Acta Universitatis Sapientiae

Legal Studies

Volume 9, Number 2, 2020

Sapientia Hungarian University of Transylvania
Scientia Publishing House

Contents

Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 195–204

DOI: 10.47745/AUSLEG.2020.9.2.01

Historical Context of the Application of Private Law in the Geographic Space of Transylvania in Antiquity and the Middle Ages[1]

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Abstract: The following contribution constitutes a short primer for the studies contained in the present issue of *Acta Universitatis Sapientiae – Legal Studies*. We present the historical, legal, and administrative context for the development of private law in the geographic region known as Transylvania during antiquity and the Middle Ages. We make reference to the major questions of private law which shall be analysed by the various authors of this thematic issue.

Keywords: Transylvania, private law, Roman law, mediaeval law, legal development

1. Introduction

Issue no 2 of 2020 of the journal *Acta Universitatis Sapientiae – Legal Studies* is dedicated to the topic of private law applicable throughout history in the geographic space constituted by Transylvania, a region which had varying boundaries – depending on the sources used to define them – throughout history and which belonged to several polities, benefiting at times from various degrees of administrative and legislative autonomy.

In this introductory study, we aim to provide a short primer to readers of this issue, familiarizing them with the historical and public law contexts in which the development of private law unfolded during antiquity and the Middle Ages in this

1 The content of this introductory paper to the thematic issue no 2 of 2020 of *Acta Universitatis Sapientiae – Legal Studies* is based on the historical analyses found on pages 29–43 (Szabó–Szeredai 2018), 99–111 (Mezey 2018), and 175–180 (Kisteleki 2018) of the volume *Erdély jogtörténete* [History of Law in Transylvania], published in Cluj-Napoca by Forum Iuris Publishing House in 2018. The second edition of the book is forthcoming in 2020.

historical region. We leave to the subsequent writings the detailed presentation of the chronology, the basic concepts, and the most significant norms of private law in Transylvania. We shall not provide here any supplementary context for the Early and the Late Modern Period as much more accessible source material and a more generalized knowledge of events in this more recent period justify such an omission.

Our paper is structured into two main parts. The first part presents the historical, international, and public law status of the province of Dacia, the administrative entity in the Roman Empire which to a significant part comprised the geographic area of what would later become known as Transylvania. Provincial organization, pertinent to private law, is also presented here. The second part provides the historical and public law context for the organization of Transylvania during the Early, High, and Late Middle Ages, as a multiethnic region with a complex administrative and political structure, which forms the substrate for the development of various systems of private law applicable to the ethnicities inhabiting this region.

2. The Roman Law Context

2.1. The Notion of Roman Law and Its Reflection in the Relevant Source Material

Between the years 106 and 271, Dacia was a Roman province comprised of the western and southern parts of today's Transylvania along with what is now Oltenia and a part of Banat, geographic regions in modern-day Romania. It was one of the last provinces to be conquered by the Roman Empire and among the first to be abandoned. Still, the period of about 170 years of Roman rule meant the integration of this province into the empire, including from a legal standpoint.

In the study contributed for this issue by Tamás Nótári, which presents the private law applied in the province of Dacia, the notion of *Roman law* is oftentimes used. By *Roman law* in this context we should understand firstly the civil law of ancient Roman origin (the law applicable to Roman citizens) but also the *ius honorarium* (*ius praterium* by another name), which is the law developed by officials, especially by the *praetors*, contained in the so-called *edicts*, in order to complement or correct applicable civil law; thirdly, the *provincial law* adopted by the Roman legislators at various administrative levels, applicable to the inhabitants of the provinces who do not hold Roman citizenship, and, fourthly, the law of the *peregrini*, or local customary law (permitted to remain in force after the Roman conquest of some provinces). Thus, the meaning of Roman law can only be elicited based on the *principle of territoriality* on the one hand and on the

principle of personality on the other hand: the law applicable to the inhabitants of a certain region or province not being identical, to each person being applied his/her own law in accordance with his/her personal status (or, more precisely, according to the *status civitatis* attributed to him/her).

Roman law knew three forms, or degrees of *status civitatis* (personal status). In order to exercise the plenitude of civil rights (to exercise one's full legal capacity in the modern term), that is, to have the capacity to enter a contract or dispose of one's possessions by way of a will, it was necessary to bring all three states together: freedom (*status libertatis*), citizenship (*status civitatis*), and standing as head of the Roman family (*status familiae*); *status libertatis* constituted the precondition of the two subsequent states, while *status civitatis* was in turn a precondition for standing as the head of the family. Distinguishing according to *status libertatis*: we can note that free persons (*liberi*) and slaves (*servi*) are the two main categories. According to their *status civitatis*, we can distinguish between *Roman citizens* (*cives*), *Latins* (*latini*), and *conquered peoples*, or *peregrini* (lit. wanderers). According to family status, persons had full exercise of their legal capacity (*personae sui iuris*) or were persons under the power, or authority of another (*personae alieni iuris*). From the point of view of private law, the Roman citizen had the capacity of disposal over patrimonial rights (*ius commercii*), which referred both to the right to conclude deeds *inter vivos* (*commercium inter vivos*) and to dispose of possessions for the cause of death (*commercium mortis causa*).

Initially, the citizens of the Latium region were the ones considered to be under the rule of Latin law and enjoyed a form of restricted legal capacity (being, for example, excluded from the exercise of public authority while still benefiting from *ius commercii*). This legal category later fell into desuetude: on the basis of *lex Iulia de civitate Latinis et sociis danda* from the year 90 BC, the Latin peoples and other faithful allies of Rome have acquired access to civil law, without acquiring Roman citizenship.

According to Roman law, any person who was neither a citizen of Rome nor subject to the law of Latins was considered a *peregrinus* (wanderer). Initially, any foreign person who was the subject of a state which was not in alliance – or party to a similar covenant – with Rome was considered an enemy (*hostis*). With the expansion of the empire, however, Rome allowed conquered peoples to retain the possibility of using their national law, conferring upon them a kind of 'imperial citizenship' of a lesser degree, even while excluding them from the exercise of civil rights ('civil' in such context being taken in the meaning of one's ability to employ – and benefit from – the institutions of Roman civil law). With the passage of time, the *peregrini*, individually or collectively, could gain the benefits conferred by Latin law (*ius Latii*) or even obtain Roman citizenship (*civitas Romana*), but these categories were largely emptied of content by the

adoption of the *Constitution of Antoninus* (sometimes also translated as the *Edict of Antoninus*) in AD 212.

Civil, praetorian, and provincial customary law have found their application in the following two situations: 1° if at least one party to a legal relationship subject to Roman civil law was a Roman citizen, 2° if both parties were *peregrinus* (so neither benefited from Roman civil law), but the dispute did not take place before a provincial court but before a Roman forum.

With regard to this dual legal system (application of civil law and praetorian law in parallel with the law of the *peregrini*), three periods can be distinguished: 1° the period from the beginning of Roman expansion until 90 BC, when the *lex Iulia* (*de civitate Latinis et sociis danda*) was adopted, which extended civil law to every free subject of the Roman Empire who lived on the Italian Peninsula; 2° the period between the adoption of *lex Iulia* and the year AD 212, the year in which the *Constitution of Antoninus* was adopted, which extended application of civil law to almost all free inhabitants of the empire; 3° the period subsequent to the entry into force of the *Constitution of Antoninus*.

Regarding the province of Dacia, the object of our inquiry, the first period should be ignored, Dacia not having fallen under Roman domination until AD 106. In the light of historical sources, the second period, starting from the conquest of the province at the beginning of the 2nd century AD and until the beginning of the 3rd century AD, is subject to a more detailed examination in this issue of our journal. Due to the increasing rarity of historical source material, only very general conclusions shall be drawn regarding the third period. The subsequent analysis will therefore be largely limited to private law, and in this framework to the law of obligations (and within the latter category mainly to contract law), due to the nature of the credible historical sources available for the province of Dacia, taking into account that deeds recorded on wax tablets known as *triptychs* (*triptychon*) – or readable and intelligible fragments thereof – arose almost singularly in connection with contractual obligations from the point of view of legal history. With regard to other areas of law (the law of persons), these only allow for general conclusions to be drawn; in other areas of legal science (family law, inheritance law, etc.), we do not even benefit from indirect grounds for conducting a thorough analysis.

2.2. The Effects of Provincial Organization on Legal Life

In the field of property relations, the creation of the *province* as an effect of imperial expansion resulted in the applicability of Roman law to the inhabitants of the newly acquired lands. The territory of the province as a legal unit became the property of Rome itself. Although the previous owners were often left in factual possession of their respective lands, a new form of property was established,

distinct from the one based on the notion of *dominium*, the property right in the strict sense applicable to the lands situated in what is today Italy (*fundus Italicus*). The existing form of ownership on this newly acquired imperial land, *possessio et ususfructus* (possession and usufruct, i.e. the right to possess an immovable and to retain its fruits for oneself), was called by another name and also regulated differently.

According to Roman law, property based on the law applicable to citizens (*quirites*), called *dominium ex iure quiritium*, constituted civil (in the sense of citizenly) property within the meaning of civil law. For this form of property to exist, three preconditions had to be met concomitantly. The owner of civil property 1° could only be a Roman citizen who 2° was not under the authority of another person and 3° who had access to *ius commercii* (or, as the case may be, a person benefiting from both *ius Latii* and *ius commercii*). The property of the provincial land (*fundus provincialis*) did not meet the second ownership requirement based on civil law. Therefore, ownership of such land was considered to be a veritable property right due to its object (which already constituted state property). The provincial land in the property of the Roman state was in the temporary possession of its 'owners' in exchange for the payment of a tax, the 'owner' having the possibility of harvesting its fruits and of transmitting the right of possession by way of deeds or as an inheritance. This arrangement – although allowing for almost all the rights of ownership – barred the possessor from degrading (destroying) or substantially transforming the possessed property. In the case of the *peregrini*, the first requirement of ownership based on civil law was absent: the personal side of this right. The possessor was not a citizen of Rome. In a formula developed over time to resolve such cases, the *praetor* ordered – by way of a fiction – that the *peregrinus* be considered as a Roman citizen. During the classical era, these differences were preserved, but the reasons for their existence disappeared: the legal distinction between provincial land and the property of the *peregrini* ceased to exist as a result of the Constitution of Antoninus.

Unlike Italian lands, provincial lands were subject to taxation by the Roman state. In the oldest provinces, acquired during the Republic (*provinciae populi Romani*), the name of this tax was *stipendium*, the lands themselves being called *praedia provincialia stipendiaria*. In the newer provinces – called imperial provinces (*provinciae Caesaris*) –, the tax was called *tributum* (tribute), the lands were designated as *praedia provincialia tributaria*, and they were regulated under this name.

This structure of the notion (or more precisely the effects) of property should not be lost sight of whenever we contemplate Roman contracts having as an object an immovable, especially agricultural land.

The free inhabitants of the provinces – at least those who remained free after the Roman conquest – did not acquire access to Roman civil law, being subject to

the unconstrained authority of the governor (the *Rector provinciae* by the generic term used for this office). The *imperium* of the governor (the plenitude of the sovereign power of the state) can be conceived of as a delegation of the power of the emperor, the governor being accountable only to the emperor himself. The governor's imperium did not mean only the exercise of powers in the field of central and local administration but also jurisdictional activity in criminal and civil cases (ancient Romans not knowing the institution of the separation of the branches of government).

It can be therefore concluded that in all elements of the legal life of the province, which were tangential to the exercise of imperial power (hence related to public administration and largely criminal law) on the one hand and to civil legal relations of Roman citizens living in that province on the other hand, Roman law was mainly applied. (By the time of the empire Roman law was understood in the sense of *ius civile*, the law developed by jurisconsults, which merged ancient civil law as well as praetorian law and which included provincial law developed for the given province by the legislator.)

At the same time, because the population of the provinces did not acquire Roman citizenship, most inhabitants retained their status as a *peregrinus* (only certain persons gaining Roman citizenship and access to Roman civil law, as a privilege). In the provinces, when local law was compatible with Roman public law and did not hinder the legal relationships of the citizens of Rome who lived in the respective provinces, the imperial administration allowed for the existence and application of local law, usually taking the form of customary law, formed before the incorporation of the province into the empire. This latter law governed relations established between persons who did not hold Roman citizenship, and thus they did not benefit from civil law on the one hand and the disputes between them on the other, and it also manifested itself in less significant issues related to the local administration of some communities.

In the era from the last century of the republic to the *Constitutio Antoniniana*, there existed legal systems in the Roman provinces that were applied in parallel with imperial law. These legal systems differed substantially from imperial law, the differences being without a doubt caused by the radically different level of development of some provinces when compared to those in Italy or Rome itself or to other provinces. Such differences can be observed in the most acute way in the field of family law and inheritance law. Within these branches of law, the regulated social relations, by their very nature, led to the continued application of local customs. For this reason, these branches of law are more static, and they oppose in the most lasting way any attempt at modification or any external, artificial intervention. Certain local laws, such as the Greek legal systems, retained their emphasis on written instruments, unlike the much more widespread system used by the Romans, which permitted concluding contracts

in verbal form, something obvious from the contracts recorded on the wax tablets from Dacia, which were drawn up under Greek influence.

In the case of the provinces, the governor was vested with all the power of the Roman state, with *imperium*, being the one who determined which legal system was to be applicable to whom in each case. Because the Romans considered from the outset that the application of Roman law by subjects who did not have access to Roman *ius civile* was excluded, it depended only on the discretion of the one exercising power in the provinces if he permitted maintaining the local legal system or repealed that system. At the same time, it is worth noting that the imperial administration had no interest in totally abolishing the local legal systems for so long as these systems did not prove to be to the detriment of imperial interest; so, it usually intervened only in case of the existence of local norms which were in sharp contradiction with imperial law.

On 11 July 212 AD, Emperor Caracalla (Marcus Aurelius Severus Antoninus) promulgated his decree in the form of an edict, the so-called *Constitutio Antoniniana*, by which he extended access to Roman civil law to almost all free subjects of the empire – except peoples forced to unconditional capitulation during conquests –, the so-called *peregrini dediticii*.

The *peregrini dediticii* were those who saw their statehood abolished and themselves turned into subjects of the Roman Empire, but this took place without them having been enslaved. Persons in this category could not acquire *ius civile* by the *Constitutio Antoniniana*, a situation which remained unchanged until much later, when Emperor Justinian granted them access to Roman civil law. The edict was not proclaimed with the intention of establishing equal rights between peoples of the empire; the emperor actually desired to extend the *vicesima hereditatum* – the tax levied on estates left after the death of Roman citizens, recently increased at the time of the edict from 5% to 10% – to almost all citizens of the empire.

The question arises as to whether the *Constitutio Antoniniana* retained or not the personal right of the *peregrini* to invoke the rules of local legal systems against other subjects who have become Roman citizens or whether the extension of civil law abolished the application of these local systems. According to Mitteis, Caracalla's edict abolished the possibility of applying local systems of law, those he deemed 'Volksrecht' ('popular law'), while Schönbauer and Kunkel considered that the edict of Emperor Caracalla conserved the *peregrina civitas*, so that it conferred on the onetime *peregrinus* turned Roman citizen the opportunity, for example, to choose between the two legal systems equally applicable in connection with a particular dispute.

In the light of all these aspects, the question arises: to what measure did the *Constitutio Antoniniana* influence the material and procedural law of the provinces? To what extent could the customs of the inhabitants (the *peregrini*)

be preserved after acquiring Roman citizenship? The study contributed by Tamás Nótári in this issue aims in part to answer this second question, based on the available source material.

3. Historical Context for the Early, High, and Late Middle Ages

With the founding of the western-style Hungarian state (in AD 1000) by King Stephen I of Hungary (997–1038), the Kingdom of Hungary sought to adopt the Western European model of state organization and legal regulation. As a result of this process, its laws were modelled in part on the Roman-German legal system. Consequently, canon law produced its effects especially on the institution of marriage but also on other institutions of family law and testamentary inheritance, as the first study contributed by Mária Homoki-Nagy to this issue of *Acta Universitatis Sapientiae – Legal Studies* attests. Roman law, due to its character of scholarly law, in turn facilitated the modernization of Hungarian private law. *Ius commune* has become such a source of Hungarian private law from which the deciding judge could always take inspiration. In Transylvanian private law, *ius commune* would come to occupy a special place not only for its significance as a source of inspiration but also due to its near-complete adoption by some of the Saxon free cities, as apparent from the study contributed to this issue by Attila Horváth. Institutions of private feudal law began to form already during the time of the kings of the Árpád dynasty. The most significant of its rules were compiled in turn by István Werbőczy in his famous work, *The Tripartitum*, which was to define the rules of Hungarian private law for the next 300 years. All throughout the mediaeval period and even during the Early Modern Age, this source of law would be of paramount importance. Most studies published in this issue will reference its major rules.

In the Middle Ages, most of the European population was forced to organize economically in conditions of self-reliance. Most goods produced in such circumstances were usually of inferior quality but cost very little to manufacture. Commercial exchange, trade was an almost exceptional phenomenon. People were producing only what they themselves also consumed. The artisan who strove to increase his profit was exceptional; this behaviour ran contrary to mediaeval ethics. For these reasons, people rarely needed or used money. Agriculture was considered to be the only reliable source of income. Estates were constant in their extent, the main mode of their acquisition not being enterprise but more usually merit earned in battle. Therefore, any gain of wealth was considered possible only to the detriment of another. Borrowing of money would take place only subsequent upon absolutely exceptional situations: disasters, poor harvests,

wars, etc. Those who by speculation profited from such situations and acted in their selfish interest risked not only moral condemnation but also criminal conviction. Therefore, private law, especially in the Early Middle Ages, was mostly unconcerned with relationships of trade, limiting itself to the regulation of real property and obligations pertinent to its transfer.

In the economic-political system based on land ownership, the priesthood, the leadership of the military, and the officials of public administration were composed almost exclusively of members of the nobility as well as of other notables, who were not regularly remunerated for the exercise of these functions but instead ensured their existence from the emoluments of their own estates. Thus, public service was possible due to the estates donated by the king, and the remuneration of the service was also made by granting of domains, and not in monetary form. The social structure apparently remained completely unchanged during the Middle Ages. Thus, the main purpose of the legal system was not to ensure the security of contract and other civil law relations but to preserve the function of landed property and to regulate the behaviour of subjects in relation to this form of land ownership. The property and power structure resulting from this state of affairs, including what concerns the exercise of legal capacity and inheritance rights, is analysed in the studies contributed to this issue by Mária Homoki-Nagy as well as Attila Horváth.

The economic development of the Principality of Transylvania was not hindered during the Middle Ages and early modern times by near-constant wars alone but also by the fact that the Ottoman Empire endeavoured to close the access of the Transylvanian economy to the markets of the West. For this reason, the capitalization of agricultural products was hampered. The penury of currency in certain periods was of such extent that grain became the general means of exchange. Landowners paid the salaries of craftsmen, soldiers, and servants in grain.

Until the end of the 18th century, in almost all states of Europe (including in England), one of the most important functions of the institutions of private law was the protection of the interests of the nobility who benefited from inherited wealth, against the competition of upwardly mobile social strata. Most of the rights were based on long-term possession, on the continuation of the exercise of a right for several generations, giving birth to the institutions of feudal property (such as property of the gens) and to institutions formed in the law of obligations to accommodate the little amount of lending that existed (such as the pledge). The dismantling of these institutions was necessary on the path to modernity; the process by which this was achieved through a series of legal reforms in Transylvania is presented in this issue.

Until 1526, the private law of the Principality of Transylvania was based on laws identical to those in force in Hungary, and the trend towards this type of continuity was preserved even later. In spite of the fact that after the Kingdom

of Hungary had been broken up into three segments the legislative power of its Transylvanian part became separate from that of the other remnants of the kingdom (until the adoption of Act VII of 1848 and of Act I of 1848 from Cluj as well as of Act XLIII of 1868), private law continued to be based on identical principles in the two lands of the Crown of Saint Stephen. The science of law and legal life continued to pay attention to the constant development of the law of the other state. Interactions between norms of Hungarian and of other foreign origin and the private law of Transylvania as well as the development of the modern legal environment at the end of the 19th century are some of the objects of analysis in this issue.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 205–223

DOI: 10.47745/AUSLEG.2020.9.2.02

Private Law in the Province of Dacia

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Abstract. Beginning from the late 18th century and until the mid-19th century, several wax tablets were unearthed in the locality of Roşia Montană in what is today Romania. They record, among other things, various contracts drafted during the time of the Roman Empire. They constitute a priceless database which attests to the application of Roman law in the Province of Dacia. This study is dedicated to briefly presenting the significance of the content of these tablets from the perspective of legal history. The major conclusions which can be drawn from the legal operations documented in them are presented regarding the status of persons and various types of contracts. Based on the content of the wax tablets, it can be concluded that the living application of Roman law in the province of Dacia differed in part from the norms indicated in contemporary sources, in local use some institutions being distorted and 'adapted' to local conditions and Hellenistic influence.

