroactive effect, i.e. the landed property of persons who had left the country before the entry into force of the law was also nationalized). The same procedure was to be followed if the land was inherited by any persons, Romanian citizens who were not domiciled in Romania (Art. 13). Ownership of dissidents' buildings (those of persons who emigrated in a manner considered illegal, including those who left the country in compliance with official formalities, but had not returned) was transmitted by law and without any compensation to the state, while those who emigrated in accordance with legal formalities were obliged to sell on to the state any buildings they owned at a price set by law (Decree no 223 of 1974 regarding Regulation of the Situation of Some Properties).

Act 58 of 1974 on the Systematization of the Territory of Urban and Rural Localities[27] stopped the legal circulation of land located in the built-up areas of localities, and following the new regulations obtaining the property right over such lands was made possible only by legal inheritance (Art. 30).

> This means [...] that every natural person may retain the right to personal land ownership, but his right of disposal over this property is extinguished as of 1 December 1974. In the case of alienation of real estate, the land related to it becomes the property of the state in exchange for adequate compensation. So, the new owner of the building will no longer be the owner of the land but will receive the land necessary for personal use from the state.[28]

The law provided for the construction of blocks of flats in urban localities for housing (Art. 8), stating that: 'In new housing estates, depending on the average height regime applicable for the buildings, the following living areas per hectare will be ensured: up to 3 levels, 4 000 m^2; between 3 and 5 levels, from 4 500 m^2 to 7 000 m^2; between 5 and 9 levels, from 7 000 m^2 to 10 000 m^2, and over 9 levels will aim to achieve about 12 000 m^2 of living space per hectare.' The emergence of entire neighbourhoods of overcrowded blocks of flats in which no areas were provided for greenery, playgrounds, or proper parking space is the direct result of this regulation, which contributes to this day to the overcrowding of new urban housing developments, to problems which appeared as a result of a low standard of living and the degradation of urban planning. In communes, plots of land between 200 and 250 square meters could be handed over for use,

27 For details, see Pop 1980.
28 Lupán 1975. 270.

with an opening to the street that does not usually exceed 12 meters in length, while in urban areas this figure was set to between 100 and 150 square meters, in both cases in exchange for an annual fee.

> From what we have seen so far, we can show that, as a result of the use of the provisions included in Act 58/1974, in principle, the circulation of land property ceased, and personal land ownership had lost its previous significance. These objects of personal land ownership gradually became state property, and the socialist state, in exchange for a small fee, gives them over for the use of individuals during the existence of the buildings erected on them. In case of the subsequent alienation of the residence or holiday home, the right to the use of the given land is transferred to the new owner of the building, as a result of the conclusion of the contract of sale (or of another type).[29]

The concept of property in accordance with Marxist principles and the transformation of private property into the mystical property of the whole people have largely contributed to the bankruptcy of the socialist economic model.

> The single-party state based on Marxist ideology replaced the private owners with the entirety of society. Although members of communist society ceased to be private owners, they never became the owners of any social property. The confiscated and concentrated property right appeared floating over the heads of mortals as a mystical right, the right of state property, and as such became a mystified plaything to the interests of the bureaucratic élite and the powerful.[30]

1.6. The Family Code. Prohibition of Abortion

The provisions on family law contained in the Civil Code, which from a social point of view have become outdated, were replaced in 1953 by a new Family Code (Act 4 of 1953).[31] The Family Code was eventually repealed by the New Civil Code (2011).

In the language of the Civil Code of 1864,

> the man is the head of the family and of the covenant of marriage, the married woman owes obedience to the man, her domicile is always identical to that of her husband, she is obliged to live with her husband and to follow him

29 Lupán 1975. 271.
30 Pécsi 1991. 365.
31 See Fekete 1958b.

> anywhere. During the existence of the marriage, the dowry of the married woman is administered by the husband, in disputes related to it only he has procedural capacity, the married woman cannot alienate her property apart from the dowry – the so-called paraphernalia – and cannot encumber it without the consent of the husband, she cannot acquire any wealth by any contract free of charge or in exchange for a price, she cannot sell the movables of the dowry that are in her ownership, nor the immovables which constitute her property, she cannot initiate lawsuits. The dowry consisting of real estate can be alienated or encumbered by her, even with the consent of her husband, only in the cases expressly provided for by law. According to the provisions of the Civil Code, in the cases listed, the woman does not have the exercise of contractual capacity and of procedural capacity. Agreement of the husband may be replaced in certain cases by the agreement of the court. Aside from the provisions limiting the legal capacity of the married woman, we can find a whole series of provisions in the Civil Code that limit a woman's legal capacity in general, so the woman cannot be guardian, curator, etc. About this situation in the law, even contemporary legal literature has rightly said that a woman is placed in the situation of a child, a minor, a mad person, or the mentally insane.[32]

Regarding the Family Code, it was established that, 'because family law as a new branch of law was free from the burden of the old codes, and the legislator was able to regulate without restrictions, unambiguously and uniformly, all significant issues related to family, it is easy to understand that this branch of law is contained in a [separate] code'.[33]

The Family Code excluded matrimonial conventions (prenuptial agreements), and Art. 30 established that: 'Property acquired during the marriage, by any of the spouses, is, from the date of its acquisition, the common property of the spouses. Any convention to the contrary is void. The quality of common property does not have to be proven.' With this solution, the Family Code recognized only one matrimonial system, the community property system. The Romanian legislator considered the salary and any claims also as belonging to the community.[34] Property acquired before the marriage, goods inherited or received as donations during the marriage (unless the donor or testator provided to the contrary), goods for personal use, goods necessary for the exercise of the profession of one of the spouses, and scientific or literary manuscripts were not part of the community property.