Keywords: wax tablets, Roşia Montană, Dacia, Roman law, Hellenistic influence

1. Introduction

The province of Dacia (roughly corresponding to the historical space which was later called Transylvania and which is now part of Romania) was ruled by the Roman Empire for a period of roughly 170 years, beginning in AD 106. During this period, Roman law was applied there. Beginning from the late 18th century and until the mid-19th century, remarkable archaeological finds were gradually unearthed in the locality of Roşia Montană (Alburnus Maior in Roman times) which to this day constitute a fundamental source material for the study of Roman law as applied in a province of the empire's vast borderlands. This study is dedicated to presenting the significance of these archaeological finds – constituted by a set of Roman wax tablets containing various legal documents – from the perspective of legal history as these documents offer us the earliest glimpses of Roman law applied in the region under examination.

2. Civil Jurisdiction in the Provinces

The question has already been asked whether the judicial forums in the provinces were or were not obliged to apply – in addition to (imperial and provincial) Roman law – the customary law preserved in the provinces. According to a text conceived by Ulpian, most likely a few years after the proclamation of Caracalla's edict, the customary (consuetudinary) law of a city or province could apply in a litigation if this customary law had once before been applied in another litigation, finalized with a sentence.[1] That source clearly referred to disputes between Roman citizens (it is unlikely that the interest of Ulpian was aroused by a legal problem concerning the already negligible number of *peregrini* remaining after the Edict of Caracalla). The question in the legal sense is whether customary law, used so long as the status of *peregrinus* still existed, did or did not retain its normative effects in intra-provincial disputes between Roman citizens. The jurisconsult allowed for the continued use of the *peregrina consuetudo* (local customary law applicable among the peregrini) where it arose before the Antoninian Constitution and manifested itself in judicial sentences which remained demonstrably final. This approach unequivocally contributed to the tightening and rigidity of the *peregrina consuetudo*, previously subject to organic development, conserving its norms in time at their current stage of development.[2]

The question remains: to what extent was the governor obliged to use this customary law in the course of his jurisprudence, rendered at the provincial level? From three other texts attributed to Ulpian, the following conclusion can be drawn: the ancient customary law of the peregrini (*diuturna consuetudo*) was to be used in disputes between peregrini who became Roman citizens as if it were customary Roman law (*pro iure et lege*).[3] If the parties did not agree on a particular problem (*neque in cautione*), and the governor's *decretum* did not regulate that matter (*neque in decreto praesidis*), nor did local customary law (*ne consuetudo*) lead to the settlement of the dispute (in the particular case, the amount of the fine due), the governor was bound to decide according to his own conviction.[4] At the same time, as a rule – according to Ulpian –, the legal provisions adopted at the imperial level are universally applicable (*in omni loco valere*), so they can tacitly and implicitly deprive local customary law of its effects.[5] So, in the absence of a decree of the emperor, the governor had to apply customary provincial law to Roman citizens during intra-provincial disputes as if this customary law were Roman law.[6] Logically, however, the

1 Ulpian: *Digesta* 1, 3, 34.
2 Pólay 1960. 30.
3 Ulpian: *Digesta* 1, 3, 33.
4 Ulpian: *Digesta* 48, 3, 4.
5 Ulpian: *Digesta* 47, 12, 3, 5.
6 Pólay 1960. 31.

local courts, which continued their activity without hindrance and whose material jurisdiction extended exclusively to minor civil disputes, continued to apply the customary law of the former peregrini on condition that it had been included in previous final judgments between subjects of law who had acquired access to civil law in the same province.[7]

Therefore, the *Constitutio Antoniniana* did not bring a radical change in the legal life of the Roman Empire because the extension of civil law to the peregrini did not confer any substantial privileges on them as did the earlier granting of the status of *Latini Iuniani*, which granted to many the right of disposition over their assets by acts between the living (*ius commercii inter vivos*) – the most importantly: provision of civil law –, as is clear from legal instruments drawn up in the province of Dacia.[8]

3. Wax Tablets and Local Use of Roman Private Law

The collation, translation, and systematization of the inscriptions discovered on the so-called *wax tablets from Dacia*, unanimously accepted even today by the historical literature, are contained in volume III of the *Corpus Inscriptionum Latinarum*[9] series, initiated by Theodor Mommsen himself, and process the entire historiographical material consisting of inscriptions from the era of the Roman Empire.

Wax tablets (*tabulae ceratae*) are typical instruments carrying the cursive writing (*cursiva*), which was in everyday use at the time of their creation. The Latin name of the wax tablets is always used in its plural form because each documentary unit consisted of at least two tablets. These were simple wooden boards of medium size (about 15 × 13 cm) with a narrow frame lining a central inset writing surface formed by hollowing out the framed area. The recessed central part of each tablet was filled with wax, of usually black or green colouration, on which the inscription itself was etched using a *stylus* (an ancient writing tool). Usually, two such tablets were connected at their edges by the affixing of metal clamps or by simply tying them together. The frames protected the writing on the two tablets that were closed, their waxed sides being turned to face each other. From the binding of two tablets, a so-called *diptych* (*diptychon*) resulted, while three bound tablets were called a *triptych* (*triptychon*), and the set of tablets resulting from the binding of more than three such plates was called a *polyptych* (*polyptychon*). The units formed this way could be read by turning the tablets

7 Mitteis 1891. 167; Pólay 1960. 31.
8 Pólay 1960. 32 et seq.
9 Mommsen 1873. 924–959.

like the pages of a notebook or a book, and for this reason the units resulting from the binding of several tablets were called a *codex* or *codicil*, *codicillus*.[10]

Wax tablets from the province of Dacia were gradually recovered in the area of today's Roşia Montană (*Alburnus Maior*) between 1786 and 1855.[11] The total number of documents thus published is 25, of which four (tablets XV, XXII, XXIII, and XXIV) do not present any legal content pertinent to civil law, while only a number of nine tablets of the ones preserved are legible in their entirety, another three being largely reconstituted, and the rest are fragmentary, their analysis from a legal standpoint thus being barely possible or entirely impossible.[12] Triptychs which could be read or dated based on the text have been determined to have been drawn up between AD 137 and 165 in the frontier localities of Dacia, such as Alburnus Maior, Deusara, Kartum, or Immenosum Maius (the latter being mining settlements, villages in the area of Alburnus Maior), none of the places of their origin being of urban rank, instead being considered as *vicus* (lower-ranking provincial settlements).[13] The documents (as can be determined from the dating of the last such document) were walled in for the sake of preservation in the passages of the mine at Alburnus Maior after AD 167 by the population in retreat to the south due to an invasion by the Marcomanni Sarmatians.

It is worth noting that University Professor Henrik Finály from Cluj and parish priest Timotei Cipariu, the Director of the College in Blaj, contributed significantly to deciphering, interpreting, and publishing these texts. Professor Elemér Pólay from the University of Szeged dedicated numerous studies to this issue and a standalone monograph (1972) that is still considered a fundamental source material today.

Entries in triptychs – using the terminology of Professor Pólay – are 'dual documents', which means that the first two of the three tablets are bound with three strings inserted and pulled through three holes on these tablets in accordance with the requirements of formal authenticity imposed by the *senatus consultum Neronianum*, thus being closed together; the *verso* (*back side*) of the first tablet is turned towards the *recto* (*front side*) of the second one (the tablets thus sealed can be opened only by cutting the strings during the proceedings for the taking of evidence in a dispute, the closed part containing the text). The verso of the second tablet and the recto of the third tablet remained open, the text from the sealed part being reproduced here so that it can be made known to third parties. The verso of the second tablet was divided into two fields, while on the wooden threshold that separated the two waxed fields strings were affixed with the seals of the parties applied onto them – the integrity of the seals being,

10 Nótári 2014. 27.
11 Pólay 1972. 13.
12 Pólay 1972. 22.
13 Pólay 1972. 24.

in a way logically, a condition of validity, their rupture or damage resulting in the annulment of the deed recorded on the tablets (*nihil momenti habent*).[14] The recto of the first tablet and the verso of the third one did not contain any text, being used only as protective covers.[15] When drawing up the triptych, as a rule, seven witnesses were required to collaborate, as this form of document was derived from the will, drawn up under seven seals (*testamentum septem signis obsignatum*), the requirement of the seven witnesses of the latter documentary form being derived from the operation of *mancipatio* (a ritual-bound verbal deed) with seven participants.[16] The decision of the Senate which provides for the form of these instruments referred predictably to deeds of public law and private law drawn up in accordance with the imperial law (*publici privatique contractus*), but the fact that the triptychs from Dacia correspond to this formal requirement shows that this Roman rule was also received by the peregrini.[17] In the case of documents from Dacia, the number of witnesses fluctuates significantly: for example, although the number of participants in each *mancipatio* was seven, on certain documents the names of six witnesses are recorded along with the seller or even the names of five witnesses along with the seller and the guarantor (surety).[18] In lending operations in which the custom of *mancipatio* did not enter the public's legal consciousness the number of witnesses shown by the documents fluctuates between seven and four;[19] in the case of operations concluded by formal contracts to which civil law did not apply (such as the employment contract, the hire of services) and where imperial law did not contain provisions regarding the number of witnesses, the documents from Dacia show that the number of witnesses was still never any less than two.[20]

4. The Law of Persons in the Text of the Wax Tablets

With regard to the law of persons, the following can be considered as having been influenced by imperial law, interacting with the local law applicable to the *peregrini*: from triptych no VIII, it can be determined that in the case of buying a house the buyer, a woman (a peregrina from the point of view of marital status), could conclude the contract without the consent of her guardian (*auctoritas tutoris*) even though – as apparent from the *Institutions of Gaius*, a work approximately contemporary with the contract in question – women were subject to a form of

14 Paulus: *Sententiarum libri* 5. 25. 6.
15 Pólay 1972. 42 et seq.
16 Mitteis 1891. 295.
17 Pólay 1961. 21.
18 Pólay 1972. 52.
19 Pólay 1972. 54.
20 Pólay 1972. 55.

supervision similar to guardianship (*quasi tutela*), and in the case of peregrini they were able to conclude deeds only with the consent of their guardian.[21]

Until the era of the Dominate, women – if they were not under the authority of their father or husband – were subjected to lifelong guardianship (*tutela mulierum*). Although they could manage their assets themselves, the consent (*auctoritas*) of the guardian was necessary for the conclusion of deeds regulated by civil law. However, this would become a pure formality over time, and the guardianship or tutelage of women disappeared during the 4th century AD. Their non-contractual (extracontractual) liability was identical to that established for men; in this sense, women benefited from a similitude of full legal capacity.[22]

Until the time of the Principate, the authority conferred on the guardian over a woman's patrimony had already been considerably reduced to a limited sphere of deeds because, as Ulpian states: the agreement of the guardian to operations requiring *mancipatio* was necessary only in cases when the woman was the seller; if she was the buyer, such agreement was not required.[23] Thus, in principle and in accordance with the law applicable to peregrini, the peregrina from Dacia, as a buyer, could participate in the operation only with the consent of the guardian (because, theoretically, only the woman who benefits from civil law can participate as a buyer by mancipatio without the consent of the guardian); therefore, it can be accepted that in this respect the imperial norm produced its effects with priority, overwriting the law applicable to the local peregrini, conferring additional legal capacity upon women.[24]

Regarding moral persons (legal persons), from triptych no I we find out about the disbandment of a funerary association (*collegium funeraticium*) with its headquarters in Alburnus Maior, which seems to have been organized according to the requirements of imperial law, but its leaders (the *magister*, responsible for representing the association and those who performed the function of *quaestor*, who were responsible for the economic management of association) were exclusively (and the members predominantly) peregrini.[25] At the time of establishment, the associations organized under Roman law (*universitas*, *corpus*, *collegium*) had to pursue a legally permitted purpose, recorded by their articles of association or bylaw (*lex collegii*), sometimes also called statute (*statutum*). *Lex Iulia de collegiis* from the year 21 BC, attributed to Emperor Augustus, conditioned the establishment of associations on an assent by the Senate. For the establishment and operation of associations, the existence of at least three members was required, so – in the wording of Marcellus (D. 50, 16, 85),[26] similar

21 Gaius: *Institutiones* 1, 193.
22 Nótári 2014. 131.
23 Ulpian: *Liber singularis regularum* 11, 27.
24 Pólay 1961. 14.
25 Pólay 1961. 15.
26 Marcellus: *Digesta* 50, 16, 85.

to an adage – the association consists of three members (*tres faciunt collegium*). In order to fulfil their purpose, representative and administrative bodies were also appointed at the establishment of the association. Associations had a limited legal capacity, and the representatives had to act in place of the association whenever concluding contracts on behalf of the association. The association was disbanded if its purpose ceased, if it was dissolved by the emperor or the Senate, if the number of members fell below three, or if it was disbanded by the members themselves.[27] The close similarity of the associations reflected in the text of the wax tablets to the template set forth by imperial law in what concerns the structure of the association of peregrini also shows the influences of Roman law on the law applicable to the peregrini.

5. Some Contracts Recorded on the Wax Tablets: Stipulatio as a Contractual Form

Stipulatio was a solemn promise in the form of a question and an answer, which gave rise to an obligation. To the verbal question of the creditor, the debtor would answer immediately, and the answer would contain the same promise (*spondeo* – hence 'I promise') and the same object of the legal operation. Its origin can be found in *sponsio*, as shown by the verb used at the oral conclusion of the contract. Due to its sacred origin, only Roman citizens could use this operation in the beginning. During the preclassical period, a custom of recording the *stipulatio* in writing developed, but it was not a condition of its validity, only a measure to facilitate proof (*cautio*) of the obligation, which – as is the case of the deeds listed above – was born by simply uttering the formula. Instead of the verb *spondere*, later the verb *promittere* became available, which – also having the meaning of promise – opened the use of the form of *stipulatio* for peregrini. Later, the formal requirements of the *stipulatio* were significantly relaxed, its conclusion becoming possible in a language other than Latin and even some deviations from the initial formula being allowed for in the content of the question and answer. Post-classical law repealed the requirement of verbal *stipulatio* altogether: if the conclusion of the deed was recorded in a document, the deed had to be considered as validly concluded.[28]

In the classical era, the *stipulatio* was a verbal contract in which the parties, according to their desire to contract, could determine the purpose of the contract, the cause (*causa*), but could also opt not to even declare its purpose, the resulting contract giving rise to an obligation which was causal or, as the case may be,

27 Nótári 2014. 132.
28 Nótári 2014. 216.

abstract.[29] Over time, the verbal form of the conclusion of the contract lost its significance, and the document drawn up only for the purpose of facilitating its proof took over the function of constituting the obligation itself. In other cases, the document (written instrument) that gave rise to the stipulation was associated with the fiction that the stipulation had been concluded.[30] In what concerns the dating of this change of attitudes, the literature is far from unanimous, with some authors indicating the end of the classical era[31] while others pointing to the post-classical era, restricting their conclusion only to the eastern provinces of the empire.[32] According to an opinion which intends to integrate the two positions and which is probably closest to reality, the habit of drawing up a document as a means of proof developed quite early on; this formality, however, did not constitute a condition for the validity of the deed as it was unable to replace the omitted verbal stipulation; at the same time, both in the provinces in the east as well as in the west of the empire, the acceptance of the practice spread, the document drawn up being accepted as full proof of the conclusion of a *stipulatio*, without proving the utterance of the formula, which in daily practice was manifested by the inclusion of the *stipulatio* as a clause of the instrument drawn up.[33] It should be noted, however, that the imperial decrees unequivocally adopt the view of attributing a verbal character to the *stipulatio*;[34] the document prepared for the recording of the deed gave rise only to a relative presumption, which could be overturned,[35] but the jurisprudence in practice – not only in the provinces but also in the imperial jurisprudence – showed that the existence of the document (of paramount importance in Hellenistic law) usually had evidentiary power sufficient to prove the conclusion of a *stipulatio* on its own.[36]

According to this position, over time, in provinces under Hellenistic influence – especially after the adoption of the *Constitutio Antoniniana* –, the written form acquired more and more significance before the Roman forums; in order to constitute proof of the stipulation as a verbal contract for which the existence of witnesses was not required, the document confirming the conclusion of the deed was accepted, the possibility to administer evidence to the contrary being increasingly restricted.[37] Based on all the aspects already mentioned and if we consider that the written instrument gave rise, from the end of the classical era, to a relative presumption even in accordance with imperial law regarding the

29 Kaser 1949. 288.
30 Nótári 2014. 216.
31 Levy 1929. 254.
32 Riccobono 1913. 172.
33 Kaser 1959. 274.
34 *Codex Iustinianus* 4. 31. 6; 3. 38. 7; 4. 2. 6; 12. 4. 64. 3; 4. 65. 27.
35 *Codex Iustinianus* 8. 37. 1.
36 Pólay 1963. 6.
37 Pólay 1963. 7.

conclusion of the stipulatio – in the absence of proof to the contrary: the obligation was considered to have been born even if the contract was not actually concluded in verbal form –, then we must accept that, in all probability, in the legal life of the provinces, especially the ones strongly affected by Hellenistic influences such as the case of the province of Dacia, a *stipulatio* to which the triptychs refer may in fact often not have even taken place in verbal form, and the instrument from which the obligation had arisen simply contained a *stipulatio* clause instead.[38]

The stipulation appears in multiple hypostases and specific functions in the documentary material consisting of triptychs: in the case of two loan agreements, in the case of sales contracts when the seller provides warranty for the eventuality of eviction (*evictio*), in the case of a promise for payment of contractual penalties (*stipulatio poenae*), and in the case of sureties, for the purposes of a guarantee. Therefore, the stipulations recorded in triptychs were used to guarantee or set up various types of obligations born of contracts concluded both between Roman citizens and between peregrini, the documents being meant to facilitate the realization of rights before the Roman judicial forums. In the case of some operations, it can be deduced that *stipulatio*, as a stage of contracting, took place also in reality, the obligation having in fact arisen by concluding a contract verbally, in other cases the obligation resulting from the document, which was preconstituted as a literal contract, there being only a simple reference to the stipulation, which did not take place in reality for the reasons shown above.[39]

6. Sale and Purchase

Among the tablets, there are four documents containing contracts of sale and purchase (*emptio venditio*). Sale and purchase consist in the acquisition of goods in exchange for an amount of money, which arises as a legal relationship at the time when the goods (*merx*) and the sale price (*pretium*) are determined by the parties. The subjects of the contract are the seller (*venditor*) and the buyer (*emptor*). With the advent of the *fides*, the essence of sale and purchase was embodied in the agreement of the parties (*consensus*), and through it, in the last centuries of the Republic, the sale and purchase have become – also in the legal sense of civil law – *a consensual contract*. As a symptom of the crises of the post-classical era, immediate sale (of goods present for a price paid in cash and on the spot) gained ground again, and in the case of the sale of some goods of significant value the written form became a condition of validity (the contract being concluded by drawing it up in a written instrument, thereby losing its consensual character).[40]

38 Pólay 1963. 11.
39 Pólay 1963. 30.
40 Nótári 2014. 221 et seq.

Triptychs no VI, VII, and XV record sales of slaves, and the one with no VIII refers to buying a house, all these contracts being concluded in accordance with the forms provided for by imperial law, yet lacking some conditions of these forms.[41] These shortcomings are the following: 1° the contracting parties were peregrini[42] but the operation was concluded by mancipatio, a legal institution reserved for Roman citizens who benefited from *ius commercii*, and for persons inducted under the regime of Latin law;[43] 2° the object of the purchase of a house was a provincial building even though only slaves, draft animals endemic to Italy, land in Italy, and established ancestral rural easements on such land could be sold and bought by mancipatio.[44]

Mancipatio is an ancient, solemn ritual that results in the conclusion of the civil deed by uttering a predetermined formula, which was used not only to transfer the title to property but also for the transfer and acquisition of any other rights (powers) known under civil law (the power of the spouse, *mancipium*, easements, etc.). At first, it can be assumed that it functioned similarly to sale, within the operation the price having to be paid immediately and at the place the contract was concluded. The participants were the seller, the buyer, five free Roman citizens (the latter could also be people who benefited from Latin law), and the scale-holder (*libripens* – the person who held the scales in his hands, an essential participant of the ritual). The object of the operation could consist only of the so-called *res mancipi*, i.e. slaves, draft animals, the Italian land, and ancestral easements set up on such land.[45]

It should be noted that for the simple conclusion of the purchase (*emptio venditio*) it was not necessary for the parties to benefit from *ius commercii* because the sale and purchase were considered to be a consensual contract in Roman imperial law, so its conclusion was valid – in principle and with certain exceptions – without the fulfilment of any formality, taking place by the simple consent of the parties.

Given the lack of elements of the operations recorded on the wax tablets, we can assume that civil law mancipatio did not occur between the parties, but rather a deed was concluded that contained in erroneous manner the formal elements of mancipatio (in terms of both the subjects and of the object of the operation), which was imbued with the law applicable to the peregrini but which was capable of producing effects if the peregrinus had accepted this operation before the courts.[46] At the same time, the parties were able to comply with certain conditions, formalities of the mancipatio, taking into account that the number of

41 Pólay 1972. 127 et seq.
42 Kerényi 1941. 176, 252 et seq., 271.
43 Ulpian: *Liber singularis regularum* 19, 4.
44 Gaius: *Institutiones* 1, 119.
45 Nótári 2014. 166.
46 Pólay 1972. 133 et seq., 144; 1961. 10.

persons who had affixed their seal on the triptychs they recorded the deeds of sale on was seven in all cases, the number corresponding to the one provided for recording the mancipatio in its typical form.[47]

The sales documents contained primarily the participants – both principal and auxiliary – of the operation (seller, buyer, and guarantor, or surety), its object (and its characteristics: name of the slave, age, origin, nationality, etc.), and the fact of the transfer of the property right (transfer of title); secondly, the warranty against defects and eviction (guarantee stipulations) and the stipulation of the surety (*fideiussio*);[48] thirdly, the fact of receiving the price (it follows that the sale was made in all cases in immediate form, with full and immediate payment of the price, which subsequent literature called *sale for ready money*), and in the case of the sale of the house the contract also established the obligation regarding payment of taxes on the land on which the building was erected.[49] In what concerns the warranty against eviction, the practice of the peregrini corresponds to the provisions of imperial law because in case of eviction the seller had to guarantee the buyer through the guarantee stipulation provided for in the *edictum aedilis*, to the amount of twice the sale price (*stipulatio duplae*).[50] As regards the warranty against defects, the same trend manifests itself because the buyer, in accordance with the *edictum aedilis*, must show the main characteristics of the goods purchased (thus, in the case of the slave, age and nationality), the seller being obliged to guarantee through specific stipulations for certain characteristics (following the example of the slave, for the condition of his/her health) and the lack of certain hidden flaws (for example that the slave is not a *fugitivus*, so s/he has no tendencies to attempt an escape).[51]

7. Loan for Consumption

Four of the tablets record agreements pertaining to loans for consumption (*mutuum*). In Roman law, the loan for consumption (*mutuum*) consisted in handing over some fungible goods to the borrower, with the obligation to return at the expiration of the loan some goods having the type and the amount identical to those of the borrowed ones. By such a loan, the debtor, having acquired ownership of the goods, also acquired the full right of disposal over them, the obligation to repay the loan having a generic character, limiting the object of the operation to fungible goods (*res fungibilis*). The obligation of the creditor is to

47 Pólay 1972. 149.
48 Regarding the surety contracts recorded on the Dacian wax tablets, see: Veress 2015. 7–13.
49 Pólay 1972. 144.
50 Pólay 1961. 18.
51 Pólay 1961. 19.

give (transfer) the title of property over the goods because the loan transfers the right of ownership in the sense of civil law, the handover taking place through the material transfer of the goods to the debtor (*traditio*) because the goods subject to *mancipatio* (*res mancipi*) could not constitute the object of a loan for consumption, not being fungible goods by definition.[52]

Tablets no II, III, and V were drafted in Latin, and (uniquely among the wax tablets) the one with no IV was drawn up in Greek.[53] It should be noted that in the case of Latin-speaking contracts – opposite to the trend that can be detected from the other documents, which manifests itself by the similarity of the formula in the case of operations with similar objects – these cannot be classified into the same category of documents. Triptych no V is a document with Roman characteristics, being only a means of proof of the *stipulatio* but without itself resulting in the conclusion of the operation: the borrower, a Roman citizen, probably knew the judicial practice of the Romans and therefore insisted on concluding the contract in verbal form – a solution which is closer to imperial Roman law – and on using the written instrument only for evidentiary purposes.[54] In triptych no III, we find a unique mix of elements of Roman and Greek origin; so, in all likelihood, it was considered to result in the conclusion of the contract, not being just a simple means of proof preconstituted by the parties.[55] (In connection with the latter contract, we can determine that the text is confusing and inaccurate, namely that it does not record that the amount borrowed was ever handed over to the borrower, and it therefore raises the possibility that the amount was not handed over at all or was only partially handed over, the document possibly disguising a fictitious loan.)[56] In the contract drawn up in Greek, it was logically not the Roman or imperial law but the law applicable to the peregrini the one to which the parties adhered, and based on this fact we can affirm that this document may be considered as recording a Hellenistic contract in the form of a written instrument.[57]

Interest stipulations in the contracts recorded on triptychs correspond to the practice of imperial law, which set the interest rate limit at 1% per month and thus at 12% per annum.[58] Of those four contracts, two mention guarantors (sureties), the parties trying to ensure the fulfilment of the contract through the establishment of a personal guarantee. Another interesting feature of these contracts is that two of them, drawn up in Latin and preserved in their entirety, were concluded for an indefinite period (the third, also written in the Latin language, is fragmentary, and therefore the duration for which it was concluded cannot be determined), so

52 Nótári 2014. 218.
53 Pólay 1972. 156.
54 Pólay 1963. 14.
55 Pólay 1972. 156.
56 Pólay 1963. 18.
57 Pólay 1972. 158.
58 Nótári 2014. 203.

the borrower was obliged to return the goods borrowed on the date on which the restitution was requested by the lender.[59] Setting this moment shows the adoption, the reception – once again – of imperial law by the peregrini.

8. Hire of Works

Among the triptychs, the ones with number IX, X, and XI record employment contracts, or more precisely contracts for the *hire of works* (*locatio conductio operarum*). Unfortunately, none of the documents have been preserved in their entirety (the triptych with number X being the best preserved), but their text can be subject to legal analysis even in fragmentary form.

Roman law knew three forms of lease: the lease of things (*locatio conductio rei*), the lease of labour, or hire of works (*locatio conductio operarum*), and the enterprise contract or hire of services (*locatio conducio operis*). The object of the lease could therefore consist 1° in handing over an object for use, 2° in the provision of labour, and 3° in the realization of specific activities in exchange for a 'rent' (*merces*). Hire of works (*locatio conductio operarum*) consists in the use of the labour power of a free man in exchange for a salary (the 'renting' of labour) paid depending on the time spent doing the work, its object being usually the performance of physical labour. The labourer (because he rents his own force) was subject to a duty of care, being required to comply with the orders of the 'employer' during the performance of the work. Each party was responsible for *culpa levis* (the slightest fault). Risk bearing was regulated on the basis of *the theory of spheres of interest*, the risk being borne by the person in whose sphere of interests the reason for not fulfilling the contractual obligations arose. Thus, the loss due to unfavourable weather conditions that make performance of work impossible was borne by the 'employer', the 'salary' being due during this period as well, but for the duration of the employee's illness (a problem arising in the sphere of interest of the latter) the 'salary' was not due, the disadvantage being borne by the 'employee'.[60]

It is noteworthy that in the Roman Empire, in addition to slave labour – which played an important role in production during the entire existence of the empire –, hired labour of free persons kept its auxiliary character. For some works, this second means of production appeared mainly in cases[61] in which the slave owner considered the work done as inappropriate (as in the case of work in swampy areas, when any deterioration of the slave's health would have caused a loss to its owner)[62] and in the case of seasonal work, when he did not have a sufficient

59 Pólay 1972. 160.
60 Nótári 2014. 224 et seq.; Molnár 2013. 195 et seq.
61 Pólay 1968. 3.
62 Varro: *De re rustica* 1, 17, 2.

number of slaves – which was the case probably often encountered in Dacia, the work carried out by slaves not having too much significance in this province.[63]

Employment contracts, including the ones according to the practice in Dacia Province, were concluded as consensual contracts, recording in writing having the predominant role of preconstituting a means of proof to facilitate evidence gathering in case of dispute, the more so since employment is mentioned in the documents in the past tense – in the case of literal contracts, they could have been concluded only if one of the parties had stipulated in writing the will to work for the other party and the other party that he wants to pay for the work performed, the two documents being handed over to the other party, which did not happen in the case of the tablets.[64] As it appears from the documents, the worker is the one who requested the recording in writing of the contract, also bearing the expenses related to the preparation of the document; this shows the usually precarious situation of the worker under Roman law given that the 'employer' did not provide to him the written proof of the contract, the worker himself being the one who had to take care of constituting the proof of the obligation.[65] From triptychs no IX and X (the relevant part not being preserved on the one with no XI), it can be determined that in the case of hire of works these took place for a specified period, with early termination if the obligational relationship ceases from the employee's initiative (in case the worker quits the work) – as it appears from triptych no X –, which results in a fine owed to the 'employer', in the form of a contractual penalty proportional to the working days left unworked,[66] but if the 'employer' was the one who broke the contractual relationship, then – with the probable application of norms known from other sources[67] – the 'salary' was due for the duration of time remaining from the contract.[68] In all three preserved contracts, the object of the obligation consists in gold mining (*opus aurarium*), so it concerns work performed in the mine. If the worker was hindered in carrying out his activity by any circumstances (such as illness), he could temporarily appoint a replacement because the work does not require extensive professional training.[69] The payment of remuneration (*merces*) was made periodically and after performance of the work (*postnumerando*),[70] and it cannot be ruled out – taking into account the precarious material condition of the workers – that the parties (although it was not a work performed by day labourers) might have stipulated

63 Pólay 1972. 37.
64 Pólay 1968. 14.
65 Pólay 1968. 15.
66 Ciulei 1991. 143.
67 Paulus: *Digesta* 19, 2. 28.
68 Pólay 1968. 16.
69 Pólay 1968. 25.
70 Ciulei 1991. 128.

a daily remuneration.[71] In all likelihood, the bearing of risks was regulated by the already developed principle of the spheres of interest.[72] It is worth noting that the 'employer' was entitled to 'discipline' the worker, a right not defined in detail in the terms of the contracts' content. The existence of this right seems to be confirmed by the stipulation, which is found in all three contracts, according to which the worker submits not only his labour but also his person (*se locasse et locasse operas suas*); hence the hire of works gave rise to a stronger relationship of subordination (*potestas*) when compared to the usual situation of inequality imposed by Roman law onto persons still free in principle but subordinate in certain circumstances.[73]

9. Associations

Of the examined documents, two contain contracts of association (*societas*), both being fragmentary, but the content of tablet no XIII may be reconstituted to an acceptable proportion, while that of the one with no XIV is so poorly preserved that it is not suitable to be subjected to analysis from a legal standpoint; even the question of whether it actually records a contract of association was long disputed.

Associations (*societas*) were nothing but the contractual expression of a desire by several persons to pursue a legal, patrimonial purpose. Associations may be classified into several subcategories according to their purpose. These include the *societas omnium bonorum*, which manages the entirety of assets, present and future, of the members and any future increase in the value of these assets, usually constituted among close relatives. Similar to this is the *societas quaestus*, in which the goods acquired free of charge are not included in the association's assets. In the case of a *societas negotionis*, the members agree to pursue a certain activity jointly, for example to participate together in trade. In the case of *societas unius rei*, the members agree to conclude a single joint deed. In Roman law, associations did not constitute a subject of law or a legal (moral) person, not having their own patrimony; the association as such had no rights or obligations, these being constituted for the benefit or burden of the members individually, in equal proportion or according to their contribution to the establishment of the association.[74]

Triptych no XIII refers to a so-called *societas danistariae* (the name is of Greek origin, from the word *daneion*, meaning loan, or the word *dameismos*, which refers to a loan with interest), so it records the conclusion of a contract in view

71 Pólay 1968. 28.
72 Ciulei 1991. 140.
73 Ciulei 1991. 134; Pólay 1968. 6.
74 Nótári 2014. 227 et seq.

of granting loans on a permanent, professional basis using modern terminology.[75] The small amounts lent as loans, as in the case of the contract recorded on triptych no V, in the amount of only sixty denarius (by comparison, the price of a slave amounts to 420 denarii, a feast organized by an association to around 170 denarii, and a procurator of a constituency in Dacia Province had an annual income of 50,000 denarii), allow us to assume that the loans were not granted for commercial purposes, or, more precisely, that these 'companies' were set up to pursue the purpose of usury, not being true 'credit institutions' and not carrying out complex activities that would be characterized today as banking (exchange of currency, valuation of goods, keeping of deposits, making of transfers), which were in fact carried out[76] in the period studied by the so-called *societas argentariorum*.[77] It is worth noting that neither in the act of incorporation of the associations nor in the loan agreements do we find any reference to the fact that the company would have provided the loan with stipulating a guarantee (in the form of collateral) – although the establishment of collateral is logically very probable, it cannot be demonstrated on the basis of available sources; also, it cannot be ruled out that the document does not mention the establishment of a collateral of which the debtor would be temporarily dispossessed, because it was considered to be an implied element (*naturalia negotii*) of such operations.[78]

Given their characteristics, associations of the type *societas danistariae* can be considered a subcategory of *societas negotiationis*,[79] being based on a long-term collaboration in order to accomplish an industrial or commercial activity. The contract records 1° the nature of the operation and the participation of members in profit and loss, showing the participation quotas, 2° the amount of contributions from each member, 3° the legal consequences of the breach of contract, 4° preparation of the document in two original copies, and 5° the date. (In the particular contract, concluded for a determined period, we may assume – because, among other things, it mentions contributions due in the past and in the future as well as a *stipulatio* previously concluded on penalties for non-compliance with the contract – that the parties concluded a consensual contract in the beginning, not subject to any validity requirements in terms of form, this being sufficient for the company to be established, and later, when the term for the cessation of effects of this first contract approached because of possible issues and since disputes can be settled on the basis of pre-constituted evidence, the parties recorded in writing their legal relationship, which existed from the moment of conclusion of the contract in consensual form.)[80]

75 Pólay 1972. 201.
76 *Digesta* 17, 2, 52, 5.
77 Pólay 1972. 203.
78 Pólay 1972. 218.
79 *Digesta* 17, 2, 5.
80 Pólay 1972. 207.

10. Irregular Deposit

Regarding the classification of triptych no XII, legal literature was long divided, the opinions expressed oscillating between a loan contract, a deposit proper, and an irregular deposit.[81]

The deposit (*depositum*) consists in handing over movable property with a view to the conservation and return of this property free of charge, with the obligation of immediate return of the property whenever and as soon as it is requested. An irregular deposit (*depositum irregulare*) may have as its object the preservation of fungible assets, with the obligation of refund in kind – in this case, the depositary acquiring the property right of the good and the good being able to be used (consumed) by the depositary, with the possibility of stipulating an interest.[82]

Against the interpretation of the contract as being a loan, the absence of a stipulation of interest and the absence of a *stipulatio* clause were invoked since these elements are found in the case of the rest of the tablets included in the documents recording loans – so we have well-founded reasons to consider the operation to be a contract of deposit.[83] The object of the deposit in this contract is the amount of 50 denarii. The following circumstances show the low probability that the document recorded a typical (proper) deposit: 1° the depositary is encumbered with a specific refund obligation in the case of a deposit proper, being obliged to return the very coins received for retention, but in this case only the amount due to be returned is indicated; 2° the amount deposited, indicated only nominally, could usually be used by the depositary, which resulted in the obligation to pay interest determined either by a *stipulatio* separately[84] or (subsequently) even without any separate agreement,[85] as a result of the initial obligation.[86] This contract can therefore be classified as an irregular deposit (*depositum irregulare*).[87] The development of this contract took place – including in imperial law – due to Hellenistic influence and was completed only at the end of the classical period, in the era of jurisconsults, its reception taking place only in the post-classical period (or even in the period close to the reign of Justinian).[88]

81 Riccobono et al. 1940. 391.
82 Nótári 2014. 219.
83 Pólay 1972. 226.
84 *Digesta* 16, 3, 25, 1.
85 *Codex Iustinianus* 4, 34, 4.
86 Pólay 1972. 227.
87 Pólay 1972. 228.
88 Pólay 1972. 229.

11. Conclusions

As we have seen, the wax tablets of what was once Alburnus Maior offer us the possibility to look into the workings of legal relationships based on Roman law in the province of Dacia. Based on what has been presented, we can conclude that Roman law as applied in this province was by no means equal to the rigid, formal norms recorded by contemporary sources but much rather a provincial, locally adapted application of these norms. We may observe that persons in this region engaged in complex contractual relationships by using sometimes atypical contracts, vastly influenced both by local custom and by Hellenistic attitudes to legal relationships and their documentation.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 225–254

DOI: 10.47745/AUSLEG.2020.9.2.03

Private Law in Transylvania as Part of the Kingdom of Hungary

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Abstract. Transylvania was part of the mediaeval Kingdom of Hungary beginning from the founding of this kingdom and until the year 1540, when, due to historic circumstances, it became for a time a separate entity. The development of private law in this historical space was therefore in the beginning in large part convergent with that of Hungary. However, having a multi-ethnic population consisting of Hungarians, Szeklers, Saxons, and Romanians, with the first three nationalities benefitting from different, autonomous forms of administrative organization, a lot is to be said of specific Transylvanian private law. This study presents those elements and sources of private law which characterized legal relationships in Transylvania beginning with the founding of the Kingdom of Hungary and until the separation of this region from Hungary due to Ottoman conquest. We examine the major sources of law, consisting of customary law, statutory law, and acts of royal power. We then present in summarized form the main characteristics and provisions of the law applicable to persons, the family, immovable and movable property but also inheritance. Some specific private law regulations applicable to Szeklers and Saxons are also presented as well as the perspective of Romanian legal literature regarding the private law applicable to Romanians.

Keywords: legal history, Transylvania, Kingdom of Hungary, feudal property, nobility, serfdom

1. Introduction

Transylvania as a historical space was characterized from the perspective of the history of private law by the dominance of the law of the mediaeval Kingdom of Hungary, beginning from its founding and until the year 1540, when the international situation resulted in the break-up of that kingdom. However, due to the multinational composition of the Transylvanian population, the laws of

Hungary were just one of several sources of private law applicable, the Saxons and the Szeklers living in this region being subject to differing legal regimes, with a high degree of regulatory and administrative autonomy.

In this study, we attempt to present and to examine the major sources of private law applicable in Transylvania as part of the mediaeval Kingdom of Hungary. Due to the multi-ethnic and diverse population of Transylvania, however, the laws of Hungary would only offer us an incomplete view of private law. Therefore, the private law applicable to Szeklers, Saxons, and Romanians in this region shall also be a subject of our inquiry.

This study shall be followed up in this issue of *Acta Universitatis Sapientiae – Legal Studies* by a second part, which examines the private law of Transylvania as part of the Habsburg Monarchy in both its imperial (absolutist) and dualist forms.

2. Sources of Law

Legal development throughout the centuries following the establishment of the Hungarian state was founded in the Kingdom of Hungary on two defining sources of law: customary law and statutory law. Habits with legal content, formed over time and transmitted from generation to generation, having binding effect allowed the existence and continued use of old customs as rules of *customary law* (*consuetudinary law*). In addition to these customs, the acceptance and consolidation of the king's legislative power meant the strengthening of royal authority. The coexistence of the two sources of law can already be seen during the reign of King Stephen I (Saint Stephen) of Hungary, a fact also demonstrated by the two codices of laws issued by him. Analysing the content of the laws, the fact is apparent that the ruler intervenes in the world of customary law only in connection with those social relations which are meant to ensure the consolidation of royal and state authority. The king is also the one to strengthen the norms meant to facilitate the Christianization of the population by developing new laws in this area.

The situation is different regarding the habits that regulate private law relations between persons. These customs survive without the intervention of the king and are applicable before various courts by the parties who invoke the old customs. These characteristics of the two sources of law had as a result that István Werbőczy in his *Tripartitum* – the collection of noble customary laws compiled by him – recorded already at the beginning of the 16th century the fact that the norms of customary law may be classified as customs that exist to explain the law, to supplement the law, and even to deprive the law of its effects.[1] This interaction between law and custom is manifested especially in the territory of

1 Werbőczy 1897. *Introduction*, title 11, para. 3.

Transylvania. In areas inhabited by the *Three Nations*,[2] which, starting with the second third of the 13th century, can be clearly determined from an administrative point of view, the role of customary law was decisive because in the Hungarian counties of Transylvania the same Hungarian customary law was used as in the royal counties of Hungary; the Szeklers kept and were determined to protect their ancient Szekler rights that are also mentioned by Werbőczy in his *Tripartitum*,[3] while the Saxons, based on their charter of privileges received in the year 1224 (the *Diploma Andreanum*), could still live according to the old Saxon law and could elect judges to enforce the rules of their customary law.

In addition to customary law and statutory law, the documents attesting royal privileges gained more significance as sources of law from the 13th century on. On the one hand, these documents secured the privileges of some or the other of the Three Transylvanian Nations, such as the already mentioned *Diploma Andreanum* or the *Charter (Letter) of privileges issued by King Vladislav II of Hungary in 1499*, which defined the rights and obligations of the Szeklers.[4]

Finally, the statutes of the Hungarian counties of Transylvania, the constitutions of the Szeklers and Saxons, and the village laws of the Szeklers, which, in turn, were sources of 'local laws' – even if only sporadically – had in their content norms regarding the regulation of legal relations under private law.

3. The Law of Persons

Given that the differentiation of the branches of law known in today's sense had not yet taken place during the centuries of the Middle Ages – at best, only groups of norms belonging to public law and private law being separated – within the legal system of private law, the rules regarding the status of persons and patrimonial relations were primarily established by customary law. This approach is also justified by the classification used by Werbőczy, which is found in *Tripartitum*.

Although Transylvania formed a distinct geographic area in the Kingdom of Hungary by way of the person appointed by the king, the so-called *voivode*, the law of the kingdom was imposed in Transylvanian counties. This goes without saying because the counties were populated by Hungarians, and their social stratification developed according to this situation. In the 10th/11th centuries, a significant part of the society was composed of freemen. As a social stratum that separated from the latter as a consequence of military service, including in

2 The Three Nations of Transylvania, also referred to as the 'three estates' of Transylvania, were the Hungarians, the Szeklers, and the Saxons. Members of these nationalities benefited from political rights.