32 Nagy 1950. 398. This situation was only partly improved after the reforms implemented subsequent to World War I.

33 Demeter 1985. 215.

34 See Pap 1966. 84.

According to Art. 35: '[...] neither spouse can alienate or encumber a land or a building that is part of the community property, without the consent of the other spouse'. In the case of movables, the Family Code established a presumption of tacit reciprocal mandate, which was considered irrefutable towards *bona fide* third parties with whom the spouses contracted.[35] According to the Family Code, the creditor of one of the spouses could enforce a claim only against the spouse with whom s/he contracted, except when the claim arose from the deeds concluded in the interest of meeting the usual needs of the family, and only within the limits of the personal property of the spouse in question. If the debtor's personal assets were not sufficient, the creditor could also request the partitioning of the community property but could enforce the claim only on that part of this property which belonged to the debtor spouse following the partition.

Art. 38 of the Family Code conditioned the dissolution of the marriage to the existence of a compelling reason why marital life became impossible to continue for the plaintiff as opposed to the more rigid and restrictive old regulation of past civil codes which expressly listed reasons for divorce (such as adultery, attempted murder, serious physical injury, disloyal abandonment, criminal conviction, immoral lifestyle, violation of marital obligations).[36] In the traditional approach during the divorce process, the guilt doctrine was dominant.

> Practical life has demonstrated that this method of regulation is imperfect from the perspective of the legislative technique, and in fact it is hypocritical and immoral. Deplorable and imperfect because it allowed the text and the spirit of the law to be shamelessly evaded. In reality, the majority of divorces took place by the consent of the spouses. The spouses agreed that one should provide a ground for divorce for the commission of which that party became guilty. Most often, the less compromising reason of disloyal abandonment was invoked in the simulated lawsuit [...][37]

In the legal literature of the time, it was shown that:

> The Family Code renounced the technique of drafting rigid and formal normative acts by the express and limiting enumeration of the reasons for divorce. This point of view is explained in a distorted way by some. They claim that the law granted too much scope to the judge's freedom and that this circumstance results in an increase in the number of divorces.[38]

35 Pap 1966. 84.
36 Kiss 1959. 464.
37 Kiss 1959. 464.
38 Kiss 1962. 883.

The Supreme Court by its Guiding Decision of 21 June 1955 stated that nothing can be less correct than such an interpretation; to the contrary, it is the court that is burdened with additional responsibility in determining the merits of the case. The actual state of fact must be checked with the utmost care: is the reason for divorce truly well-founded? So, has it really become impossible to maintain conjugal cohabitation in accordance with the conditions of socialist morality? According to the same decision, the dissolution of marriage could not be decided on the basis of a reason caused exclusively by the applicant.

> The socialist-minded judge is not controlled by the arbitrary but by socialist ethics [...]. This means that within the divorce process the judge must relate to those requirements which are prescribed by socialist ethics regarding intimate life and for the protection of the interests of the child.[39]

For this reason, it was concluded that, in fact, the Family Code is not favourable to the institution of divorce, but it is not hostile to it either. 'The fundamental concept of the law is that divorce is necessary in all cases when the possibility of conjugal life imposed by socialist morality is irremediably compromised.'[40]

A measure specific to the Soviet-type dictatorship – for the purpose of facilitating population growth – was the introduction of the ban on abortions (by Decree of the State Council no 770 of 1966 for the Regulation of the Termination of Pregnancy).[41] Abortion was allowed (Art. 2) only in cases where:

> a) the pregnancy put the woman's life in a state of danger which cannot be removed by any other means; b) one of the parents suffers from a serious disease which is inherited or which causes severe congenital malformations; c) the pregnant woman presents severe physical, mental, or sensory disabilities; d) the woman is older than the age of 45 years; e) the woman has given birth to at least four children and is tending to them; f) the pregnancy is the result of rape or incest.

Interruption of the course of pregnancy had to be approved by a medical commission appointed by the Executive Committee of the local people's council.

The ban on abortions was repealed at the end of 1989, immediately following the regime change (by Decree with the Effect of Law no 1 of 26 December 1989), this being among the very first measures taken following the overthrow of the dictatorial regime. The effects of the regulations are still researched by historians

39 Kiss 1959. 465.

40 Kiss 1962. 887.

41 For details, see *Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România 2007*. 421–436.

and sociologists, but it is undisputed that many women have died as a result of clandestine abortions performed in primitive conditions (according to some estimates, their number may have been higher than 10,000), and the number of cases in which children were abandoned increased significantly, many children being institutionalized in orphanages, where they were often subjected to inhumane living conditions and treatments.

1.7. Labour Law

The Soviet dictatorship also transformed labour law: 'The most significant result of perseverance in the field of codifying the Romanian people's democracy, which has now stepped onto the path of socialist construction, was the early elaboration of the Labour Code.'[42] The main foundation of labour law consisted in the concept that no one can earn income by appropriating another person's work, in concordance with the principal precepts of socialist morality and equity, enshrined in legal norms.[43] In reality, the main employer – following nationalizations – became the state, so the rules of labour law developed by the state served less and less to protect workers. In the Soviet-type dictatorship, the labour union did not serve to defend the interests of the working class but to control it and to increase work performance and the mobilization of workers in the Party interest.

The Labour Code was adopted by Act 3 of 1950,[44] being subsequently replaced by the Labour Code adopted by Act 10 of the year 1972. The latter was repealed only by the current Labour Code, still in force today, Act 53 of 2003.

According to the mentality of the time, communist labour law was a superstructure built on an economic substrate,[45] which aimed at this time to facilitate the struggle for the victory of socialism. Act 3 of 1950 repealed 'the last normative act remaining in the bourgeois system so that there is no one to rule among the sources of labour law adopted by the old system'.[46]

According to Act 3 of 1950, the employment contract is a written or verbal agreement; it is concluded for a determined duration, for an indefinite time, or during the performance of a work, and the employee, in exchange for a salary, commits to the employer until the accomplishment of the task (art-s 12–13). For final employment, the candidate could be subjected to a probationary period, with a limited duration: in the case of labourers at most 6 days, in the case of clerks at most 12 days, and in the case of those who were to perform

42 Demeter 1985. 214–215.
43 Balogh 1986. 342.
44 For a detailed analysis which reflects the ideology of the time, see: Câmpeanu 1967; Mártonffy 1959. 600–605.
45 Bădescu 2011. 19–20.
46 Demeter 1985. 215.

management tasks (having liability) at most 30 days. The employee could resign from the employment contract concluded for an indefinite period only in duly justified cases, the employer being obliged to decide on the application to this effect within a maximum of 14 days (Art. 19). The employer could terminate the employment contract unilaterally, for example due to total or partial dissolution of the employing entity, reduction of activity, suspension of activity for more than one month, professional misconduct of the employee, repeated violation of the obligations arising from the employment contract or from internal regulations, and arrest of the employee for a period exceeding two months (Art. 20). In the case of disciplinary liability, the termination of the employment contract could be ordered in the state sector by the Commission for the Settlement of Labour Disputes and in the case of the private sector (of almost no significance whatsoever) by the court. Less severe disciplinary sanctions (observation, reprimand, written reprimand with warning, or demotion for 3 months with the corresponding salary reduction) were provided not in the Labour Code but in the internal regulations of employers.

If the employee caused damage, in the case of negligence or violation of the internal rules applicable for the work performed, the amount of compensation could not exceed more than three times the monthly salary of the person liable for compensation (limited liability) because the purpose was 'the defence of public property, compensation for the damages caused to public property, but without this meaning a pecuniary catastrophe for the worker'.[47]

Nevertheless, if the damage or loss was caused in connection with goods under the employee's management (for example, when the employee was a depositary, cashier, or a payment collector), full compensation was due (unlimited liability), while in the case of damage caused by the commission of criminal offences, the amount of compensation could be doubled as a sanction (Art. 68) in addition to the obligation to pay full compensation for the damage caused. Compensation had to be paid gradually, through withholding one third of the monthly salary due to the employee by the employer.

The state aimed to achieve full employment, and in the interest of this measure it developed a system for the distribution of jobs (for example, Act 24 of 1976). Ethnic Hungarian employees were systematically distributed to jobs outside the region of Transylvania, the distribution of labour being thus put into the service of a forced assimilation policy.

The Labour Code of 1972 provided by positive norm (Art. 6) in the following way: 'Appropriating in any form the labour of another and all manifestations of social parasitism are prohibited as incompatible with the socialist order, with the principles of socialist ethics and equity.'[48] In practice, this meant that the employer could only be the state (or state entities, including state-owned

47 Kerekes 1961.
48 Balogh 1988. 497.

enterprises) because if individuals or organizations of individuals could have acted as employers that would have meant appropriating someone else's labour, exploitation and development of the capitalist system. Thus, the labour law of the Soviet-type dictatorship ensured the maintenance of the exclusivity of the state as sole owner and employer. The socialist labour law was used as a means of ideological struggle. Constant repetition of achievements in the field of labour law served the purpose of camouflaging the fact that capitalist exploitation had not been replaced by a utopian workers' society but by the exploitation of workers in the interest of the state and the party oligarchy.

2. The Development of Romanian Private Law Following the Fall of the Soviet-Type Dictatorship (1990–)

2.1. Overview: Restoring the Rule of Law and Building a Market Economy

Following the regime change, the legal bases of the market economy founded on private property had to be created. This requirement has produced fundamental changes in the field of private law: a return to the development interrupted after 1945. Such a return, however, was not possible in several areas; the consequences of the Soviet-type dictatorship, which lasted longer than four decades, could not be ignored.

In addition to the radical changes, there was also continuity of private law. The Civil Code and the Code of Civil Procedure – adopted in their original forms as early as the 19th century – as well as the Family Code (1953) were still in force two decades after the regime change. The Commercial Code – except for the rules on companies – has been re-implemented, never being repealed but only becoming temporarily dormant during the decades of the planned economy. After the regime change, a new Companies Act had to be adopted (Act 31 of 1990) because the rules on companies contained in the Commercial Code of 1887 had become obsolete: company law regarding joint-stock companies has undergone radical development, and in the meantime a new form of company – the limited liability company – emerged.

One of the most significant factors that affected Romanian private law was the transfer and implementation of the norms of the European Community and later the European Union (EU) during the process of preparing Romania's accession to this trading block. Romania became member of the European Union on 1 January 2007, European law entering into force on the territory of Romania from this date, and at times even prior to accession, during the preparation procedure.

2.2. Restitution of Property (Reprivatization)

Following the regime change, reparation for nationalizations accomplished during the Soviet-type dictatorship emerged as a vital issue. In the eyes of many, the ideal solution for reparation was dismantling the effects of nationalizations altogether by the return of nationalized properties to its former owners or their heirs. There were, however, many arguments brought against this position.