3 Werbőczy 1897. Part III, title 4.

4 Béli 2004. 55–63; Egyed 2016a. 351.

Transylvania, the *serjeanty* (*servientes*), the soldiers of the king, directly subject to his authority or subordinate to him indirectly, through the voivode, had to be taken into account. Besides the king's soldiers, the men-at-arms in the service of the church and of the aristocracy also belonged to this social stratum.[5]

The apex of society was made up of aristocrats (also called *magnates*) who had several extensive private estates, including in Transylvania.[6] The royal donations of estates and the privileges acquired from the king resulted in the transformation of social relations. The Golden Bull to the issuing of which king Andrew II was constrained by the barons ensured to the aristocracy and the serjeanty of Transylvania those privileges which subsequently came to be considered to form the basic rights of the nobility. They too were directly subject to the authority of the king or the voivode and owed exclusively military obligations, in exchange for which they were exempted from taxes, could not be detained or imprisoned without a legally rendered judicial decision, and enjoyed the right to insurrection. All this resulted in the formation and consolidation of feudal order, which took place in Transylvania in the same way as in the other territories of Hungary. On the basis of these noble privileges, the royal counties of Transylvania, which gained autonomous administrative authority, were allowed to elect two judges on their own initiative. Thus, the rules of private law regarding the Transylvanian nobility as an estate were in principle consistent with the norms that regulated the legal relations between the members of the nobility in the rest of the Kingdom of Hungary.

With the formation of the noble estate, the decline of freemen began, and at the turn of the 13th/14th centuries serfdom was formed as a unitary social class from the point of view of the legal regime applicable to it. The serfs' fundamental obligations were stipulated by the Decree of 1351, which also entered into force in Transylvania. Still, the resistance of Transylvanian serfs also showed the capacity of this class for the acquisition of political rights, which were enshrined in the *Convention of Cluj-Mănăştur of 1437*.[7]

The formation of the feudal regime affected legal relations of private law in the sense that *full legal capacity and its exercise* were reserved for Hungarian men of noble birth, born in legally concluded wedlock. The rules regarding the legality of marriage were defined by canon law. The norms of Protestant denominations, which appeared towards the end of the analysed epoch as an effect of the Protestant Reformation, had not yet influenced the rules applicable to marriage during this period. Children born out of wedlock could be legitimized either by the subsequent conclusion of the marriage between the parents or by the grace of the king or the prince. The latter measure was conditional on the father not having any male children born of a legal marriage. If, following legitimization,

5 Kelemen 1927. 9–10.
6 Kelemen 1927. 7–8.
7 Demény 1987.

a new male descendant of the father was born, this time legitimately – that is, resulting from a legal marriage –, the patrimonial rights of the latter could not be prejudiced. Thus, the legitimized child would only retain his noble status, as a personal effect of legitimation, but could no longer benefit from the patrimonial effects of legitimation, not having the right to inherit the estates of his ancestors and those received by donation from the Crown by his family.[8]

The ways of acquiring noble titles were identical to those provided by the rules applicable in the rest of the kingdom. First, we must mention the royal donations of estates, which conferred by right (*ipso iure*) upon the donee the quality of nobleman. The rights of other persons could not be prejudiced as a result of the donation – a rule embodied in the principle *salvo iure alieni* –, and for this reason the Szeklers insisted on maintaining their privileges so that in the Szeklerland *ius regium* (the law of the king/kingdom) would not become applicable. Therefore, Szekler estates were not transmitted by right to the royal treasury in case of conviction for treason or extinction of the male family lineage, and they could not be donated by the king to persons other than Szeklers.[9]

The rule according to which the granting of the right to use a coat of arms, the so-called donation of coats of arms, conferred the rank of noble on the donee, even if it was not accompanied by a donation of land, was also applicable in Transylvania.

A nobleman whose family would have been on the verge of extinction regarding the male lineage had the possibility to adopt any person, the adopted being thus admitted among the nobility, with the king's assent. In the event that a legitimate son had been born to the nobleman after this adoption, only the personal effects of acquiring noble status would have been retained in favour of the adopted person.

The institution of the legal fiction of the declaration as a son introduced by King Charles I of Hungary was also used in Transylvania. In the absence of legitimate male descendants and seeing the imminent extinction of his male lineage, the father could declare with the king's assent a daughter or other female member of his family to be a son. If subsequent to this, from the legally concluded marriage of the person declared by fiction to be a son, a legitimate son had been born, the latter son would have inherited directly after his grandfather his noble title, the family estates, and those acquired by royal donation alike.

Apart from these, a person had to have the quality of *a son of the homeland*[10] (in modern terminology: citizenship) to acquire full legal capacity. A child born to a Hungarian, Szekler, or Saxon father was considered to be a son of the homeland in Transylvania. At first, by donation of estates, the ruler could elevate any person to the quality of son of the homeland, even if he was a foreigner. Following the

8 Werbőczy 1897. Part I, 108; Dósa 1861. 70–71.
9 Béli 2004. 58; Egyed 2016a. 362–364; Kordé 2001.
10 Dósa 1861. 148–151.

issuance of the Golden Bull by King Andrew II of Hungary, the Royal Curia (Royal Council) acquired the right to be consulted in such decisions. After the *Diploma Andreanum* had been issued, donations of royal estates, and thus conferring the title of son of the homeland, were forbidden in regions previously donated to the Saxons (the so-called *Königsboden*, or *Fundus Regius*, translated as the 'King's Land') and also in the Szeklerland. Thus, following this normative act, conferring the quality of son of the homeland by the king on a foreigner could take place only in the Hungarian counties of Transylvania.

In addition to the above shown factors, the exercise of legal capacity was influenced by age, discernment, and honour of the person. According to provisions recorded by Werbőczy, children under the age of 12 years were considered underage (impuberant) and thus incapable of exercising any legal capacity at all, while persons aged between 12 and 24 years were considered to be juvenile (pubescent) and therefore had limited exercise of their legal capacity. Upon reaching a certain age, pubescents acquired *locus standi* in court proceedings as defendants or respondents (so they could stand as defendants), could conclude certain deeds, and could even dispose by way of wills, reaching the age of majority at the age of 24, acquiring what is in today's language the full exercise of their legal capacity.[11] From that time on, men could enter into marriage without the consent of their legal representatives and could acquire an estate separate from that of their father, thereby acquiring an independent legal status (*sui iuris*). A large number of minutes are available dating from the 16th century, which were drawn up by the so-called Commissions (or Courts) of Partition, from Cluj and the Szeklerland, their practice preserving the customary law of previous centuries. According to these, if the partition of the family estate had not taken place between the father and the eldest son due to the subsistence of the state of property indivision over the paternal estate, not even an adult man could acquire the status of an independent person, retaining the quality of *aliens iuris* (under the power of another), therefore being subject to the authority of the head of the family.[12]

In the conditions of feudal private law, it was of special importance for the individual to maintain a good reputation, to be considered as honourable. Each person had an obligation to keep his honour spotless, so that if a person considered himself injured in his honour by another person, the injured party had the obligation to seek to restore his honour in court. If he failed to do so, any person could invoke a lack of honour, the fact that one had a tarnished reputation, that he was dishonourable. In such cases, the testimony of a dishonoured person as a witness could not be taken into account; he could not conclude certain deeds, did not have active procedural capacity (could not stand as plaintiff in civil proceedings), and could even find himself in the situation of becoming a

11 Werbőczy 1897. Part I, title 111 paras 2–3; Dósa 1861. 5–6.
12 Werbőczy 1897. Part I. 51; Dósa 1861. 12.

defendant for certain offences due the fact that his honour had been tarnished.[13]

Private law relations between persons were influenced by family standing and kinship. These relationships could be related to consanguinity (blood kinship), where the kinship in a straight line or in a collateral line from a common ancestor not only forms the basis of paternal power relations or those of tutelage over a ward but could also influence the validity of the marriage and was of major significance in matters related to inheritance. With regard to ownership and possession, of special significance were the relatives who descended from the male members of the family, because only men could benefit from a royal donation of estates, and family property, the original estate of the noble family could be inherited only by the sons, while the rights of female descendants were mainly limited to paraphernal property rights such as the *douaire* (also called the *brideprice*, or *dos* in Latin, the wedding gift that was given to the wife from the husband's property), the *dowry* (endowment, goods brought by the woman into the marriage), and the *quarta puellaris* (i.e. one quarter of the value of the father's landed estate reserved as the common inheritance for all daughters).

In the customary law system, both the children and the wife were under the power of the head of the family, the father (in the case of the wife, this manifested itself in the institution of *coverture*). The father was responsible for the welfare of the family, was bound to raise and support his children, and the family estate was in his care. As a result of the authority of the husband as head of the household, during the existence of the marriage, he could freely dispose of the dowry of his wife, which was additionally meant to ease the spouses' economic difficulties imposed by marriage. After the marriage had ended, however – if its contents had not been exhausted during the marriage –, the dowry was returned to the wife (in case of annulment of the marriage) or passed on to her heirs.

The father had the right to *appoint a guardian* for his minor children. Guardianship was meant to replace paternal authority when instituted. In Hungarian feudal law, three types of guardianship could be distinguished. The first was the so-called *testamentary guardianship*. If the father desired the appointment of a guardian, this could be done by means of his last will. In this case, the guardian so appointed had priority over those who would be appointed by other methods of designation. If the father did not desire or could not appoint a guardian by his will, appointment of the so-called legal guardians followed. Thus, all male relatives of the father with a valid claim to the (future) inheritance of the orphaned minor would be appointed as guardians at once and jointly – hence the important role of blood kinship in the system of customary law. There could be several legal guardians, and their main obligation was the administration of the orphan's estate, the raising of the minor being left in the mother's care. If no such legitimate male relatives existed either due to illness or other reasons

13 Werbőczy 1897. Part II, title 72; Dósa 1861. 13.

of incompatibility (such as when the person entitled to exercise guardianship is in enmity with the family of the ward or already administers the estate of several orphans), they could not exercise guardianship over the orphan's estate. Consequently, a guardian was appointed by the king if the ward was a member of the aristocracy, by the county if he was only an ordinary nobleman, or by the lord if he was a serf. By the end of the era, a custom began to take shape, according to which the guardians – regardless whether they were chosen by the father's will or were legitimate relatives designated by law as guardians – were obligated to give an account regarding their administration of the assets of the ward.

A defining element of family law is the law that governs the *conclusion of marriage*. The early effects of canon law on civil law were felt in this field because the church was able to rapidly propagate Christian ideas regarding the family. Formal rules that regulated marriage in these centuries were based on the norms formulated at the Synod of Esztergom by Coloman, King of Hungary (also called Coloman the Learned or Coloman the Bookish). It stipulated that a valid marriage could be concluded before the parish priest determined according to the domicile of one of the future spouses, in the presence of two witnesses (Coloman II. 15.). This rule was not always adhered to by the parties, and in the event of a dispute as to the validity of the marriage covenant, the forum with jurisdiction established by the Holy See could be called upon to settle the dispute.

Impediments to marriage were established by old customs, of which it was of special significance that only persons having the exercise of full legal capacity could conclude a valid marriage. With paternal consent, however, girls of at least 14 years of age and boys of at least 18 years of age could validly conclude a marriage. Upon entering into marriage, women were released from under the authority of their father to be subjected to the authority of the husband, becoming by the effect of marriage adults at the same time. In contrast, men did not acquire *sui iuris* status by the effect of marriage unless they also partitioned at the same time the family estate with their father, the head of the family. The ancient rule according to which the marriage could not be concluded between blood relatives was applied. Over the centuries, the sphere of relatives excluded from marriage has, however, been restricted to collateral relatives of at most the fourth degree of kinship to each other. The impediments to marriage provided by canon law were established only at the end of the period studied in this part of our paper, at the Council of Trent (also known as the Council of Trento, *Concilium Tridentinum*).

Marriage was terminated *ipso iure* by the death of one of the spouses. The canon law of the Catholic Church declared marriage to be a sacrament; therefore, its dissolution by court decision was not possible.

The *matrimonial regime* (the marital property system) also played a significant role in the private law of Transylvania. Both among the Hungarian Transylvanian nobility and among the Szeklers, the presumption that during marriage the

husband is the main acquirer of the goods of the estate was applied. In contrast, in the case of marriages between Saxons, the regime of community property was used, based on ancient Germanic law.

During marriage, the wife enjoyed certain special rights. One such right was that of the *dowry* (*allatura*), which constituted the property of the wife during the marriage, although only the husband was entitled to dispose of it. The *engagement gifts* (*res parafernales*) included movable property granted to the bride, which was naturally in the property of the wife, who also had the right of free disposal over such movables. The noble women of Transylvania were entitled to the *brideprice* (*dos*, known in the legal literature by its name in the French language as *douaire*), which, according to Werbőczy's teaching, constituted the price of the wife's virginity. Its origin is considered by some authors to be found in the customary institution called the *Morgengabe* (a husband's gift marking the consummation[14] of the marriage). In the customary system of law, the wife's claim to the *douaire* was born at the moment of the valid conclusion of marriage, but it became enforceable only upon the termination of the marriage. The amount of this right was determined in accordance with the *homage* (a fine set for persons who would harm a nobleman) applicable to the husband and was intended to improve the financial situation of the widow. Given that the *homage* applicable to the nobles of Transylvania was less than the one applicable to the rest of the nobles in the kingdom – 66 forints –, the *douaire* of the noble wives of Transylvanians was also lower than that owed to noble wives in the rest of Hungary. If the wife did not fulfil her obligations arising out of marriage or was convicted of infidelity, she would lose the right to claim the *douaire*. 'To the baron's wife, however, the *douaire* must be provided as in Hungary.'[15] The *douaire* had to be handed over in currency by the heirs of the deceased husband to the widow, a norm modified in Transylvania – according to Werbőczy – to grant the possibility of paying the *douaire* in a proportion of 2/3 in currency and in a proportion of 1/3 in kind, in the form of movable property.[16]

The information found in the documents preserved from this period, along with the Golden Bull issued in 1222, demonstrates that from the family estate of their father a *quarta puellaris* was owed to women of noble lineage. Its value was usually paid to these women in currency, but exceptionally it could also be released in kind if the woman, with her father's consent, married a nobleman without an estate or a man who did not have the title of a nobleman. The *quarta puellaris* was owed to all the daughters of the head of the family, taken together. Of this heritage, they could dispose freely.[17]

14 Mosher Stuard 2013.

15 Werbőczy 1897. Part III, title 3, para 5. Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.

16 Werbőczy 1897. Part III, title 3, para 9.

17 Banyó 2000; Kelemen 1929. 69; 1926.

The rights of the widow, to which widows were entitled as inheritance after their deceased husbands, were applicable also in Transylvania, according to the laws of Stephen I of Hungary. This meant that, following the death of her husband, a widow could claim from the heirs of the estate left by the deceased maintenance and provisions in accordance with her social status on the one hand, and, so long as she kept the family name of her deceased husband, she could keep possession of the goods that made up the deceased husband's estate on the other hand.

4. Immovable Property and Contracts Used in Connection with It

As far as real estate law relations are concerned, it was of decisive importance whether the estate to which they referred constituted family property or was constituted of holdings (estates) donated by the king. After the Hungarian conquest of the Carpathian Basin, people settled in certain geographical areas according to their tribal affiliation, and within these regions according to their *gens* (extended family, clan). Resulting from the communal regime of land ownership, the areas of residence thus formed constituted the property of the *gens*, the families who composed the respective *gens* having 'only' possession of the land. The Transylvanian territories were settled during the Hungarian conquest by the tribes of Gyula and Tétény. Thus, from the perspective of immovable property law, we can consider as a starting point that the areas inhabited by Hungarians, including those in Transylvania, constituted the property of the *gens*. All this meant that without the consent of the entire extended family no disposal over the land was possible, and as a result the inhabited land was inherited by the men of that *gens*. This ancient system was modified by King Coloman the Learned when he ordered that by law the estates donated by the Crown should form the exclusive property of the donee, the right of any heirs to inherit it being established solely by the donation charter itself. Through this, King Coloman insured for the case of extinction of the donee's bloodline the retransmission of the estate to the Crown and the possibility of its subsequent donation to another donee. The main property right of the Crown was thus fully enshrined in the legal relations governing immovable property in Hungary, separating the regime of the property of the *gens* from the system of donations by the Crown. Due to legal provisions adopted by King Coloman, these two systems of ownership, or, more specifically, systems of restricted transfer of rights over immovables, need to be taken into account including in Transylvania. The legal regime of immovables applicable to the nobility of Transylvania was governed by rules applicable to the property of the *gens* and those instituted by Crown donation charters. Due to the omission from the confirmation decree issued in the year 1351 by King Louis I of Hungary

(known also as Louis the Great) of the provisions of Article 4 of the original text of the Golden Bull of 1222, which initially revoked the right to free disposal granted earlier to the serjeanty deceased without a male heir, in its place the institution of property of the *gens* was consecrated by the effect of statutory law.

However, we must not forget that – especially under the Árpád dynasty – lands resulting from deforestation were acquired into private property. Thus, during this period, we can identify the existence of the right of free private property.

Concomitantly with the development of serfdom, a third restrictive element appeared among legal relations governing immovable property: the feudal system. Thus, the triple restriction on the legal circulation of rights over immovables was brought to completion also in Transylvania, the *system of divided* property having been instituted. This is why we cannot speak of property in the modern sense of the notion in the system of customary law in relation to the epoch studied; the sources instead record possession, which is a state of affairs visible and obvious to all.[18] Mainly possession and the possessor were the ones protected by law. Whenever the entire *gens* or the donee mentioned in the royal donation letter could prove their right to property, the latter right could be invoked against others and imposed if needed. The documents regarding the donation of the estates were for this reason subject to repeated transcriptions by noble families in order to ensure the establishment of adequate means of proof for the purpose of preserving their rights.

Consequently, according to the system of triple restriction on the circulation of rights over immovables, which was also applied in the Hungarian counties of Transylvania, we must distinguish between the estates in the property of the *gens*, those owned as a result of a donation from the Crown, and lands subject to feudal relationships. The *property of the gens*, the community of blood relatives, and their ownership rights acquired legal embodiment, this system regulating the circle of relatives descending from a common ancestor in the lines of ascending and collateral kinship and the regime legally applicable to immovable property acquired by the ancestors and then transmitted by the effect of legal norms regarding inheritance to the members of their family. This estate, regardless of whether it was owned and used simultaneously or was in fact divided between coheirs to create lots used by each one, remained in indivision (co-ownership), and such heirs could not dispose of it either by deeds *inter vivos* or *mortis causa* without the consent of the entire *gens*, of the members of the extended family entitled to inherit such family property. Only in case of conviction for treason, called infidelity to the Crown (*nota infidelitatis*), or in case of extinction of the *gens* was this ancient estate transmitted to the royal treasury.

In parallel with this regime, an entire *system of estate donations* was established by the Crown, based on the good offices rendered to the king. After the law decreed by King Coloman the Learned, the estates received as donations

18 Zalán 1931. 25.

could be inherited exclusively according to the order established by the charter of donation, which meant primarily inheritance on the line of male descendancy. In addition to the estates donated in exchange for good offices, *mixed donation* was also applied, when the donee paid a certain amount of money in exchange for the donated property to the Crown. This was in fact a disguised sale and purchase. At the end of the epoch, the donation of disputed (litigious) rights also appeared. In these cases, the king would donate to the donee only the right to stand in court as claimant. On condition of success of this claimant in proving during the trial that the property of the disputed estate belonged to the king, the valid donation of such estate to the claimant occurred (with retroactive effects). Within the system of Crown donations, the title under which the donation was granted was defined early on. In addition to the good offices rendered to the king or country, the donation of an estate could be justified also on the ground of extinction of the family bloodline of the previous holder or his infidelity to the Crown. Moreover, cases of binding royal assent appeared, the king's consent being compulsory for transmission of property over donated estates by inheritance, along with property of the *gens* in cases of *perpetual assignment* (*fassio perennalis*) of the estate received by donation, its *pledge* (transmission of the usufruct of the mortgaged property to the creditor), and, where appropriate, *alienation* by private donations on the one hand and in the case of legitimation by the grace of the king, of the declaration as a son, and in cases of adoption on the other hand.

In addition to the estate of the *gens* and the estates received through donation, together with the formation of serfdom, the feudal property right also appeared, based on which part of the immovable property in the possession (*possessio*) of the nobility entered into *de facto possession* (*sessio*) and into the use of serfs as feudal property. Serfs would owe the payment of a fee of 1/10 from each harvest,[19] obligations of labour (called – by a word of Slavic origin – 'robot' also in Hungarian), and other contributions in kind and in currency to the landowner. One of the underlying causes of the Bobâlna Uprising (1437) was the fact that, owing to inflation, Transylvanian Bishop György Lépes (1375–1442) refused to accept payment when due of the ninth part and the tithe (already owed in currency by the mid-fifteenth century), and following the issuance of new, higher-value coinage, he requested that these fees be paid retroactively at their nominal value. So, it is no coincidence that by the point of the Convention of Cluj-Mănăştur, it had been stipulated that the peasantry was to continue to owe tithes to the church, but it could pay this obligation both in currency and in kind.[20]

The serfs had no right to dispose of the feudal lands they worked although they could dispose of the house built on these lands and their movable property.