The restitution of agricultural and forest lands took place gradually. Act 18 of 1991 on Agricultural Lands allowed restitution of at most 10 hectares of land and no more than one hectare of forest between the years 1991 and 1997. Ideological descendants of the former Soviet-type regime wanted to create a transitional system between socialism and capitalism and would not have preferred in any form the restoration of the old, landed class, the 'Hungarian threat' being also often invoked in connection with the restitution of real property in Transylvania. These were the reasons for limiting returned areas. As a result of this measure, from the bodies (lots) of nationalized property with an area exceeding 10 hectares, the original owner (or his/her heirs) was entitled to the return of an area of maximum 10 hectares, over the rest of the lot restitutions to other entitled persons also taking place. The Land Law was also meant to accomplish a minor agrarian reform,[49] for which property bodies greater than 10 hectares were utilized. Thus, the land situation described in the land books before nationalization was made irrelevant, and the application of subsequent, more permissive rules for restitution became excessively difficult. The principle according to which nationalized lands had to be returned, as far as possible, on their previous lots (instead of granting other lots as compensation) could no longer be observed (there was also very little desire to do so).

The next phase of restitution was initiated by Act 169 of 1997, which extended the upper limit of the areas that could be returned to 50 hectares per family in the case of agricultural land and 30 hectares per family for forested land. Act 58 of 1998 regarding the Legal Circulation of Lands, in turn, provided that the total land

49 Decree no 42 of 1990 on Some Measures to Stimulate the Peasantry ceded to the member of the agricultural production cooperative the land next to the house which was the member's dwelling, the household annexes, the yard, and the garden. Before the regime change, the property right of the cooperating member was limited to an area of at most 250 m^2, this new norm extending the property right over the entire yard and garden up to an upper limit of 6,000 m^2. Subsequent Act no 18 of 1991 granted rights to: former cooperating members who had joined the cooperative without assigning land areas or assigning land areas smaller than 0.5 hectares to the cooperative upon joining; those who were not cooperating members but worked for the cooperative (at least for a period of 3 years before the entry into force of the act) and did not own agricultural land; deportees who did not own farmland; persons who had entirely or partially lost their ability to work due to participation in the December 1989 Revolution and heirs of people killed during the Revolution as well as other people who participated in the Revolution. Upon request, these persons could be granted ownership free of charge of 10,000 m^2 of agricultural land.

area acquired *inter vivos* may not exceed 200 hectares per family. Application of this law has been hampered by the transformation of state agricultural enterprises (which coexisted with agricultural production cooperatives but were much better equipped and considered to be agro-industrial enterprises) into companies, the lands in their possession not being subject to restitution. This rule ensured for the first time to specific structures developed throughout history for the common management of lands – such as the commonages in the Szeklerland – the possibility of requesting the restitution of lands held jointly and commonly in a state of permanent indivision.

Adoption of Act 1 of the year 2000 constituted the third phase of restitution, which changed the upper limits set by previous rules: each previous owner of nationalized (or collectivized) land or the heirs of each such owner acquired the right to the restitution of up to 50 hectares of agricultural land or 100 hectares of pasture located on the old lots initially nationalized (if they were still available). This act introduced the possibility for requesting compensations in the case of impossibility of restitution of lands in kind.

Finally, Act 247 of 2005 stated the principle of *restitutio in integrum*, although it could not be achieved due to the way the rules of previous restitutions were implemented. The closing of the process of restitution of nationalized immovables was initiated by Act 165 of 2013 and subsequently by Act 168 of 2015, but this process is still ongoing.

The process of the restitution of buildings located in the built-up areas of localities, and especially in urban areas, was started by Act 112 of 1995. This law, however, allowed only the restitution in kind of those residential buildings that were already leased by the previous owner (a Romanian citizen) or his/her heirs or which were at the time not inhabited by other tenants (Art. 2). Nonetheless, the law allowed to all tenants – not just those who have been the victims of a measure of nationalization – to buy the nationalized real estate rented by them, at an advantageous price (due to its effects, this process was perceived as being a measure to consolidate the benefits of nationalization by these persons, in fact a re-nationalization in defiance of the previous owners). Clearly, the legislator was not interested in widening the restitution process in 1995. Act 112 of 1995 prevented the full application of subsequent restitution measures, the end result being a legal mess similar to the result of restitution in the case of agricultural immovables. The restitution process of nationalized buildings reached its peak through Act 10 of 2001, which allowed a much wider scope of restitution in kind of nationalized buildings. The issue of payment of compensations owed by the state to the former owners and their heirs for real estate impossible to return in kind remains unresolved to date (the state has already spent the price of real estate purchased by the former tenants, and the cost of the state's behaviour to prevent restitution in kind must now, as in the future, be borne by all taxpayers alike).

Resolving the issue of restitution of nationalized immovables in the case of churches and national minority organizations, or minority communities respectively, was regulated by special norms (e.g. Government Emergency Ordinance no 21 of 1997 in the case of the Jewish Communities, Government Emergency Ordinances no 13 and no 112 of 1998 adopted in the general interest of national minority organizations and churches, Government Emergency Ordinance no 83 of 1999 in favour of organizations of national minorities, Government Emergency Ordinance no 94 of 2000 and Act 501 of 2002 for the modification of the latter emergency ordinance which ordered restitution in favour of the churches of minorities). These measures were also only partially implemented. In many cases, the practice of administrative bodies and courts has hampered the application of the generally permissive provisions of these normative acts.

In its entirety, the process of restitution of immovables nationalized under different titles or without title resulted in hundreds of thousands of legal disputes, Romania being convicted before the European Court of Human Rights repeatedly for the violation of property rights. This liquidation of the dictatorial past is therefore both a success and a partial failure at the same time.

2.3. Privatization

The economy of the Soviet-type dictatorship based on central planning, on state and collective property had to be dismantled and transformed into a market economy based on competition and private property, organized according to the principles of pluralistic, democratic society. The construction of political pluralism and the democratic institutional framework in itself was not easily accomplished, but the process of economic regime change and its central element, privatization, proved to be an even more complex process, having a duration now measured in the decades.

This process has not been completed to this day. So: 'The central phenomenon of the general change of the socio-economic regime is privatization for without the domination of private property neither the market economy nor civil society can exist'.[50] Privatization can be considered an end in itself in systems theory and constituted the fire sale of an unimaginable amount of wealth owned by the state.[51] Competition between former socialist states, oversupply of goods subject to privatization in the region, the unfavourable conjuncture prevalent in the world economy, lack of capital, legal insecurity that stopped investments, outdated technologies and destruction of the environment, all adversely affected the privatization process in Romania. In the troubled economies of the Eastern Bloc, which have lost access to their markets in the east and were stricken by

50 Sárközy 1997. 19.
51 Sárközy 1997. 19.

social problems, and in the midst of a fight against impending economic crisis, there was great and urgent need for the funds resulting from privatization.

In a simpler formulation: businesses in state property had to be sold.

The privatization process in Romania – and implicitly in Transylvania – was delayed compared to other Central and Eastern European countries, having been accomplished in several phases and under the sign of serious contradictions. The reasons for the delay were summarized as follows:

> The gap that can be seen by comparison with several Central European countries can be explained on the one hand by the fact that the regime change was impossible to prepare intellectually, economic reforms not having been implemented in the eighties. On the other hand, the population was less prepared for a radical regime change, egalitarian views still being prevalent. The third reason was that the élite that was brought to power was not fully committed to the idea of a market economy based on private property and was too weak politically for the completion of such economic programmes in a consistent manner.[52]

In the summer of 1990, Act 15 of 1990 (On the Reorganization of State Economic Enterprises as Autonomous Companies) reorganized state-owned enterprises: for those that were desired to be kept in the property of the state, the form of *autonomous utility companies* (*regie autonomă* in Romanian – based on the French *régie autonome* model of companies providing public services and utilities) was provided, while those that were to be subjected to privatization were transformed into commercial companies. A proportion of about 47% of the assets of state-owned enterprises have been assigned to autonomous utilities, including the assets of strategic enterprises. In order to reorganize them, a 6-month deadline was set. Reorganization was the precondition to privatization:

> the form of the socialist state enterprise was not suitable for the capitalization of private enterprises, this [former] being considered in essence a public law institution. The enterprise as an organization was inalienable in this way. Thus, socialist countries were forced to transform state-owned enterprises into joint-stock companies (or companies with limited liability) in which the sole shareholder (or associate) became the state by using the technique of universal succession of rights copied from German reorganization law. This was the so-called formal privatization, privatization in the legal sense, the compatibilization of legal form with its desired marketing but without altering the property relationship [...]. Only this formal legal

52 Hunya 1991. 135.

> privatization can be followed by real privatization, carried out in the economic-social sense [...].[53]

A proportion of 30% of the stock of joint-stock companies founded as a result of the transformation of state enterprises according to Act 15 of 1990 were scheduled to be attributed to the population.

The Companies Act, as a fundamental law of the market economy (Act 31 of 1990), entered into force only in the month of December 1990. The law made substantial use of the chapter regarding companies in the draft of the Carol II Commercial Code. Based on the principle of compulsory corporate form, it regulated five types of companies: the general partnership, the limited partnership, the company limited by shares, the limited liability company, and the joint-stock company. The procedure for registration, modification, and deregistration of companies and the rules regarding the Trade Register were regulated by Act 26 of 1990.

The first real privatization act was Act 58 of 1991, which regulated the privatization of the companies resulting from the transformation of state-owned enterprises. After several amendments, it was repealed by Government Emergency Ordinance no 88 of 1997, which introduced the rules on privatization still in force today. This emergency ordinance has, in turn, been changed repeatedly.

Based on Act 58 of 1991, privatization was carried out by selling a proportion of the state's stock and by awarding stock to the inhabitants. The law also allowed the direct sale or sale at auction of constituent parts of companies which were fit to function as independent units, as a particular way of privatization.

The State Property Fund was set up to organize the sale of state-owned stock. This property fund (a holding company by the proper name) took over a share of 70% of the stock packages of companies which were formerly state-owned enterprises and exercised the rights provided in favour of shareholders in the case of such state-owned enterprises accordingly. The sale of shares could take place by public subscription, open auction or with participation based on invitation, by direct negotiation, or by the concomitant use of these means. If, following the capitalization of the shares, the State Property Fund would have lost control of the company subject to privatization, the prior approval of the National Privatization Agency to complete the operation was a compulsory prerequisite. The law allowed employees and members of the former management of state-owned enterprises to acquire shares with priority over others (the so-called MEBO model, from the name of the procedure in English: 'management and employee buyout'). In case of public subscription, these persons could purchase with a 10% discount from the initial offer price a maximum amount of 10% of the share package subject to sale, being preferred in the case of sale by auction through legal provisions and being able to purchase shares with preference at a price 10%

53 Sárközy 1997. 20.

lower than the one established at auction, in this case without any quantitative limit imposed on the number of shares which could be purchased. The law even allowed delaying payment deadlines to members of management, employees, and former employees whose work relationships ceased due to retirement as well as the possibility of rescheduling payments of the price or the granting of preferential credit. Based on Act 77 of 1994, management and employees could even set up partnerships for the purpose of acquiring shares.