19 This was referred to as 'the ninth part' in the Hungarian language, meaning the penultimate tenth percentile of the harvest, the last tenth percentile of it being the tithe owed to the church.

20 Demény 1987.

Immovable property could be acquired primarily through inheritance, donation from the Crown, perpetual assignment, and settlement of litigation. At the same time, in the built-up areas of the few royal free cities – for example, Kolozsvár (Cluj, Klausenburg, Claudiopolis) –, only burghers could acquire property rights. If a nobleman wanted to buy a house in such a city, he had to relinquish his noble title.[21]

In addition to the rules of customary law preserved in documents, the first written legal rule regarding contracts is related to the name of King Matthias Corvinus, who in his so-called Major Decree (*Decretum Maius*) issued in the year 1486 set forth the principle of *pacta sunt servanda*, meaning that the contracting parties must perform exactly the obligations they have stipulated in their contract. 'And with regard to obligations, the law must be obeyed in order to receive a right and justice before the first octave [a council of the royal curia] according to those to which they were bound, after they have been legally summoned to court' (Act 17 of the year 1486).

The exercise of the right of disposition by *inter vivos* deeds, to which an owner was entitled, was limited – according to the limitations presented above. The estate of the *gens* could be alienated or encumbered only with the consent of all members of the descendancy in the ascending and collateral lineages of the original owner, they being entitled to exercise a right of pre-emption (first refusal) in case of sale and having priority also when a pledge was established over the estate. The rules of customary law to this effect were recorded in Werbőczy's *Tripartitum* and can be demonstrated by the use of documents regarding the perpetual or temporary assignment of estates which were preserved from the studied epoch. Perpetual assignments were intended to transfer ownership due to the regime applicable to the property of the *gens,* being necessary to prove the well-founded nature as well as the reason for the alienation[22] on the one hand and the agreement of all coheirs of the ancestor to this alienation of ownership on the other. Lack of these conditions entailed the annulment of the contract.[23] In case of alienation of estates received by donation from the Crown, the king's assent – with immediate effect on alienation – was also required. Preservation of the estate for the *gens* was also ensured by the applicability of the right of redemption. Upon reaching 24 years of age – within one year of reaching this age –, the son had the right to repurchase from the buyer the estate previously alienated to such buyer by his father. For the security of rights of the buyer, the *nil iuris*[24] clause was developed at the turn of the 15th/16th centuries, also recorded in Werbőczy's *Tripartitum*, by which the father, upon alienating the property of the *gens*, also waived the right of regaining

21 Várady 1910. 70.
22 Werbőczy 1897. Part I. 70–73.
23 Werbőczy 1897. Part I. 60.
24 Werbőczy 1897. Part I. 69.

it on behalf of his sons. Also, for the protection of the interests of the buyer, two contractual warranties were formed for the enforcement of perpetual assignments: *assuming encumbrances* (*onus asumare*)[25] as an obligation of compensation and the *guarantee against eviction* (*evictio*)[26] as an obligation to defend the buyer in case of dispute with third parties. Already in the era of the Árpád dynasty, perpetual assignments were known and used to guarantee the performance of contracts in the form of a bond, or *vinculum* (*contractual penalty*), which consisted of an amount of money stipulated by the parties in the contract, owed by the party which failed to perform its contractual obligations. The transfer of ownership took place only through the drafting of a document, a written instrument (*diploma*) concluded before so-called *authentic places* (*loca credibilia authentica*), under the seal of the authentic place in question. Based on this document, the new owner could be put in possession. Granting possession was a condition *sine qua non* of the acquisition of ownership, not only in the case of perpetual assignments but also in the case of acquiring the right of ownership through inheritance or even by donation.

The other major class of contracts consisted of the so-called *temporary assignments*, when the transfer of title took place temporarily over an element of the person's estate. From this category, two types of significant contracts were the *contract of pledge* and the *contract of lease*. The contract of pledge was developed to secure loan agreements. In mediaeval law – mainly under the influence of canon law –, the stipulation of interest was initially prohibited so that, in order to compensate creditors, the debtors would cede possession of income-generating estates. According to the testimony of the documents that were preserved, in the beginning, this contractual form used to be concluded for a period of one or two years, later the repayment term of the loan being extended gradually until in the 15th/16th centuries the practice of concluding contracts of pledge over a period of 32 years became commonplace. As in the case of perpetual assignments, the coheirs of the estate of the *gens* had priority in this case as well when concluding a pledge, in order to ensure that possession of the estate remained in the hands of the *gens*. Because in the case of pledges real estate had for a long time been removed from the possession of the owners, the status of the creditor developed through the intervention of judicial practice. During the existence of the contract, the creditor acquired possession of the pledged property; being able to use it and harvest its fruits, he could undertake investment in the estate, but he was forbidden from damaging it and was obliged to bear the tax contributions established for the estate. The debtor did not have the right to repay the debt due prior to the expiration of the term stipulated by the contract, having this possibility only after the duration set forth in the contract had expired, being obliged to return – above the amount borrowed – also the value of the necessary and useful investments

25 Werbőczy 1897. Part I. 59.
26 Werbőczy 1897. Part I. 74–75.

performed on the estate by the creditor, but only to the extent and in the amount in which these investments were useful to the debtor. The debtor was entitled to decrease the total amount owed with the equivalent value of damages caused to the estate by the creditor either intentionally or negligently. The protection of the rights of the coheirs of the estate of the *gens* was served by the rule according to which the creditor could not acquire the property of the estate received in a pledge by means of usucaption. If the debtor did not repay the owed amount, the creditor could retain possession of the property received in pledge, having the right to continue to harvest its fruits. Besides this, the lender had the right to request repayment of the loan also in court.

> Our old law, therefore, is trying to strengthen the position to the owner who guarantees the pledge in relation to the object of the pledge; more precisely, it wants to protect the estate of the gens from possible diminution as a result of the pledge. One of the most powerful weapons through which this protection manifests itself is the imprescriptibility of the right of redemption.[27]

The practice of everyday business developed on the basis of the pattern of contracts of pledge, also with respect to the rules applicable to leases, the differences being that these latter contracts were always concluded for shorter periods by the parties on the one hand, and the rent had to be paid in the manner established by the contract, but most often in advance for each semester on the other hand. A *vinculum* (a penalty set in currency, imposed for non-performance) was usually stipulated as collateral in the case of temporary assignments as well.

5. Inheritance Law

The third category of property law regulations was formed by the norms of inheritance law. Originally, due to the relations between the members of the *gens*, the paternal estate was inherited in equal shares by sons, based on the principle of equal division (division by heads or *pro capita*). Daughters had the right to inherit only from the estate and property acquired by the deceased during his lifetime (so-called acquired goods) by inter vivos deeds. However, due to the special inheritance rights of women, the *douaire*, the engagement gift and the dowry could be transmitted by women as an inheritance; they even had the right to dispose of these goods by *mortis causa* deeds.

The appearance of property resulting from donations received from the Crown was also favourable to male offspring because the king made such donations

27 Zalán 1931. 28.

at first in exchange for (bravery shown during) military service, and this title excluded women from acquiring goods through such donations.

In addition to legal inheritance, over time, the need arose for the possessor to dispose of the estate in his possession due to death, by drafting a will. Disposal by will was also encouraged by the church, this possibility being mentioned for the first time in Article 4 of the Golden Bull.[28] This provision of the charter of privilege granted to the feudal nobility in reality records the ancient rule of legal inheritance by allowing for disposal by will only in the absence of male heirs on the one hand and if the one who leaves the inheritance does not exercise his right of disposal, providing that his closest relatives would inherit his property on the other hand. If the estate remained masterless, its contents were inherited by the Crown. The rules of legal inheritance, which are more detailed than those described here, were developed on the basis of daily practice in customary form and were finally recorded by Werbőczy.

The legal inheritance involved the division of the father's estate which he left as legacy in equal shares, the so-called 'division by heads' (*pro capita*). Since the legal relations in the field of property were restricted by the triple limitation resulting from the feudal concept of property rights, a rule arose (only gradually) that heirs should benefit from every type of goods found in the estate in equal shares, so from the estate of the *gens*, from that received as a donation from the Crown, and from those purchased during the life of the deceased. The *paterna paternis*, *materna maternis* principle was applied, according to which the paternal estate was inherited by the father's heirs, first of all by the sons, and the maternal estate was inherited by the mother's children, in equal shares, being divided *pro capita*. Formation of lots of goods that represented the shares of the inheritance could be accomplished by the heirs themselves, or they could appeal to the officials of an authentic place in order to have the lots established. It should be noted that the partition of the estate could take place even during the life of the head of the family, even on his own free initiative, but the opposite case could also be encountered, when the sons did not divide their inheritance into shares, even after the death of their father. This case is called *fraternal indivision*. At all times, prior to the formation of the lots, the dowry had to be handed over, along with the *douaire*, to the widow. The rights of the widow also had to be granted her and for the unmarried daughters the rights of the unmarried daughter secured. This meant that male heirs had to provide, according to their social standing, maintenance and provisions to the daughters, granting them a dowry appropriate to the daughter's social standing, before the conclusion of any marriage. Following the division, the paternal house was always left to the youngest son because he had the obligation to maintain, care for, and bury his elderly parents. For the other sons, houses or lots for building houses of a similar

28 Érszegi 1990. Supplement page.

value had to be awarded.[29] If the one who left the inheritance died without having any descendants, his estate was inherited by his ancestors and by closer collateral relatives. According to the rules of parentelar-linear inheritance, the deceased person's property was to be returned to the (living) blood relatives it was originally acquired from, before its transmission to the person who left the inheritance took place. Only in cases when no heirs would inherit in this way could the Crown (the Treasury) inherit.[30]

The one who left the inheritance was entitled to dispose *mortis causa* of his estate, but only according to his free uncorrupted will (in the sense of freely made disposition). The formal requirements of the last will were not regulated through legal norms, having been developed instead through the effect of everyday practice, as a custom of substantive law the right of disposal having been limited to movable and acquired goods. However, this did not rule out that a testator's will may also refer to the property owned by the *gens* or to goods received by donation. Testamentary provisions relating to these goods, however, had to include solely provisions that were consistent with the rules governing legal inheritance.

In Hungarian law, legal and testamentary inheritance have coexisted because, due to the restrictions applicable to the property regime, the possibility had to be established for the testator to dispose of the goods acquired by some testamentary provisions which derogate from the provisions of the rules of legal inheritance, in compliance with ancient legal custom.

6. The Law of the Szeklers

From the information available to researchers, the reasons and circumstances for settling the Szeklers in Transylvania cannot be precisely established, but what can certainly be said is that they were colonized in this region in order to defend the eastern borders of the kingdom in a process that was long lasting, leading them to occupy the areas permanently inhabited by them today only in the 13th century. This fact is known in connection with the provisions of the charter of privilege associated with the royal donation granted to the Transylvanian Saxons.[31] The Szeklers gained many privileges in return for the military burdens to which they were subjected, but these privileges were not compiled together and codified in the same way as the privileges of the Saxons in the *Diploma Andreanum*. Regardless of this shortcoming, the Szeklers have always successfully invoked their ancient rights and privileges, which in many respects differed from Hungarian customary law. This is recorded by Werbőczy in Part III, title 4 of *Tripartitum*.

29 Werbőczy 1897. Part I, title 40.
30 Werbőczy 1897. Part I, title 47.
31 Kordé 2001. 67.

The sources of Szekler law are also constituted by customary law and numerous privileges created by various legislative acts. 'However, the summarization from a historical perspective of Szekler law is not an easy task because even today the sources of customary and positive Szekler law have not been gathered together.'[32] The first collections date back to the 15th/16th centuries, which also bear witness to the rules of customary law in previous centuries.[33] One of the most significant of these is the diploma of privileges awarded by King Vladislaus II of Hungary in 1499.[34] In this diploma, in addition to the military burdens imposed on Szeklers, the payment of a tax was recorded, which consisted in giving an ox from each household on the occasion of festive events such as the coronation of the king, the marriage of the king, and the birth of the king's first son, also called 'burning the oxen' (*ökörsütés* in the old Hungarian of the time, meaning the marking of the ox with a hot branding iron). The diploma also records rights pertaining to procedures before the court. The supreme judge of the Szeklers was the count of the Szeklers appointed by the king, who 'exercised his judicial function, such as [...] the palatine in the counties of Hungary and the voivode in the counties of Transylvania, on the occasion of the judicial assemblies'.[35] The basis of the judicial court system formed until the beginning of the 15th century was constituted by the *courts of the seats* (the seat, or *szék* in Hungarian, was a unit of territorial-administrative organization in the Szeklerland, different to Hungarian counties in its organization structure), to which the Szekler inhabitants of the different seats elected their judge and his aids, the jurors. The decisions of the courts of each seat could be appealed to the court of the Seat of Odorhei, and then the dissatisfied party could address the count of the Szeklers; according to the charter of privilege, this order of appeals could not be avoided as it was not possible to address the voivode or the king directly. The Szekler *magistrates* (senior officials) could be elected exclusively from among the aristocracy ('great lords', members of the high nobility, referred to as *primori*) and the equestrian class (lieutenants, named in Latin *primipilus*), while some of the jurors had to be elected from the social stratum of common Szeklers.[36] The formation of the Szekler judicial system and in connection with it of the Szekler administrative autonomy – which began through the assemblies convened in Odorheiu Secuiesc and later in Lutița – allowed for the application of their own law and their own customs even if these legal and customary rules have not been compiled into an independent code.[37] The customs governing their law of succession were recorded only in 1555, in the Constitutions of the Szeklers (*Székely Konstitúciók*

32 Egyed 2016b. 348.
33 Bónis 1942, Kordé 2001.
34 Béli 2004. 55–63; Bónis 1942. 17–20.
35 Béli 2004. 56.
36 Egyed 2016b. 350.
37 Egyed 2016b. 353.

in Hungarian), which resumed and transmitted[38] their ancient customary law on the one hand and, to some extent, also altered these customs on the other hand.[39]

The existing private law relations between the Szeklers were also marked by the fact that the entire Szekler nation was considered from a legal standpoint as being composed entirely of nobles (even the common Szeklers). Among the ranks of this nobility, distinctions could be made – primarily based on material wealth – between three social strata: the aristocracy, the equestrians, and the common Szeklers. This noble status meant that the rules which were applicable to the Hungarian nobility produced their effects over the Szeklers with some derogations known collectively as 'Szekler law', or *ius Siculicale*. This manifested itself primarily in the regime applicable to property rights over the Szekler estate and secondly in the law of succession.

The Szekler estate (which can also be translated as the Szekler heritage, *haereditas siculica* in Latin) in particular meant that the Szeklers were free in their persons and at the same time noble, and the lands in their possession – similar to the property of the *gens* in Hungary – were entirely owned by them. The Szekler estate meant initially:

> that body of property which the Szekler acquired or occupied at its establishment or later, but due to military service. [...] The bulk of the estate subject to inheritance [...] was formed by the immovables: the house [...], the household annexes: the barn, the stable, the hearth, the gardens, the ponds, the mills, or other industrial units intended for specific services, and the land.[40]

Land ownership in the Szeklerland could not be conferred upon persons outside the Szekler people, and *ius regium* was not applicable to it.[41] A rule in this respect was already formulated in the provision of the charter of privilege of 1499, according to which if a Szekler was guilty of infidelity to the country or to the ruler, his fortune, which was retained by the royal treasury, could be donated by the king exclusively to another Szekler, thus preventing the exiting of the Szekler estates from the property of the Szekler people.[42] The regime of Szekler land ownership stems from the communal property system in which the *gens* as a village community were considered to be the owner, and the families belonging to the *gens* were only in possession of the land they worked. Communal land ownership existed among the Szeklers for a longer period than

38 Tüdős 2008. 208.
39 Bónis 1942. 26–27; Rüsz-Fogarasi 2012. 11.
40 Tüdős 2008. 210.
41 Szabó 1890. 182–187; Degré 2004. 299.
42 Béli 2004. 58; Egyed 2016b. 351.

among the Hungarians and was preserved due to the framework provided by the institution of the Szekler estate. According to an ancient custom, arable land was divided between families by drawing lots using the shafts of arrows, while pastures and forests were shared. In this way, we can understand the freedom of disposition over land ownership by *inter vivos* deeds if they were concluded between Szeklers and without prejudice to the rights of the men in the *gens*. Laws adopted in the 15th century established that if an aristocrat or equestrian did not initially own land in a village community, the consent of the village community was also required in case of a purchase.[43]

In addition to the lands subject to the Szekler estate, there were the lands resulting from deforestation, over which the one who cultivated them had full rights of disposition, being able to dispose of them by will, in a way similar to movable property.

In the Szeklerland, the Crown's donation system was not applied in practice because the whole of the Szeklerland belonged to Szekler communities. Diplomas attest that the Szeklers succeeded in opposing manifestations contrary to this principle by the Crown. This may explain the provision of the Diploma of 1499 regarding the fate of the estate of the person convicted of infidelity.

A strict order of inheritance was formed regarding the land property of the Szeklers. Similar to the inheritance of the *gens* of the Hungarian system, the land ownership of the Szeklers was inherited primarily by sons, being obliged in return to contribute to the marriage of the unmarried daughters of the deceased. If no sons were born to the deceased, the daughters inherited after the deceased by law, but in such a way that if later a son as well as a daughter was born to the inheriting daughter, the latter's son was to have priority at inheritance before the daughter, being obliged in turn to contribute to his sister's marriage. This type of inheritance by daughters was called 'inheritance by a daughter as if she were a son' (*praefectio* in Latin).[44] In the absence of descendants, the ascendants and collateral relatives, members of the *gens* inherited the estate of the deceased, always keeping in mind the priority of the male lineage.[45] In case of the extinction of the *gens*, the neighbours were called upon to inherit.[46] In reality, this normative solution allowed the preservation of land ownership within the Szekler nation.

At the division of the Szekler estate, the duration of the term required for acquisition by prescription (sometimes also called usucaption) was also 32 years, as recorded in the case of Hungarian law applicable to the nobility by Werbőczy.[47]

43 Egyed 2016c. 365.
44 Szabó 1890. 193–194.
45 Bónis 1942. 72–85.
46 Degré 2004. 299.
47 Tüdős 2008. 206.

Among the Szeklers, the institution of widow's rights also existed with regard to the right of use of the property of the deceased by the widow.

7. The Law of the Saxons

It is a generally accepted thesis that the Saxons settled in Hungary due to the privileges conferred on them by the diplomas of Hungarian kings. (The name 'Saxon' was given to this population by the Hungarians, but this does not mean that these German settlers arrived in Hungary only from what was at the time Saxony.) Among these, the diploma issued by King Andrew II of Hungary in 1224, the *Diploma Andreanum*, is especially worthy of mention because it not only allowed them to settle on the territory of Hungary, but the king also handed over the city of Sibiu and its surroundings to the exclusive possession of the Saxons on the basis of royal privilege, this land being later named the King's Land (*Königsboden* in German, *Fundus Regius* in Latin). This territory had to be abandoned by members of all the other nations, Szeklers and Hungarians, and even by the Teutonic Order, which had originally settled there. Based on the right of *hospes* (guests of the king), the *Diploma Andreanum* awarded the Saxons the privilege of electing the parish priests and the county judges and living in accordance with the rules of their ancient law. Although the Saxons of Transylvania existed under the name of *Universitas Nobilium, Saxonum et Cumanorum* – as attested by a diploma issued in 1298 –, their 'social and community relations were only later regulated generally and uniformly, on the basis of specific national institutions'.[48] The *Diploma Andreanum* ensured over the centuries the autonomy of the Saxons settled in Transylvania. 'Autonomy was one of the basic tenets of the political life of the Saxons in Transylvania.'[49] The rights and privileges granted to the Saxons settled in the surroundings of Sibiu were later also granted to the Saxons settled in the area of Braşov (*Kronstadt*) and in Ţara Bârsei (*Burzenland*). The privileges acquired through the diploma made the social and political development of Saxon cities possible.[50] The *Diploma Andreanum* exempted the Saxons from 'any kind of foreign jurisdiction',[51] thus making it possible for them to choose from among themselves judges who were familiarized with ancient customary law. According to the generally accepted position formulated in the literature, the basis of this customary law was the Mirror of the Swabians (*Schwabenspiegel*), a collection of laws written around 1275 in Augsburg. The diploma awarded the Saxons the right to hold fairs and the right of free trade. As early as the 13th

48 Wenzel 1873. 6.
49 Szabó 2004. 26.
50 Benkő 1994.
51 Szabó 2004. 26; Blazovich 2005. 1–17.

century, various guilds were founded in the cities inhabited by the Saxons; thus, in addition to the development of trade, also that of industry began. This allowed the formation of the bourgeois order. The collection of Transylvanian Saxon laws took place relatively late, only in the second part of the 15th century, when Thomas Altenberger, who would later become the Mayor of Sibiu, compiled a textbook of law, the so-called *Codice Altenberger*, in which elements of the Mirror of the Swabians, of Magdeburg law, and even elements of Iglau law can be found.[52] Altenberger attempted to unify the judicial practice of Saxon cities.[53] This code was often invoked as a source of customary law before the count's court in Sibiu. Altenberger's code can be considered as a retrieval, or reception of foreign laws, of which certain passages may be also discovered in later works of legal literature.[54]

The creation of the Saxon National University as a form in which the administrative autonomy of Saxons manifested itself made the unification of law necessary because the Altenberger Code was effectively utilized only in Sibiu. The unification of Saxon law in Transylvania took place in the 16th century. In 1544, *Johannes Honterus* created a collection of legal norms,[55] which was strongly influenced by the provisions of Roman law, and after a longer period of preparation *Matthias Fronius* completed his code[56] in 1570 with the title *Eigenlandrecht der Siebenbürgischer Sachsen*, confirmed in 1583 by Prince Stephen Báthory (1533–1586). In addition to the norms of customary law, elements of Roman law were also transplanted into this work. Besides the rules of procedural law and criminal law, he also brought together the rules of family law and the law of successions as well as those of the law of obligations. It becomes unequivocally clear from this book of law that, according to the old customs, a matrimonial community of property is formed in the Saxon family between husband and wife after the conclusion of the marriage. The wife would receive one third of the estate resulting from the dissolution of this community following the death of her husband. This estate was not acquired by the widow under the title of inheritance but as her own property resulting from the dissolution of the community of property, the wife being a co-owner for the time of the marriage.[57] This code was used until the entry into force of the Austrian Civil Code in 1853.