At the same time, five companies were set up, called Private Property Funds, each established on a regional basis. A proportion of 30% of the shares issued by state-owned joint-stock companies in each geographical region was transferred to the Private Property Funds, these becoming minority shareholders of the joint-stock companies.

> If we accept the rhetoric of the Government, which is also present in the choice of the name of these private asset funds, then these organizations have been privately owned since their establishment. By the entry into force of the privatization act, all enterprises were automatically assigned in a proportion of 30% to private property. The state (through the State Property Fund) held the majority of the shares in each enterprise, so that the private asset funds had very little influence over the management of the enterprise. Moreover, because the management of the private asset funds was chosen on political grounds and because shareholders were incapable in practice of influencing the operation of the private asset funds, the private character of these businesses was questionable.[54]

These Private Property Funds distributed to the population coupons called 'certificates of ownership' for free, these in reality being the shares of the Private Property Funds.

These coupons could be alienated, or they could be converted into the shares of companies subject to privatization within 5 years, or, after this period had expired, they could be used as shares in the Private Property Funds, transformed into Financial Investment Companies (abbreviated as 'SIF' in Romanian). The law forbade the alienation of these titles to foreign natural or legal persons.

In the case in which investors wanted to buy the shares of the given company in a proportion of 100%, the negotiations were conducted by the Private Property Fund which had territorial jurisdiction, including in respect of the shares held by the State Property Fund.

Because privatization did not go as smoothly as it was imagined, the parliament adopted Act 55 of 1995 for accelerating the privatization process, which was also meant to wrap up the free privatization programme altogether. Inalienable

54 Earl–Telegdy 1998. 481.

coupons were issued to the name of the beneficiaries (members of the general population), which could be exchanged for shares together with previously issued property titles (coupons). This new set of coupons had a face value of 975,000 lei each, the coupons from the previous issue being devalued to 25,000 lei. It was estimated that each entitled citizen would receive a sum of 1,000,000 lei from the assets of state enterprises (in total about 30% of the asset value of state-owned enterprises). In connection with the real value of the assets of these enterprises, no accurate data was available. Mass privatization resulted in a dispersed shareholder structure, without the ability to effectively influence the management of the company. Coupons could also be deposited with the Private Property Funds, in which case the Funds could use them at the subscription of shares, the coupon owner becoming a shareholder of the Fund.

Pursuant to Act 133 of 1996, the five Private Property Funds were transformed into Financial Investment Companies (SIFs). Of these, two are in operation in Transylvania: SIF Transilvania SA (based in Braşov) and SIF Banat-Crişana SA (with headquarters in Arad). Government Emergency Ordinance no 30 of 1997 transformed some of the autonomous utilities into companies, thus extending – in theory – the scope of the companies subject to privatization.

The series of normative acts on privatization was continued by Government Emergency Ordinance no 88 of 1997. The Ministry of Privatization was set up, and the State Property Fund continued its activity. The new rule maintained the benefits system stipulated in favour of management and employees, keeping the possibility of setting up associations with legal personality with a view to the collective acquisition of shares. In the case of payment of an advance of at least 20% of the price of the package of shares purchased, the rule provided the association with the possibility of paying the price in instalments, within a period of 3–5 years and with an interest rate of 10%. In 2001, the name of the State Property Fund was changed to the Authority for Privatization and Administration of State Participations. In 2002, a new act to accelerate privatization was adopted (Act 137 of 2002), which allowed the sale of shares, even below the starting price of the auction if there is no tender or proper direct bid, determining whether the sale was opportune and the price that was real and serious being exempted from judicial review, judicial review thereby being restricted in the matter of sale only to its legality. The norm also allowed privatization for a single euro in the case of companies selected by the government if the buyer had committed itself to making investments, keeping jobs, or creating new jobs. Since 2004, the name of the authority exercising the state's shareholder rights was again modified, this time to Authority for Recovery of State Assets, and since 2012 it has been called the Authority for Managing State Assets. The latter name change shows that the privatization process is considered closed by the legislator, at least in terms of its main lines.

To regulate the management of the remaining companies in state property that have not been privatized or have not been intended for privatization, a special norm was adopted (Government Emergency Ordinance no 109 of 2011 on the Corporate Governance of Public Enterprises).[55]

2.4. Recodifying Civil Law

In Romania – although the renewal of the regulation of civil substantive law and civil procedure with their origin in the 19th century was already required –, there was no situation that made it imperative for a new codification of these rules of private law to take place. Reform would have been possible by simply comprehensively modifying the old codes. Traditionalists have supported this approach, preferring to follow the French example, where the *Code civil* (*Code Napoléon*) was renewed several times without it being formally repealed. The other approach to the general reform of the judiciary, which subsequently proved victorious, argued that a new Civil Code should be adopted.

The 'new' Civil Code of 2009 entered into force following some substantial changes on 1 October 2011 (as Act 287 of 2009) and introduced numerous novelties to Romanian private law.[56] The reform put an end to the dualism between civil and commercial law, achieving thus, at least in principle, the transition from the dualistic system of regulation of civil law to the monistic model. Still, to some measure, the differentiation of business law within the Civil Code was preserved because in the matter of relations between professionals both this new code and other special rules continued to provide for derogations from the general norms.

The new Civil Code again included and integrated into a unitary whole from a systematic point of view the numerous norms of private law enacted during the Soviet-type dictatorship outside the framework of the Civil Code, for example Decree no 31 of 1954 concerning Natural and Legal Persons, Decree no 167 of 1958 regarding the Statute of Limitations, the Family Code; the legislator even merged into this new norm the rules applicable to private international law.