52 Wieland 2013. 124; Lindner 1884. 161–204.
53 Gönczi 2013. 101.
54 Szabó 2001. 49.
55 Vogel 2001. 11; Szabó 2001. 28–54.
56 Szabó 2004. 30; Rüsz-Fogarasi 2012. 14.
57 Rüsz-Fogarasi 2012. 14; Gönczi 2013. 101.

8. Perspectives of Romanian Legal Literature on the Private Law Applicable to Romanians in Transylvania during the Examined Period

Regarding the law of Romanians in Transylvania, we have very little information from the period studied. The life of the Romanians in Transylvania, as that of other populations belonging to the various nationalities in this historical region, was governed largely by customary law in the period between the reign of King Stephen I of Hungary (997–1038) and the conquests of the Ottoman Empire, which began with the defeat suffered during the Battle of Mohács (1526). These rules bore various names (*consuetudo*, *jus valachicum*, *lex Olachorum*).[58] They were gradually complemented, even replaced, by the decrees of certain kings of Hungary who endeavoured to differentiate the laws of the king from the legal custom of the region; the decrees of 1298 and 1239 are specifically mentioned as well as the 1486 decree of King Albert of Hungary, known more widely as Albert II of Germany, the first king of the Habsburg dynasty, and the decree of Vladislaus II from the year 1492 (the latter being of public law character).[59]

The codification undertaken by Werbőczy affected the legal life of the Romanian community in Transylvania from the point of view of private law, similarly to that of other nationalities.

Given the relations – underpinned specifically by their common religion – between the Romanians of Transylvania and those from the extra-Carpathian principalities, a continuous exchange of ideas and legal regulations developed. A telling example of this exchange is the reference to Transylvania in some copies of the *Pravila de la Govora* (1640), which can be loosely translated as the *Rules (or Laws) of Govora* in a form adapted to refer to the Metropolitan (Christian Orthodox religious leader) of Transylvania, Ghenadie, in the place of the Metropolitan of Muntenia, Teofil.[60] The translation of the codex bearing the title *Îndreptarea legii*, compiled in 1722 by Petru Dobra, falls within the same pattern of communication of legal ideas.[61]

In what concerns the legal capacity of persons, the legal literature in Romania shows that the personal situation of Romanians in Transylvania, like that of other nationalities, was influenced by their social status, the social class to which the person belonged, but also by the person's position within these social classes. 'With rare exceptions, Transylvanian Romanians belonged in the feudal period to the inferior, productive classes, deprived of privileges and holding only civil rights and no political rights, namely to the categories of free peasantry (to a

58 Berechet 1933. 298.
59 Berechet 1933. 298.
60 Berechet 1933. 155.
61 Berechet 1933. 301.

lesser extent) and to the serf peasantry (to a greater extent) (...)'.[62] In particular, in the case of the Romanian ethnicity, an additional circumstance that affected the status and implicitly the legal capacity of persons was constituted by the religion of the population, mostly Christian Orthodox, given that the exercise of certain occupations required professing the Catholic religion.[63]

The nobility, the social class that enjoyed the quasi-totality of civil rights allowed to individuals during the Middle Ages, showed significant differences in the complexity of its internal structure compared to the prevailing nobility in the regions outside the Carpathians. The rights of this social class were enshrined in numerous legislative instruments, such as the Golden Bull (1222), the *Approbatae Constitutiones*, and the *Compilatae Constitutiones*, and included in Werbőczy's *Tripartitum*.[64] The nobility's privileges fundamentally affected the legal status of this class both in political and economic terms, including in the field of the exercise of legal capacity. Although it was a social class whose relative unity was maintained by the indivisibility of the noble privilege, being considered that, regardless of social status, the nobles enjoyed one and the same freedom (*una et eadem libertas*), the economic power of its members still often determined the ability of some nobles to participate in economic and political life. Persons of Romanian origin were at times co-opted among the nobility.

Members of the clergy – initially the Catholic clergy and after the Reformation also the clergy of the politically accepted Protestant denominations – enjoyed privileges similar to those provided for the nobility; the status of the Eastern Orthodox clergy, however, remained inferior, this state of affairs constituting a means of coercion in order to compel Romanians to join the politically accepted ('received') denominations (initially and unsuccessfully Calvinism, then Catholicism).[65]

The burghers – similar to the status of the Transylvanian nobility when compared with that of the nobility from the extra-Carpathian regions – also had a more complex internal structure than the urban population of the extra-Carpathian regions. The burghers of Transylvania could be divided into two significant groups: the patricians and the commoners. Regarding the effects of personal status on legal capacity, burghers enjoyed broader rights to participate in trade, in the field of immovable property rights and of freedom to transfer rights over their own property *mortis causa* in testamentary form. The Romanian historical literature shows that Transylvanian cities have been reluctant to grant the status of accepted burgher to Romanians during the feudal period,[66] without, however, indicating historical sources in this regard.

62 Hanga–Marcu 1980. 476.
63 Hanga–Marcu 1980. 476.
64 Hanga–Marcu 1980. 478–479.
65 Hanga–Marcu 1980. 480–481.
66 Hanga–Marcu 1980. 482.

The free peasantry in Transylvania (including the Romanians in the region inhabited by the Saxons, called the King's Land) as a social class benefited from a different status to that of the peasantry in the principalities of Moldova and Wallachia in terms of legal capacity, benefiting from a wider right of disposition, being allowed to alienate immovables and being granted a wider contractual capacity.[67]

Serfs – grouped according to their economic standing into *serfs with one lot*, *serfs with one and a half a lot* but with a house (*inquilini*), and *houseless serfs* (*subinquilini*) –, who made up the dependent peasantry of Transylvania, were subjected to an inferior social and legal status when compared to the free peasantry, which was also reflected in the extent of their legal capacity. They were subject to prohibitions regarding the acquisition and transfer of land ownership. Their succession capacity, both under the aspect of acquiring goods through inheritance as well as regarding the right to dispose *mortis causa* by a will, was also restricted by rules during the analysed period. The serfs' freedom of movement was also severely restricted.[68]

Historical literature shows that, similar to the extra-Carpathian regions of present-day Romania, a social class of 'slaves' existed also in Transylvania and was subject to a separate legal regime. This legal regime, somewhat different to slavery in the proper meaning of the word, was attenuated over time. Slavery in the sense of servitude, in which slaves (*servi*, *ancillae*) had the status of movable property (chattel) by destination, fell into disuse as early as the 13th century. By the Constitution granted in 1423, Sigismund of Luxembourg ensured the legal capacity of free persons to slaves (a notion which at that time referred in particular to the Roma population) but deprived them of their political rights. The situation of slaves in the extra-Carpathian regions of today's Romania was much harsher. The regime applicable to their legal capacity in the studied historical period seems tantamount, according to all appearances, even equal to slavery in the initial meaning of the word.[69]

In addition to belonging to one of the social strata analysed above, three coordinates determined the legal capacity of persons, both in terms of the existence and the exercise of this legal capacity: age, sex, and the existence of a form of guardianship applicable to the person. In terms of age, custom and *Tripartitum* presented certain inconsistencies.[70]

67 Hanga–Marcu 1980. 482.
68 Hanga–Marcu 1980. 483.
69 Hanga–Marcu 1980. 486–489.
70 The various regimes applicable for protecting the minors' (or the incapable adult's) person and property when these were unable to conduct their own affairs, in the form of guardianship and curatorship, were often used due to the large number of minors in need of such protective measures. See: Hanga–Marcu 1980. 491–493.

Depending on the sex of the person, three states of legal capacity could be determined. Due to impuberty (*illegitima aetas*, *pupillaria aetas*), girls up to the age of 12 years and boys up to the age of 14 years (12 years according to *Tripartitum*) were completely deprived of the exercise of their legal capacity. Restricted exercise of legal capacity occurred along with the status of puberty (*legitima aetas*), after reaching the age at which impuberty has ceased. The status of puberty allowed persons to undertake certain acts of estate management (initiation of litigation, contracting of attorneys), while certain acts of disposal were also allowed: contracting loans secured by a pledge after reaching the age of 12 for girls and 14 for boys; concluding contracts related to valuable movable property and valuable metals for 16-year-old boys. Adulthood, or coming of age (*perfecta aetas*) occurred at the age of 24 in the case of men and at 16 years in the case of girls, and it provided these persons with the right to dispose of their own assets and in the case of married women of the assets known collectively as paraphernalia.[71]

Regarding the effects of a person's sex on civil capacity, the legal system of the Middle Ages usually granted only a marginal role to women in legal operations of a patrimonial character, apart from such current operations, of low value, which are usual in the everyday conduct of a household. However, in the matter of the law of succession, the fiction of *praefectio* (inheritance by a daughter as a son), in effect a form of trust, the conferment of inheritance rights upon a female descendant was permitted in view of the retransmission of these rights to her male child.

In matters of inheritance law, the imperative to transmit and divide the deceased person's estate and the need for his property not to remain masterless were universal. Thus, in the absence of a will, the transmission of the inheritance usually took place to certain classes of heirs, in particular to legitimate descendants, ascendants, and collateral relatives of the deceased. A child born out of wedlock could not inherit from his father, but he would inherit from the mother. The widow or widower must be listed as heir as well as public institutions such as the royal Treasury, the Crown, and the local poor. As a particularity of the transmission of property in the form of an inheritance, in Făgăraş County, the principle of gender equality was preserved (a system that was also applicable in Wallachia) along with the privileges of male heirs up until the 17th century.[72]

In accordance with the priorities of the age and regardless of the specific regulations applicable, Transylvanian inheritance law concentrated on the preservation of the elements of the deceased person's estate – to the extent of possibilities – within the family of the deceased. Thus, on the one hand, the goods acquired by ancestors through occupation, known as avitic property (ancestral

71 Hanga–Marcu 1980. 490.
72 Hanga–Marcu 1980. 521.

property), the goods acquired from the king or prince by way of donation, and those acquired by the deceased in other ways during his lifetime were subjected to different regimes of transmission during the procedure of succession, and, on the other hand, the privilege provided to male heirs played a significant role.[73] To ensure the unitary transmission of certain types of property in consideration of their economic utility, the principle of *primogeniture* (the privilege of the first-born) was used to differentiate the rights of descendants of the same sex.

Heritage was organized according to the social class the person leaving the inheritance (also called *de cuius*) belonged to.

In the case of noble inheritance, the avitic property could be transmitted exclusively according to the rules of legal inheritance (the youngest son gaining the parental home, the eldest son the deeds conferring rights on the remaining land holdings, the weapons being divided among the male heirs). Estates resulting from donations by the Crown were transmitted as part of the inheritance or returned to the Crown upon the death of the holder, according to the provisions of the donation deed, and *de cuius* was entitled to dispose by his last will only with regard to the acquired goods; in the case of *ab intestat* succession (when no last will existed), the rules of legal inheritance remained applicable. The main classes of heirs who came into the deceased person's inheritance in the absence of a will were made up of blood relatives of various degrees, descendants, ascendants, and collateral relatives, who inherited in this order. The division of inheritance between the descendants took place on an equal basis (*pro capita*) when no privileges were applicable, and in case of the predecease of a descendant who in turn left descendants of his own, these descendants of a more distant degree would inherit the share of their predecessor by representation (*per stirpes*), dividing this share among them. Female descendants acquired from the avitic property and from donations (in the latter case, under the conditions of the deed of donation) together – no matter the number of female descendants of equal degree – only the *quarta puellaris* (*ius quartilitium*), which was in almost all cases the value expressed in currency of a quarter of the estate, being due only by equivalent and not in kind. With regard to the goods acquired, women participated equally in the inheritance with men. The institution of the *quarta puellaris* remained in place in Transylvania until 1848, later being repealed. In the absence of descendants, the ascendants came into the inheritance according to the principle of proximity of the degree of kinship, and in the absence of ascendants collateral relatives were next in line. Women were allowed to dispose by will only in connection with their dowry. The widow was still entitled to sustenance from the heirs of her deceased husband. The testamentary inheritance was governed by various rules on the forms of the will.[74]

73 Hanga–Marcu 1980. 530.

74 Hanga–Marcu 1980. 530–531.

In the case of burghers, the rules of legal and testamentary inheritance were much more similar to modern regulation. The townspeople could dispose of their movable and immovable property by a will, in the absence of which the norms of legal inheritance becoming applicable (the order of the classes of heirs being identical with the inheritance of the nobles). The right of *de cuius* to dispose of his assets by means of a will was limited by the existence of a legal reserve in favour of certain relatives (*portio legitima*). In the case of Saxon cities, norms were preserved that excluded the inheritance of real estate within the city by persons who did not hold the citizenship of the respective city, the sale of the property and then assigning the equivalent value to the heir being required in such situations.[75]

Inheritance law among the free peasantry was governed in a different way, depending on nationality, place, and time. Among the Romanian peasantry, historical sources attest to the existence of the custom of dividing an inheritance up between:

> (...) both sexes; in some regions, girls have to be contented with the dowry consisting of clothing and other items for household use as well as with gifts consisting of various valuables received on the occasion of the wedding; the surviving spouse received, in some places, a third, in others an equal share with that of the sons in movable and immovable property; upon the death of a person without children, the inheritance belonged to his/her brothers and sisters in equal parts (the home and fields usually belonged to male successors).[76]

Among the serfs, inheritance was divided among the legal heirs in the absence of a will. Vacant inheritances reverted to the lord's estate. The acquired real estate of the deceased could be transferred only in a proportion of 1/2 by will, the rest being returned to the lord. The widow's rights were recorded as having the extent of 1/3 of the inheritance in respect of movable property, female descendants having no inheritance over any movables other than clothes in the absence of an authorization from the lord.[77]

The inheritance of the clergy was governed by rules of lay and canonical law.[78]

75 Hanga–Marcu 1980. 531–532.
76 Hanga–Marcu 1980. 532.
77 Hanga–Marcu 1980. 532–533.
78 Hanga–Marcu 1980. 532–533.

9. Conclusions

We have seen in the course of our study that Transylvania as a historical space was characterized during the existence of the mediaeval Kingdom of Hungary by diverse norms of private law applicable to the various nationalities of this region and to the various administrative entities within it. This diversity may, however, be summarized by drawing the following conclusion: while the laws of the Kingdom of Hungary made up a significant part of the private law environment, especially the fields of family law, the law applicable to property as well as inheritance law presented specific elements for each nationality in turn.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 255–268

DOI: 10.47745/AUSLEG.2020.9.2.04

Foreign Policy and International Relations of the Principality of Transylvania

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Abstract. The subject of the paper is the international relations and recognition of the Principality of Transylvania. International law requires the existence of three mandatory elements in order to recognize a state. These are territory, population, and sovereign authority over them. If we focus on the Transylvanian state, meeting these requirements will not represent an issue. The interesting question is the fourth but not additional criteria of statehood in international law, international recognition. Without international recognition, a state cannot act as part of the international community, and there will always be a collision between claims of sovereignty by other states. In Transylvanian history, this collision existed with the Habsburg and the Ottoman Empire. The essay shows that the independent Principality of Transylvania had the recognition of other states, also having regular foreign policy and diplomatic relations. To demonstrate this statement, the essay is built on three points and breaks down as follows: the evolution of the state from the Eastern Kingdom of Hungary until the Principality of Transylvania, the foreign policy of the Transylvanian state, its directions and orientations and the international relations of the Transylvanian state, with evidence of state recognition.

Keywords: international law, international recognition, Transylvania, Principality of Transylvania, legal history, sovereignty, foreign policy, statehood

1. Introduction

If one wishes to investigate the Principality of Transylvania from a legal history or international law perspective, one will find oneself in a conundrum. The primary reason for this can be found in the political, legal, and historical disputes between

Hungary and Romania regarding Transylvania. The other reason is that there are still a number of historical sources which do not offer a consensus regarding the legal status of the Transylvanian state existing between the 16th and 18th centuries. Many of these sources state that the Principality of Transylvania was a semi-independent state under the suzerainty of the Ottoman Empire;[1] however, the principality had all the mandatory elements required by international law for modern statehood.[2] According to new research, we should overwrite the old principles surrounding the question of statehood. The above-mentioned disputes between Hungary and Romania are not only present in the diplomatic channels but also at a societal level, which means that all research has to be mindful of this too. It is also noteworthy that the historical meaning of the word Transylvania also had a different content as opposed to nowadays. Also, Transylvania means something else in geography, politics, international law, or literature, but again, also at a societal level.

This essay is a study of the historical Principality of Transylvania, with a focus on legal criteria and without involving politics. The topic of the essay is the time of the independent state, i.e. the period between 1526 and 1711. The research primarily focuses on the following question: was Transylvania an independent country in the investigated centuries? Did it have statehood?

The goal is to present a specific state that appeared in the 16th century on the map of Europe. That state was specific, as Professor Gábor Barta claimed: in less than two centuries, Transylvania was shown to us as the Eastern Kingdom of Hungary, as the Voivodeship – a kind of autonomous region –, as the Independent Principality, and as an occupied province as well, and its *de facto* disappearance after the reign of Francis II Rákóczy.[3] From these periods, a number of documents are still in existence which offer a full view of its history, political system, legal system, and foreign relations from the beginning until the end of its statehood. From its birth to its disappearance, we have every important document and source which contains evidence regarding the important question of statehood and international recognition.

At the centre of our research is the question of independence from an international law point of view. Despite Transylvania being one of the two legal successors of the mediaeval Kingdom of Hungary,[4] the region also developed as a newborn entity which had to fight for recognition, so the essay presents its role in the international community, in international law, its recognition, and foreign policy.

According to international law, in order for an entity to be recognized as a state, it has to have the following three mandatory elements: territory, population, and

1 Barta 1993. 239.
2 Kisteleki 2018. 180–193.
3 Barta 1984.
4 Mezey 2003. 74–76.

sovereignty.[5] Transylvania had all three of these elements – this is a historical fact which needs no further investigation. The first element of territory was composed of the mediaeval Transylvanian Voivodeship, the counties of Hungarians, the Saxon seats and the Szekler seats, the so-called Eastern Parts, and the counties of the mediaeval Kingdom of Hungary. These territories were named in the official title of the head of state as Prince of Transylvania, lord of certain parts of Hungary, and Count of the Székelys. The area was about 100,000 square kilometres in the investigated period, out of which Transylvania itself as a geographical region constituted 59,000 square kilometres.[6] The second element of the statehood is population. In the investigated period, the principality had a multi-ethnic population size of approximately 955,000-1,000,000.[7] The third criterion is that of sovereignty, which will be further examined together with international recognition in the second part of the essay. The reason is evident: no sovereignty can be effective without international recognition, in the absence of which a state cannot act as part of the international community and will always be in dispute regarding competing claims of sovereignty by other states.

The Transylvanian state as a legal successor to the Kingdom of Hungary showed both the internal and international faces of sovereignty through the reign of its heads of state. Due to the fact that without international recognition a state cannot have any political and economic ties with other states and in a radical situation its very statehood would be put in jeopardy or its sovereignty would be subjected to claims or military action by other states, scholars consider that there is a fourth mandatory element: international recognition.[8] This essay tries to answer this complex question.

Transylvania, Erdély, Ardeal, or Siebenbürgen mean the same territory which started enjoying its own statehood after the Battle of Mohács in 1526 and constituted the alternative development of the Kingdom of Hungary, of Hungarian law and statehood. Of course, the history as a science does not usually ask 'what if', but the historical situation gave a non-hypothetical answer to this question in Hungarian legal history. The Habsburg Hungarian Kingdom was situated in the West, while the nation-state was in the East. Both had different constitutional systems, and this separate legal development can be a subject of legal and comparative research.

5 Kovács 2006. 165–174.
6 Kisteleki 2018. 183.
7 Barta 1993. 238.
8 Kovács 2006. 254–256.

2. Historical Background. Basics of the International Recognition of the Principality of Transylvania

As mentioned in the introduction, the Principality of Transylvania was the legal successor to the mediaeval Kingdom of Hungary after it had been defeated by the Ottoman Empire in the Battle of Mohács in 1526. This is supported by historical evidence surrounding the person and title of the head of state. In that period in history, the recognition of the title of a person also had an impact on the sovereignty of the land. The recognition of the title also meant the recognition of the state. Of course, historical facts and evidence had an important role as well next to the other three elements, but the essay focuses mainly on the international aspects.

After the Battle of Mohács, where King Louis II died, two legal monarchs were elected, which resulted in the division of the Mediaeval Hungarian Kingdom into two parts. The Diet, the national assembly at Székesfehérvár, first elected John Szapolyai as Governor (Voivode) of Transylvania and King of Hungary on 10 November 1526, calling him King John I. On 17 December 1526, noblemen from the region known as Transdanubia convened at another Diet in Pozsony (today's Bratislava) electing Ferdinand Archduke of Austria as King of Hungary, in accordance with the Habsburg–Jagiellonian family contract. This resulted in Hungary legally having two heads of state by the end of 1526,[9] which – as can be expected – caused a civil war to break out. At that time, we could not talk about a Transylvanian state because King John I. was legally king, and it was only the historical situation which caused his sovereignty to have effect only in the eastern part of the Kingdom. However, the Kingdom of John I lay at the core of Transylvanian statehood. When King John died in 1541, the Ottoman Empire proceeded to occupy Central Hungary. The political and military situation changed radically because the Diet elected King John's newborn son as King John II, but his sovereignty only extended to the eastern third of the territory of the former mediaeval Kingdom of Hungary.[10] The Ottoman Empire in Buda created the 'Vilayet of Buda', and Central Hungary came to be integrated into the administrative structure of the Ottoman Empire for about 150 years.

As the result of the above-mentioned historical facts, mediaeval Hungary had been divided and had collapsed, but from an international law perspective the situation was not quite so clear. King John I. was legally elected, thus legally a King of the Kingdom of Hungary. After the civil war with Ferdinand and due to the diplomatic situation, he only reigned in the eastern part of Hungary. The border between the two rival kings was not defined. King John's capital was Buda – the former royal capital –, and his Kingdom can be named The Eastern Kingdom of Hungary. King John II, who went by the popular name

9 Pálffy 2017. 313, 333.
10 Kisteleki 2018. 176–177.

John Sigismund, was elected king of the aforementioned Kingdom; however, he was never actually crowned. His state was also in the eastern part of the former country, but the border was mainly fixed by the river Tisza as the result of the Ottoman occupation of Central Hungary. This state could also be named a kingdom because of the title of John II, but in context it is named Szapolyai-Hungary in contrast to Habsburg-Hungary or Royal Hungary. The Treaty of Speyer signed in 1571 between Ferdinand and John II afforded the latter the right to use the title 'Prince of Transylvania'.[11] Nevertheless, John never used this title. Three days after the signing of the Treaty, he suddenly died.[12]

After the death of John II, the Transylvanian Diet elected Stephen Báthory as head of state. Until his election as King of Poland, he used the mediaeval title of Voivode (Governor) of Transylvania.[13] The reason was simple: the Báthory family was not a royal house as the family of Szapolyai was, and at that time the common political programme of both kingdoms, Hungarian states, was the reunification of the Empire of Saint Stephen's Crown. Stephen Báthory having the title of voivode symbolically reinstituted the Voivodeship of Transylvania as an autonomous part of Hungary. However, Habsburg King Maximilian I had no effective political power or sovereignty over Báthory's land. When Stephen Báthory became elected sovereign King of Poland, he immediately changed his title to Prince,[14] which was the title of the sovereign monarch at that time. Prince Sigismund Báthory, the heir of Stephen Báthory, was the first head of state who was elected Prince of Transylvania, and the region was named the Principality of Transylvania. The name remained until the end of its quasi-independence and was only formally changed in 1768 to Grand Principality under the Habsburg monarchs.

The name of the country, as explained above, has to do with the title and rank of the head of state. Nowadays, the situation is the same: the Republic of France has a president, the Kingdom of the Netherlands and the Principality of Liechtenstein have a king or a prince. John Szapolyai was the undisputed King of Hungary. In the international community, his title and rank were recognized by everyone. Even the rival Habsburg dynasty recognized it by the Treaty of Várad (today's Oradea). The situation of his son, John Sigismund, however, was subject to further dispute. He was elected, but he was never crowned King of Hungary with constitutional and international consequences. Of course, his court and personal contacts used the title of king when addressing him, but internationally this was not clear. The Ottoman Empire as a consequence of their alliance, the Kingdom of Poland due to his Jagiellonian mother, and France due to its anti-Habsburg policy all recognized his royal title and country. Because of his Protestant religion, all

11 Pálffy 2017. 339–340.
12 Barta 1993. 228.
13 Barta 1993. 228–229.
14 Kisteleki 2018. 177.

Protestant countries followed suit, behaving like the abovementioned powers. In fact, he was the Monarch of Transylvania, but due to the above reasons he can be mentioned alongside the Kings of Hungary. He was more of a Hungarian king than a Transylvanian prince. He renounced his royal titles only in the Treaty of Speyer,[15] three days prior to his death, therefore only ruling for three days as prince.

Stephen Báthory was the first Transylvanian head of state who was elected by the Transylvanian Diet. The right to elect the prince was one of the fundamental rights of the Transylvanian Diet. As was mentioned above, at the beginning of his reign, Stephen Báthory first used the vassal 'voivode' title in his official contacts with the Ottoman Empire or with the Habsburgs. The sultan's 'ferman', or alliance letter, to him was also symbolic to Báthory. Before his reign, in the Szapolyai period of the country, all fermans were written as equal alliance letters of equal parties, but Báthory had to accept a vassal status symbolized by the acceptance of the 'voivode' title. Despite this situation between the two empires, his talent and diplomatic activities made Transylvania a *de facto* independent state. When he was elected King of Poland, as monarch of an internationally recognized state, he could change his title to sovereign prince as an equal counterpart of the European monarchs.[16] Neither the Habsburgs nor the Ottoman Empire wanted to go to war for Transylvania with the then great power Poland and its crowned monarch. The title of voivode disappeared in the future, and in 1593 the Transylvanian Diet adopted a constitutional act regarding the head of the state. According to this act, the title is Sovereign Prince: *princeps Transylvaniae partiumque regni Hungariae dominus et sicolorum comes*. Thanks to their title and rank, the heads of state could make effective diplomatic activities and conduct foreign policy independently, which meant that the princes were in fact not vassals but rather allies of the Ottoman Empire. Of course, this alliance was in fact not equal due to the power of the Ottoman Empire, but in much of this period Transylvania could conduct foreign policy independently, as we will explain below. During the period of Transylvanian independence, the country had 18 princes, mostly well-educated, multilingual, and Protestant Hungarian noblemen. Also, most of them were very active in public international life, their actions and the effects of these constituting the unique Transylvanian foreign policy.

3. International Recognition of the Principality of Transylvania

John Szapolyai was legally king as King John I. As the undisputed monarch of an internationally recognized kingdom, he was also recognized as such by the

15 Kisteleki 2018. 191.
16 Kisteleki 2018. 192–193.

Habsburgs. His son, John Sigismund, or King John II, and his land were also recognized by most of the European monarchs and by states such as France, Poland, the Protestant principalities and kingdoms, and, naturally, by the Ottoman Empire. The reason for Protestant recognition came from his personal life: as a typical renaissance person, he was born as a Roman Catholic crown prince, but his open soul accepted the Lutheran and afterwards the Reformed theology, and finally he died as a Unitarian monarch. His religious personality and his legislative actions are at the roots of the world-famous Transylvanian freedom of religion, tolerance, and patience, which was legally constituted by the Act on Freedom of Religion of 1568 and 1571 in the Transylvanian Diet.[17] In the investigated period, the effective recognition of the head of state also meant the recognition of the state. After the disappearance of the royal Szapolyai dynasty, Transylvania faced an issue of legitimacy.[18] The elected head of state, Stephen Báthory came from a wealthy provincial family but not from a royal house. When he was elected King of Poland, his kingship as an international status resolved that legitimacy issue, and he started to use the title and rank of sovereign prince, which resulted in the recognition of the state as the Principality of Transylvania. The name of the title came from the text of the Treaty of Speyer, but Stephen Báthory was the one who effectively filled it with content and attached undisputed sovereignty to it. After his reign, all the heads of state used this internationally recognized title, and the Principality of Transylvania – with few exceptions – was also recognized.

The Ottoman Empire as a great power considered Transylvania to be an Ottoman vassal state, but most European states did not see it this way. The reason for this European recognition came not only from the personal qualities of the princes but also from Protestantism. Transylvania was part of the cultural, political, and economic life of Europe and declared itself a European state (its cultural memories and contacts, educational contacts, built heritage, and diplomatic relations are presented in the fourth part of this paper). Transylvania negotiated at a diplomatic level with most of the European states of that time. All the peace treaties, international contracts, alliances, and dynastic marriages are clear evidence of the equal international status of the Principality with the other European states.[19] The Transylvanian State joined the Protestant Alliance in the Thirty Years' War and also joined the Holy League. Such memberships in international organizations are also significant evidence of state recognition. The most glorious example of international connections and recognition was the 1648 Peace of Westphalia, which created the political and international system of Europe until the Vienna Congress and under some aspects even until the First World War. The mentioned treaty system, which constitutes one of the fundamental building blocks of modern

17 Mezey 2003. 74.
18 Kisteleki 2018. 191.
19 Kisteleki 2018. 194–202.

international law and sovereignty, declared the Principality of Transylvania as a partner of the Protestant Alliance, an allied state of England and Sweden. Switzerland and the Netherlands were also recognized by this treaty system, which means that the Westphalia system constitutes a *de iure* recognition in a collective form of the Principality of Transylvania. The Peace Treaty of Karlowitz between the Ottoman Empire and the Holy League declared the *de iure* independence of Transylvania. It is also noteworthy that some of the dynastic connections were also important: Gabriel Bethlen, Stephen Báthory, and Sigismund Báthory were married to imperial or royal princesses from Europe, while Michael II Apafi's guardian was William of Orange, King of England and Governor of the United Provinces of the Netherlands. If we accept that Transylvania was an Ottoman vassal state, no dynastic connection would have been formed in such ways. The diplomacy of the Principality was clearly a successful one.

4. The Directions of the Diplomacy of the Principality of Transylvania

The Transylvanian National Assembly, or Diet, controlling the Princes' diplomacy[20] usually followed two basic recommendations: loyalty regarding the alliance with the Ottoman Empire and good connections with the neighbouring Christian countries.[21] The executive power of the foreign policy was under the prince, but the supreme forum of diplomacy was the National Assembly. Loyalty towards the Ottoman Empire was a necessary condition for the election of a prince mandated by the National Assembly. The reason is clear: between two world powers – i.e. the Habsburg and the Ottoman –, the Transylvanian statehood had its basis on the Ottoman alliance for most of the investigated period.[22] The Transylvanian diplomacy was in a special but difficult situation. Most of the time, the state's territory came under attack by either of the two great powers who wished to extend their sovereignty onto Transylvania. The Ottoman Empire considered Transylvania as its vassal state, and the Habsburg Empire considered it as a rebel province despite Transylvania being declared and clearly recognized as an independent legal successor of the Kingdom of Hungary – a small fatherland between two pagans, as one chronicler said. These were the reasons and roots of the active and effective Transylvanian diplomacy. In the most glorious time of its independence, Transylvania would have territorial successes and also influenced the Ottoman policy at its borders in Wallachia and Moldova.

20 Mezey 2003. 75.
21 Trócsányi 2005. 20.
22 Eckhart 1946. 278–281.

The supreme directive of the diplomacy was the Ottoman loyalty. The fall of the Ottoman Empire was the reason for the fall of the principality too, but it survived by its name until 1867. The topic of this paper is the time of the independent state, therefore the period between 1526 and 1711. In the following, I shall attempt to introduce the main directions of Transylvanian diplomacy. To be noted, all the directions were affected at the same time, but there were periods with dominant directions, as follows.

4.1. The First Period (1526–1571). Beginnings, Core of Identity

In the first period, until the extinction of the Szapolyai dynasty, the main diplomatic directions of the State were the reunification of the Kingdom under the Szapolyai kings with the recognition of their title as kings. In fact, that direction had nothing to do with the question of state recognition, which did exist; at issue was the recognition of the government. In our definition, if a state changes its constitutional system, it will not necessarily have to receive recognition, but in this special situation with two rival kings it determined the foreign policy in the first period.

King John I realized that the Habsburgs could not keep Hungary safe against the Ottoman Empire, so reuniting Hungary could only work without them. The active diplomacy looked for diplomatic help from France under Francis I. After the French coalition, which did not work, King John I turned to the Ottoman alliance.[23] That diplomacy led to a schizophrenic situation, and King John I hesitated. For him as a legitimate and constitutional king, a Christian monarch, it was essentially a last resort to turn to the Islamic Empire as an ally. His decision was supported by traditional Hungarian anti-Germanic sentiment and by the common goal of reuniting Hungary. The French king was also in an alliance with the Ottoman Empire since 1525, a fact which could also justify the alliance with the Ottomans. This diplomacy was successful; however, it was the final step to the total dissolution of mediaeval Hungary. When King John I achieved it, the eastern Hungarian diplomacy tried to reunite Hungary under the Habsburg monarchs. On 24 February 1538, the two sovereign monarchs signed the Treaty of Oradea (Nagyvárad, Grosswardein). Both kings recognized each other as such and also declared that if John died, his heir would be King Ferdinand I. If John had a son, he would become the Duke of Szepes, a newly created dukedom in Northern Hungary. The other main objective of the treaty was the alliance against the Ottoman Empire. The most interesting thing in that treaty was the paradox situation that two sovereign Hungarian kings made an agreement about their realm, meaning an internal dispute was solved and negotiated in an international treaty. As a result of the treaty, the Eastern Kingdom of Hungary, the Principality of Transylvania, which had already possessed the mandatory elements of statehood,

23 Pálffy 2017. 334–336.

population, territory, and sovereignty, also achieved the fourth but not additional element of state recognition. This meant that the Eastern Kingdom of Hungary became an equal state with other sovereign states in Europe at that time.

Without effective Habsburg diplomatic, military, and economic help, the enforcement of the treaty was not possible. King John I later tried to build contacts with the traditionally good ally Poland and married Princess Isabel of the Jagiellonian dynasty. With this step, the enforcement of the Treaty of Nagyvárad became an illusion and was transformed and used as the basis of the next Szapolyai–Habsburg, or Báthory–Habsburg treaties (29 December 1541 – Treaty of Gyalu, 8 September 1549 – Treaty of Nyírbátor, 10 March 1571 – Treaty of Speyer). The only difference was that the Dukedom of Szepes was dissolved, and for the Szapolyais, or Báthorys the Habsburg monarch created the dukedoms of Oppeln and Ratibor. At that time, the Ottoman alliance was effective, except for the few years when the country was under Habsburg rule under General Castaldo as governor and Francis Kendy as well as Stephen Dobó, the hero of the siege of Eger, as voivodes.

4.2. The Second Period (1571–1613). The Age of the Báthorys

In this period, the main issue of foreign policy was still the unification of Hungary. The Transylvanian National Assembly realized that the Habsburgs could not achieve unification and that the two great empires had equal power. According to this recognition, the Transylvanian National Assembly elected the wealthy nobleman Stephen Báthory as Voivode of Transylvania. The more significant points of his reign have already been detailed in the above. Báthory as King of Poland could have the sovereign title of prince recognized in Europe. The Báthorys built good relations with Wallachia and Moldova, proposing an anti-Ottoman coalition. Transylvania, as an allied state of the Republic of Venice and of the Habsburg Monarchy, fought in the Long War (Fifteen Years' War) too. This time, there was also a chance to change the constitutional electoral monarchy into a hereditary monarchy. The sultan recognized the right of the Báthory family to the throne of Transylvania; however, the national assembly protected its electoral rights. Stephen Báthory as King of Poland had also taken diplomatic and military steps in creating a great anti-Ottoman coalition of the Eastern European states, led by him, and for this reason he also tried to obtain the Russian throne.[24]

4.3. The Third Period (1605–1606, 1613–1657). The Glorious Age of the Protestant Monarchs

The third period was the golden age of the Principality of Transylvania. The diplomacy worked well regarding the Ottoman alliance, and a successful anti-

24 Nagy 1994. 5–41.

Habsburg Protestant policy was the main political direction of the period.[25] Transylvania joined all the Western European coalitions against the Habsburg Empire, and the leading coalition partners (states like Sweden, England, Venice, or the Netherlands) recognized its statehood. The princes could grant freedom of religion in royal Hungary. The anti-Habsburg conspiracies in royal Hungary looked at the Transylvanian state as having a real perspective and also the power to reunite Hungary under a national king. The treaties of Vienna (1606), Nikolsburg (1621), and Linz (1645) not only granted the Transylvanian interests but declared the constitutional interests of the royal Hungarian nobility against the royal court. In international focus, in the peace treaty of the Habsburg–Ottoman Long Turkish War, the Treaty of Žitava, the Prince of Transylvania, as an equal partner, was the mediator between the two global powers.

In this period, Hungary was also reunited under Transylvania two times, but for a few years only. Stephen Bocskai became Sovereign Prince of Hungary, and Prince Gabriel Bethlen was elected King of Hungary.[26] Under the mentioned Protestant princes, the Principality of Transylvania managed to obtain from the Ottomans the appointment of friendly voivodes in the neighbouring Wallachia and Moldova. At this time, Transylvania paid no tribute to the Ottoman Empire. The Habsburg Kingdom of Hungary paid a yearly tribute to the Ottomans of 200,000 golden florins. The Principality's diplomacy at that time worked with permanent ambassadors in the allied states. To be noted, Transylvania used the asylum system – accordingly, when political or religious refugees from Hungary or from other parts of Europe came to Transylvania, they could seek refuge, and the Transylvanian State would not send them back.

4.4. The Fourth Period (1657–1661). Collapse

The powerful, peaceful, wealthy, and successful Principality collapsed in just four years.[27] The Transylvanian diplomacy had not obtained the Polish throne since the reign of Stephen Báthory. The current political situation and the Ottoman alliance and pressure exerted until the rule of Prince George II Rákóczy could prevent real actions in Poland. However, Prince George I Rákóczy's second son, Sigismund, had a real chance to achieve this title under the support of the Protestant Radziwill Dukes, but the plan would eventually fail because of his early death. However, Prince Sigismund's brother, the ruling prince George II Rákóczy, initiated a war for the Polish Crown without Ottoman consent.

25 Barta 1993. 262; Péter 1993. 281–284, 288–294.
26 Pálffy 2017. 416–427.
27 Péter 1993. 312–317.

The result was diplomatically and militarily disastrous[28] and ended with an Ottoman, Tatar, and Wallachian invasion of Transylvania.

4.5. The Fifth Period (1661–1690). The Apafis' Fight for the Survival of Transylvania

After a short interregnum, Transylvania had rebuilt itself. In this period, the main diplomatic direction was the secret anti-Ottoman alliance. The Ottoman Empire was in decline at this time, and Transylvania's solution to preserve its independence was to join the Holy League. The asylum system still worked, and there would be no official break with the Ottoman alliance until 1687. Transylvanian diplomacy forced every possible diplomatic step to recognize and preserve its independence, but the global political balance changed dramatically. As member of the Holy League, Transylvania was an allied power of the Habsburgs, France, the Papal State, and Venice, and it still had good relations with Wallachia and Moldova, Poland, and the Protestant states.[29] As a result of the successful war between the Holy League and the Ottoman Empire, Transylvania nominally regained its sovereignty, but under the Austrian Habsburg Monarch, by way of the *Diploma Leopoldinum* of 1691, it was recognized as one of the holdings of the Habsburg Monarchies of Europe.[30] Transylvania was not reunited with Hungary but was granted separate governmental institutions within the Habsburg Monarchy.

4.6. The Sixth Period (1691–1713). Wars of Independence

As a result of the *Diploma Leopoldinum* and the Treaty of Karlowitz, Transylvania lost its *de facto* independence and became a Habsburg province. The newly organized Habsburg governmental institutions were not integrated into the organically developed and traditional constitutional system of Transylvania, causing internal political crises and resulting in several wars of independence.[31] These wars were named after the leaders such as Prince Emerich Thököly, Prince of Northern Hungary and Transylvania, or Prince Francis II Rákóczy, Ruling Prince of the Federative States of the Kingdom of Hungary and Principality of Transylvania. All these wars of independence were under Ottoman and French financial support and saw Dutch and English mediation too. Under Francis II Rákóczy, Transylvania[32] was member of the Confederation of Hungary and Transylvania, and thus it had no independent foreign policy, wherefore only the

28 Pálffy 2017. 422–424.
29 R. Várkonyi 1993. 325–327.
30 Pálffy 2017. 424–427.
31 R. Várkonyi 1993. 327–337.
32 R. Várkonyi 1993. 331–337.

National Assembly was in operation. Prince Francis II Rákóczy's title of Ruling Prince of Hungary was not recognized internationally, and so in international relations he used the traditional and undisputedly recognized Transylvanian titles of a prince. However, most of the territory of the principality was under Habsburg rule during the wars.

5. Conclusions

The Principality of Transylvania was created and developed as a legal successor to the mediaeval Kingdom of Hungary.[33] Its role was quite important in Hungarian and Romanian history and cultural heritage as fatherland of many nations and nationalities. The discussion exploration of its history, especially its legal history, can have certain effects nowadays too. Transylvanian tolerance is proverbial and is based on its balanced international policy in the past, which resulted, for example, the first act on the freedom of religion in world history and the survival of a multi-ethnic society.