However, the changes were not purely formal, or structural, but also of substance. The new Civil Code reformed private law in several areas: personality rights, matrimonial law, real property rights, the general rules on obligations, those on certain special contracts, the debt guarantee system – in particular, the pawn and mortgage on movable property. These measures – although no doubt they could have been achieved through reforming the 'old' Civil Code – have significantly contributed to the effective application in practice of Romanian private law, including in the context of the 21st century.

55 Veress 2017a. 62–78.

56 See Veress 2017b.

It may just be accidental but the birth of the new Civil Code may be considered as being part of a wave of codifications of private law in Central and Eastern Europe as in Hungary and the Czech Republic as well adoption of the new civil codes coincided almost completely with that of the new Civil Code of Romania. In a broader contextual perspective, the – at least partial – reform of civil law was conducted in the Netherlands, France, Switzerland, and other states also during this period.

The question may be asked: what was the basic pattern or what legislation provided the models on which the new Civil Code is based? The international circulation of legislative models (the existence of so-called legal 'transplants') is a fact. In the case of Romania, adoption of the Civil Code of 1864 was a necessary measure of modernization created and artificially implemented in harsh historical conditions which made impossible the organic and endogenous development of civil law. For this reason, the 'old' Civil Code was largely a more or less faithful translation of the Napoleonic Code of 1804.

What are the models followed by the new Civil Code? A new transplantation of the Civil Code of France, in its 'updated' form, which takes into consideration the development of French law would not have resulted in the modernizing momentum expected from the adoption of the new Civil Code in Romania. It is for this reason that new Romanian private law pursues a multitude of models in addition to building on the achievements of Romanian legal science in the field of private law. One of the most important models was the Civil Code of the Canadian province of Québec, in its French-language version. This code, like the Romanian Civil Code of 1864, is based on the Napoleonic model, but it is a thoroughly modernized version of the basic model and was recodified at the end of the 20th century. For this reason, we can say that, although the new Romanian Civil Code is not a simple transplantation of the French Civil Code, it does not drastically deviate from the conceptions of French private law manifested by codification, still being a member of the francophone family of norms of private law. Obviously, the Civil Code of Québec is just one of the model regulations used. In the normative content of the new Civil Code, one can detect the influences of some solutions of the Italian Civil Code of 1942 but also those of the DCFR – the Draft Common Frame of Reference (in its full name: the Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference) – or even the UNIDROIT Principles of International Commercial Contracts of 2010.

2.5. The Systemic Renewal of the New Civil Code: The Introduction of Monism

The Civil Code in force, in addition to ensuring continuity in the field of private law, has also introduced many new solutions, modernizing the regulation of this

branch of law. Some of the radical changes were the abolition of the dualistic system of regulation of private law and the transition to the unitary model of regulation.

In connection with the systemic approach to private law, two solutions are possible. On the one hand, there is the traditional model, the dualistic regulation of private law. In this system, private law can be subdivided or subclassified into two basic subsystems: civil law itself and commercial law. Thus, trade, more precisely, economic life has its own, partial private law differentiated from the general rules of common private law. The main argument that can be invoked in support of maintaining the dualistic system is that trade and business must be conducted in conditions of speed, flexibility, transparency, and maximum predictability, with ample protection offered to creditors, which cannot be achieved by civil law because this branch of private law seeks to defend the public interest and the balance between the interests of the creditor and those of the debtor, unable to ensure the conditions of trade in an efficient way. The dualistic system, in fact, finds its origin in customary commercial law (*lex mercatoria*), developed at the same time with but separately from the rigid system of private feudal law, which subsequently was codified by different states.

In practice, two positive private legal regulations of substantive law have developed, separately and formally (included in different codes), in the dualist system: there were separate rules of civil law and other rules for commercial law that would often govern identical institutions. For regulations contained in commercial codes, civil law constituted the 'mother law', i.e. the common law (the rule), the Civil Code being applied as an auxiliary, whenever it related to a certain issue the Commercial Code did not provide for. The main provisions of the Commercial Code contained the general rules on commercial obligations and some special rules on contracts (thus, both the Civil Code of 1864 and the Commercial Code of 1887 regulated the contract of sale and mandate in the forms of their civil and commercial manifestation, etc.). According to Ödön Kuncz, commercial law is 'a refinement similar to a lace of private law', which differs from private law in the same way as 'intense and planned trade is different compared to relations of private [economic] life'.[57]

From an economic perspective, manifestations of the dualistic principle are constituted e.g. by the French norms on land and maritime trade (the *Ordonnance de commerce* of 1673 and the *Ordonnance de la marine* of 1681) and the Commercial Code of France (1807), the Commercial Code of Spain (1829), the Common Commercial Code of the German States (1861) and the Commercial Code of Germany (the *Handelsgesetzbuch* of 1897), and the Italian Code of Commerce (1861, 1883). It follows from the data that the principle of the dualistic concept was most prevalent in the 19th century. The Romanian Commercial Code (1887)

57 Kuncz 1946. 79.

was also adopted during this period, based mainly on the Italian model, being contemporary with the Trade Act in Hungary (Act XXXVII of 1875), this second code being based on the model of the *Handelsgesetzbuch*.

On the other hand, the other alternative is the monistic concept of private law. There is no separate commercial law in this system, civil legal relations and those born in the course of commercial activities being subject to and determined in accordance with an identical set of rules. Even in the age that was the apogee of the dualistic concept, in the 19th century, the conclusion was already drawn according to which the differentiation of civil law from commercial law is due to extrinsic, relative reasons of historical origin, and this separation jeopardizes the unitary character of positive substantive law and legal security. In the 20th century, the monistic perception unambiguously spread. For example, Italy, through the Civil Code adopted in 1942, switched to the monistic concept. The French legal system, the German, and the Austrian, however, continue to maintain the dualistic tradition and concept of regulation.

The fundamental argument that supports the introduction of the monist system is that private law, rigid in ancient times, has accelerated and has been transformed today to such an extent that it has become apt to ensure the flexibility required by the activities of trade, and therefore no need subsists for a separate and distinct trade law. General civil law has taken on the character of commercial law, assimilating itself to the latter. In this transformation, the main role that contributed to the increase of flexibility of civil law to the degree known today was played by commercial law. Commercial law sculpted to its likeness the face of civil law, and through it – in the states that have assumed the monistic position in place of the dualist one, making the transition to the first regulatory model –, it finally liquidated itself.

Romania has also taken the road from the dualistic approach to the monistic one. Romanian private law has traditionally been built on the dualistic concept. On the one hand, the Civil Code of 1864 was adopted as a source of general rules in the field of private law. In parallel with this, the translation of the French Commercial Code was initially used, and later, in 1887, the Commercial Code was adopted. During the Soviet-type dictatorship, the Commercial Code was not repealed, it was instead simply ignored: the code has lost the object of its regulation by the abolition of private property or at least through the severe limitations that have been imposed on this property.[58] Following the regime change, the code was applied again. The fate of the Romanian Commercial Code is also interesting for this reason: it would go on to survive its own model (Italy's Commercial Code was repealed during World War II, the Italian private law – used as the initial model – making the transition to a monist regulation of civil law through the Civil Code

58 See Sipos 2003. 41–42.

of 1942).[59] The Romanian Commercial Code survived totalitarianism and revived itself after 1989 along with its natural environment, capitalism.

On 1 October 2011, with the entry into force of the new Civil Code, Romania, too, transitioned to the monist system. This change resulted in the almost immediate repeal of not only the provisions of the 'old' Civil Code but also of those contained in the Commercial Code of 1887. Thus, Romania also joined the ranks of states whose private law has a unitary (monistic) character, the general rules relating to commercial life and business activities being included in the Civil Code.

According to Art. 3 of the new Civil Code:

> (1) The provisions of this code shall also apply to relations between professionals as well as to the relationship between them and any other subjects of civil law.
> (2) All those who exploit an enterprise are considered professionals.

The entry into force of the new Civil Code in Romania has aroused fierce controversies about the future of commercial law (business law). Would commercial law be abolished? Is the era of commercial law – as a field of specialization in practice, as a university discipline, and as a research topic – about to end? The answer to these questions is an unequivocal no.

The unification of private law is in principle a positive phenomenon. Family law is now regulated in the Civil Code, as are many (but not all) special contracts, but also the norms applicable to companies (while maintaining the segregation of their main regulation in the Companies Act, which is much less stable compared to the Civil Code and requires more frequent modifications) and the law of persons which was separated from the body of the code in the 1950s. As a separate branch of law, the commercial law of obligations was apparently abolished, just as the category of subjective and objective acts of trade and the autonomous regulation of commercial contracts. However, the only truly abolished category is the autonomous commercial law of obligations: the contract of sale or mandate does not have a dual regulation, as before.

In spite of all appearances, commercial law remains an autonomous subdomain of civil law.

On the one hand, the Civil Code is a set of commonly applicable rules, but it does not exclude the existence of special rules governing numerous aspects of economic life. Company law, in its entirety, the regulation of insolvency law, or regulations of the stock exchange cannot be included in the Civil Code. Such an attempt would break the conceptual framework of this code. Research in the field of commercial law and its teaching as a discipline of university studies do

59 Sipos 2003. 42-43.

not depend on the existence of a separate Commercial Code. The Commercial Code itself has only partially provided the rules applicable as common norms in the field of commercial law, which in a significant proportion was composed of rules contained in special norms. Even today, the regulation of many significant special contracts is not found in the Civil Code because the regulation of all types of contracts at the level of the Civil Code would not have been possible. The contract of leasing, and also that of franchise, for example, has kept its regulation by special rules; the factoring contract was also kept at the level of current regulation (with its legal definition consisting of one phrase, in a state of perpetual transition between the categories of typical named and unnamed contracts). In addition to the Civil Code, special laws continue to regulate multiple areas of the market economy: companies, insolvency, and the capital market.

On the other hand, many features of commercial law were maintained, including in the system of regulation by the Civil Code; as an example the presumption of joint and several liability in business relations (Art. 1446 of the Civil Code).[60] The existence of special rules concerning business relations under the new Civil Code allow drawing the conclusion that Romanian private law has a formal monistic character (no separate Commercial Code is in force), but from the point of view of content it retains dualistic features (in addition to the general rules of civil law, the new Civil Code and other special laws contain regulations applicable to economic life).

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60 Passive joint and several liability is a means of defending the interests of creditors. If several debtors participate in a legal relationship, the creditor has the right to demand payment of the full claim from any of these debtors and may proceed to the enforcement of the entire claim, against any one of his co-debtors. If this happens, the debtor who has paid the full claim voluntarily or had to bear its enforcement may request the part of the claim that was owed by the other debtors to the creditor and can recover this part from them. In case of joint and several liability, the creditor is not obliged to divide his pursuit of the claim among the co-debtors; thus, the creditor finds him-/herself in a better position than his/her civil law position would be in the general case, under which the rule of divisibility of pursuit applies to the debtors.

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