If we look at the criteria for statehood in international law, Transylvania meets all those requirements: the Principality of Transylvania was an independent, sovereign entity, a state in Europe in the 16th/17th centuries. There is much evidence to this effect, such as international documents, dynastic connections, and the political and diplomatic behaviour of the countries at that time. Formally, in the beginnings, it was an equal allied state of the Ottoman Empire, whereas in the end, as a consequence of Prince George II Rákóczy's aggressive and disastrous foreign policy, it became a vassal state and lost its independence. In its history, there were periods when it had to pay tribute to the Ottoman Empire or when the Ottoman Empire appointed the head of state, but such appointments constituted exceptions. For example, in the golden era, or the Báthory era, the National Assembly freely elected the prince, while under Gabriel Bethlen or the Rákóczys' Transylvania no tribute was paid or just symbolic amounts compared to its yearly income. For most of the period studied, Transylvania was not under another state's sovereignty and was not annexed or occupied. The reason was clear, and the Ottoman Empire realized it too: the road to Vienna was not across Transylvania. The Habsburgs would not gladly occupy that eastern state as they needed their forces against France or on the other fronts against the Ottomans. Internal policy, such as cultural, educational, religious, and defence policy, was absolutely free of foreign and Ottoman influences, more so than perhaps nowadays, as membership of different international organizations or entities such as the European Union comes to gradually influence such policies. Many historians believe that Transylvania being obliged to pay tribute to the Ottoman Empire is

33 Pálffy 2017. 345.

evidence of its vassal status. To pay such tributes was not out of the ordinary for that period. For example, the Habsburg Kingdom of Hungary was also obliged to pay tribute to the Ottoman Empire in its history, mostly in higher amounts than Transylvania. Thus, paying such fees and taxes does not constitute evidence of Ottoman vassal status, and it has no effect on the question of sovereignty.

The Principality of Transylvania was not only successor to the Hungarian mediaeval state but was also a buffer state between two global powers. Both of those powers wished for and were interested in its independence, semi-independence, and neutrality from their conflicts. As heir to the Hungarian statehood, the Principality of Transylvania preserved Hungarian culture, literature, and the legal system, developed them and created a specific, Transylvanian culture and identity mixed with the preserved elements of Romanian, Saxon, Armenian, and Jewish heritage. After almost two hundred years of sovereignty, it lost its independence, formally and nominally maintained until 1867, when a union was formed with Hungary,[34] within the Austro-Hungarian Empire.

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34 Szász 1993. 524–525.

Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 269–306

DOI: 10.47745/AUSLEG.2020.9.2.05

The Private Law of the Principality of Transylvania (1540–1690)

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Abstract. In the period between AD 1540 and 1690, Transylvania enjoyed a high degree of independence in conducting its internal and also, at times, external affairs. This led to the divergence of Transylvanian private law from that of the Kingdom of Hungary, the sovereignty of which ceased in the sense of international law following the defeat at the Battle of Mohács. This divergent development is examined in the present study from the perspective of private law along with the later convergence of legal norms to those of the Habsburg Monarchy during the latter half of the 17th century. The sources of private law as well as private law norms governing the status of persons, immovable and movable property, obligations, and inheritance are examined in detail for this period. The specific laws applicable to the Szekler, Saxon, and Romanian inhabitants of Transylvania are also presented.

Keywords: Principality of Transylvania, private law, inheritance law, family law, law of persons

1. Introduction. Sources of Law

1.1. The Laws of Transylvania

After the Battle of Mohács, in which the Ottoman Turks defeated the armies of the Kingdom of Hungary, the political fortunes of Transylvania were forever altered. As a newly formed principality with autonomy in its internal – and at times also external – affairs, the development of legal norms in the field of private law slowly diverged from the models developed in the previous 500-year period. This development was, however, organic, in line with the principles of collective decision which had characterized the political functioning of quasi-independent Transylvania until it was attracted into the orbit of the imperialist Habsburg Monarchy.

The following norms constituted sources of law in Transylvania in the period examined:

1. Laws common with Hungary up to 1526 analysed in the first part of the study with the title *Transylvania in the Habsburg Empire and in Austro-Hungarian Monarchy (1690–1918)* by Mária Homoki-Nagy in this issue.

2. Laws adopted by the Diet of the Principality of Transylvania.

The separate legislature of Transylvania was initiated by the Diet of August 1540 held at Sighişoara, following the death of John Zápolya (1487–1540), the elected King of Hungary, and lasted until the adoption of Act II of 1848. Opposite to the practice in the Kingdom of Hungary, several diets could be convened in each year, so numerous laws and resolutions were adopted by this legislative assembly. From time to time, the Diet exercised judicial powers as well.[1] Therefore, both the estates and the Transylvanian princes considered it important to compile and systematize the legal norms in force. Gabriel Bethlen (1580–1629), Prince of Transylvania, was the first to order the elaboration of a collection comprising 22 articles of the laws governing judicial procedure in 1619.

Subsequently, the so-called *Approbatae Constitutiones*[2] (their full name being *Approbatae Constitutiones Regni Transylvaniae et Partium Hungariae eidem annexarum* 'The Confirmed Laws of the Country of Transylvania and the Parts of Hungary Annexed Thereto'),[3] which was the collection of Transylvanian laws that could be found in the archives of cities and counties, was compiled at the behest of George I Rákóczi (1593–1648), Prince of Transylvania. The collection of laws was completed during the time of the reign of George II Rákóczi (1621–1660), Prince of Transylvania, and – based on the assent of the diet of 1653 at Alba Iulia (*Concordantia discordantium articulorum diaetalium*) – it was published on 15 March the same year. The *Approbatae Constitutiones* was drafted in the Hungarian language but was sprinkled with numerous Latin phrases. It was divided into five parts: a. ecclesiastical law, b. constitutional law, c. law of the estates, d. judgments, e. other sources of law.

The *Compilatae Constitutiones*[4] (*Compilatae constitutiones Regni Transylvaniae et Partium Hungariae eidem annexarum* 'The Collected Laws of

1 Horváth 2014. 260.

2 Approbatae constitutiones regni Transylvaniae et partium Hungariae eidem annexarum, ex articulis ab anno millesimo quingentesimo quadragesimo ad praesentem huncusque millesimum sexcentesimum quinquagesimum tertium conclusae, compilatae; ac primum quidem per dominos consiliarios revisae, tandemque in generali dominorum regnicolarum, ex edicto... principis... Georgii Rakoci... in civitatem Albam Juliam ad diem decimumquintum mensis Januarii anni praesentis congregatorum conventu publice relectae, intermixtis etiam constitutionibus sub eadem diaeta editis 1653.

3 All translations in this work of non-English quotations are by the author, unless otherwise specified in the footnotes.

4 Compilatae constitutiones Regni Transylvaniae et Partium Hungariae eidem annexarum. Ex articulis ab anno millesimo sexcentesimo quinquagesimo quarto, ad praesentem huncusque

the Land of Transylvania and the Parts of Hungary Annexed Thereto') is the codex of Prince Michael I Apafi (1632–1690), adopted by the Diet of 1669 and decreed in the same year on 4 March, which constitutes a collection of articles adopted by the Transylvanian Diets held between the years 1654 and 1669, drafted as a continuation of the *Approbatae Constitutiones*.

3. István Werbőczy's *Tripartitum* was referred to as law in the years 1571–1572[5] and was mentioned among the laws of the country in the inaugural oath of several princes and in point 3 of the *Diploma Leopoldinum* from 1691.

4. The so-called *Articuli novellares* (New Articles), i.e. the laws adopted between 1744 and 1848 and included in the codex (in Latin until 1847 and then in Hungarian). Resolutions of the Diets between 1669 and 1744 were considered to be suffering from formal defects and were therefore not considered to have the force of law.

5. The so-called *Articuli diaetales provisionales*, i.e. the eight articles (94–97 and 133–136) adopted by the Diet of 1791 and confirmed only temporarily by King Francis I of Hungary (1768–1835).

6. The validity of established laws which were not included in the codes remained disputed among Transylvanian jurists. The first edition of the Transylvanian Code of Laws in a single volume appeared in 1779 and the second edition in 1815. The Codes of Laws of the Principality of Transylvania Divided into Three Books (in Hungarian: *Erdély országának három könyvekre osztatott törvényes könyve*) was published in two volumes of 4 tomes each and was structured – contrary to the title – not in 3, but in 4 books, namely: a. Approbatae Constitutiones, b. Compilatae Constitutiones, c. Articuli novellares, d. the municipal statutes of the Saxon nation.[6]

1.2. Customary Law

The private law of Transylvania was constituted at the beginning almost exclusively of customary law. Werbőczy struggled to collect these rules in his *Tripartitum*. According to Werbőczy, customary law, especially in the field of private law, could produce three kinds of effects: a. interpretation of statutory law, b. completion of statutory law, and, exceptionally c. it could deprive statutory law of its effects.[7]

Customary law continued to play an important role especially in the field of private law even in the era of written legal norms as well as in that of independent Transylvanian law-making.

millesimum sexcentesimum sexagesimum nonum conclusis excerptae 1671.

5 Balás 1979. 42. *Tripartitum* by István Werbőczy was printed at Kolozsvár by Gáspár Heltai in the year 1571.

6 Trócsányi 2005. 29.

7 Geörch 1833. 16; Dósa 1861a. 34.

1.3. The Practice of the High Courts

The jurisdiction of the highest court of the country (the palatine, the substitute for the person of the king, known in Latin as *personalis praesentiae regiae in judiciis locumtenens*) ceased to have jurisdiction in Transylvania with the break-up of the kingdom in 1526. The Principality of Transylvania, however, soon formed its own structures of high court jurisdiction, their practice being respected.[8] But there is no doubt that these courts did not enjoy the significant prestige the high courts of Hungary once held.[9]

1.4. Legal Literature

István Werbőczy's *Tripartitum* was printed in Hungarian in Transylvania by Gáspár Heltai in Kolozsvár (Cluj, Claudiopolis) in 1571.[10] Also a Hungarian translation of *Tripartitum* (1669), intended for law students, was printed by Ferenc Nagy de Sânpaul in the form of a poem.[11]

After his studies at Wittenberg and at the request of the advisers of the Prince of Transylvania, János Décsi Baranyai[12] drafted a work with the title *Syntagma institutionum juris Imperialis ac Hungarians* (Collection of Hungarian and Imperial Legal Norms, Kolozsvár 1593), in which he found that the Transylvanian local laws were deficient, chaotic, and outdated, and for this reason he tried to synchronize them as far as possible with Hungarian and Roman law to improve the process of developing new legal rules. It is surprising that, when presenting domestic law, Décsi makes repeated reference to the *Quadripartitum*,[13] published in print only in 1798, not having been able to know its contents except perhaps in the form of a manuscript.[14] Unfortunately, by the time his work was completed, the new powers that be were no longer receptive to Décsi's ideas.[15]

The humanist lawyers of the prince's court also contributed significantly to garnering interest for developing legal life in Transylvania, as Márton Berzeviczy (1538–1596), Chancellor of Transylvania and diplomat,[16] for example, who –

8 Bogdándi 2016. 47.
9 Stipta 1997. 88.
10 Werbőczy 1571.
11 *Verböczi István törvény könyvének compendiuma, melly közönséges magyar-versekre formáltatván iratott, és ki-adatott Homord Sz. Pali N. Ferencz által* 1699.
12 Johannes Decius Barovius [born at Décs (today's Hungary) in 1560 and died in Târgu-Mureş (today's Romania) on 15 May 1601].
13 The *Quadripartitum*, in its complete Latin name *Quadripartitum Opus Juris Consuetudinarii Regni Hungariae*, was a collection of customary laws prepared at the order of King Ferdinand I of Hungary (1503–1564). Its effects on the development of Hungarian law were much inferior to those of *Tripartitum*.
14 Illés 1931, Viczián 1936, Degré 1936a, Degré 1936b, Máthé 2015.
15 Zlinszky 1999. 49.
16 Veress 1911.

following his decade-long studies abroad – was, among other things, elected in 1568 as rector of the University of Padua,[17] or Farkas Kovacsóczy (1540–1594), Hungarian nobleman and Chancellor of Transylvania,[18] or István Kakas (1565–1603), another noteworthy Transylvanian diplomat.[19]

1.5. Privileges

Some privileges have significantly affected the development of Transylvanian law (see articles 7–17 of Part II of Werbőczy's *Tripartitum*). Suffice it to refer here to the privileges of the Saxons in Transylvania. Later, the privileges granted by several princes of Transylvania were no longer recognized: for example, the privileges granted by Stephen Bocskai (1557–1606), Gabriel Bethlen, and George I Rákóczi, which were conferred during wartime (Act III of 1609, Act VII of 1622, paragraph 13 of the Fifth Act of 1647).[20]

1.6. Statutes

In addition to laws, the statutes of nations, lands and localities, or municipal bylaws had a greater significance in Transylvania, higher than in the Kingdom of Hungary. The object of regulation of Transylvanian law was predominantly constituted by the prince's power, the political status of different nations, and the legal regime applicable to various religious denominations. The main issues of private law were regulated by the various statutes.

2. Legal Capacity of Persons and Its Exercise

The notion of legal capacity and its exercise have been developed in Roman law. At that time, the situation of the free person was different from that of the slave, a person without legal capacity. The abolition of the institution of slavery and the declaration of the principle of the universal character of legal capacity is the merit of Christianity. According to Christian principles, every man is free and equal. In reality, however, the principles of freedom and equality have for a long time been ignored or infringed. This less than ideal state of affairs was rationalized under the pretext that although once all people were equal, the cowards, who were unwilling to fight for their freedom, later forfeited it, while the nobility redeemed its privileges at the price of its own blood.

17 Veress 1915.
18 Szádeczky 1891.
19 Veress 1905.
20 See Wenzel 1863. 78.

In Hungary, after the founding of the state by King (Saint) Stephen I and following the conversion to Christianity, theoretically every man had legal capacity, so they could be subject to rights and obligations, but full legal capacity was reserved for the nobility. Servants, serfs, and those who were not considered noble benefited only from a restricted legal capacity. The distinct subjective rights of the privileged estates and of the subjects with limited legal capacity were defined, in addition to legal and customary regulation, also by the different systems of jurisdiction and public administration to which they were subjected. In feudal law, personal dependence and limited legal capacity were compatible.

In law prior to 1848, only the nobility benefited from full legal capacity. Hungarian private law did not distinguish between aristocrats and minor nobility. In this respect, indeed, the principle of unity of the nobility and the indivisibility of the nobles' freedoms was respected, as decreed by the Act of 1351. Starting from the 15th century, only the nobility could own property that had not been burdened with obligations specific to the encumbrances to which the serfs were held and would exercise royal rights in these areas. The nobles were entitled to levy the so-called *ninth part* (in the amount of 10% from the harvest, called the ninth part because it was the ninth 10% of the harvest due as a fee, the tenth 10% being the tithe owed to the church). The nobility had general authority and jurisdiction over persons with a noble title and the serfs who resided on their estates. In Transylvania, theoretically, only the people belonging to the four accepted ('received') religious denominations, Catholics, Lutherans, Reformed Protestants, and Unitarians, could gain noble title. This principle was also confirmed by the Diet of 25 November 1671. In practice, however, the rule was not firmly enforced because among Romanians those of the Orthodox religion could become nobles.[21] Priests and pastors of the four accepted denominations were considered noble in their person. Noble rights are summarized in the *Approbatae Constitutiones*, Part III, Article 6. According to the text, noblemen could be summoned only before a judge having jurisdiction according to their person, could not be required either to provide horses for postmen or couriers or to give accounts, could not be detained outside the criminal procedure, could not be forced to be servants, and could not be compelled to go under arms except by order of the Prince.[22]

As for the serfs, the laws of 1514 were even more severely tightened by Article 47 of Part V of the *Approbatae Constitutiones* and by the Diet of 10 February 1683 held at Sighişoara, which made their situation almost untenable by Article 8 of its resolution.

The title of noble could be acquired in an *original way* and in a *derived way*.

1. The *original mode of acquisition* meant that after the formation of the noble estate only the king was entitled to grant noble titles by donation.

21 Balás 1979. 196.

22 Trócsányi 2005. 37.

Cases of original acquisition of noble title were:

A. *Donation of domains* by the king. The one who benefited from the donation of some domains became a noble by right.

B. *Royal letter of ennoblement with coat of arms* as well as the *donation of coats of arms*. This mode of gaining noble status spread in practice during the reign of King Sigismund of Luxembourg, who at times donated only the title of noble, without it being accompanied by domains. This form of conferment of the noble title usually took place so that the number of warriors would multiply and the newly ennobled would rally to the king's banner. These so-called nobles bore little difference to serfs, being distinguished only by the letter of privilege granted to them and benefiting from no holdings of their own.

C. *Legitimation*. The child of a nobleman, born out of wedlock, could be ennobled by the grace of the king.

D. *Declaration as a son*. This means was introduced by King Charles I of Hungary (1288–1342). The king could declare as a son through fiction the daughter of a nobleman left without descendants on the male lineage or another female relative in the *gens* (the wider family, or clan), giving her identical rights to those of men, including the right to inherit.[23]

E. *Adoption*. The king could approve for the nobleman without posterity on the male lineage the adoption of a person without a noble title, who would thus acquire noble title and the right to inherit.

F. *Solemn declaration as son of the fatherland*. The king had the right to confer noble title to foreigners with the consent of the estates, by decreeing a law in this respect (Act LXXVII of 1550).

2. Derived acquisition methods:

A. *Birth*. The child born from the legally concluded marriage of a nobleman became noble by birth. If a child was born from the legally concluded marriage of a noble mother with her husband, who lacked noble title, it would acquire the rank of *agilis*, being considered as only half noble. The *agilis* became a free person, not subject to the authority of the lord, but he had full exercise of legal capacity only regarding the estate inherited from his mother. His social status practically depended on the influence of the mother's family.

B. *Marriage*. Women could also acquire noble title through marriage, a rank that could be maintained even after the death of the husband but only until a new marriage was concluded.

C. The child of a woman *declared as a son*, born from the marriage concluded with a person without noble title, in turn became, by right, a noble.

In the legal and value system of old Hungarian society, the main source of privilege was valour shown in times of war (*Tripartitum*, Part III, Article 18); thus, according to feudal private law, the full exercise of legal capacity was

23 Holub 1925. 305–319.

reserved for noblemen. Even though the church did much in the interest of improving the personal and economic situation of women, and the notion of knightly valour also raised the level of respect for (noble) women, the legal capacity of women and its exercise was in many respects restricted, mainly to the field of inheritance and family law.

Through marriage, a woman became an adult, belonging to the estate to which her husband belonged: for example, a woman of middle noble status could become by marriage an aristocrat. Married women were entitled to maintenance, which meant that the husband was obliged to support his wife in a proper way according to his social and economic status. A married woman could dispose freely of her own patrimony (the *paraphernalia*), held in property before marriage or acquired subsequent to marriage by means of donations and inheritance. Engagement gifts, received from her husband or his family, were also part of a woman's own patrimony. The *dowry*, received by the woman from her own family at the conclusion of the marriage, was also part of her own estate, but it was managed by her husband. The *douaire* is one of the oldest institutions of Hungarian private law and was owed by the husband to the wife as a form of remuneration in consideration of the obligations the wife assumed by marriage. Its amount was in accordance with her husband's status. Upon the death of their predecessors, unmarried daughters had the right to claim from the male coheirs maintenance, education, and the arrangement of their marriage, by virtue of the so-called *right of the unmarried daughter*.

In the law before 1848, the legal capacity of a nobleman who had committed a serious crime could be restricted. A person struck by infamy could not hold public office, could not be appointed as guardian or curator, and could not hold membership within associations or corporations, while his will and any attestation or testimony made or given by him were null and void. Aside from these, the legal capacity of children born out of wedlock was restricted.

A person admitted among the *citizenry* of a city through a decision made by the city council and the elected citizens (jurors), who then paid the usual fees and took the necessary oath, was considered *a burgher*. The bourgeoisie benefited from their own privileges: they had the freedom of their person while residing in the city; their *homage* (a fine, applicable in case harm would come to them at the hands of another person) was set in an amount identical to that of a nobleman; they had the right to elect their own judges and dignitaries. Outside the city, however, the oath taken by them had only the evidentiary value equal to that of a serf.

Serfs were subject to the authority of the lord. Due to this status, their personal and real property rights – in spite of the improvements of the 18th/19th centuries – remained limited. The serf could move from his domicile only after fulfilling certain conditions as, for example: obtaining authorizations (*licentia*) was required; he could not be subject to litigation, could not have debts, and had

to have paid the relocation fee (*terragium*). The education of the sons of serfs was conditional upon the consent of the landlord, just as the conclusion of a marriage by serfs. They were also obliged to perform certain services (such as labour, called 'robot' after the Slavic word for 'work'), pay the landlord the ninth part (10% of the harvest), and provide other 'gifts' according to the income of their lot. All disputes arising from the feudal relations between the serf and the lord fell within the jurisdiction of the lord's seat (*forum dominale*, the court of the lord) as well as any criminal proceedings brought against the serf. If the lord was also granted the privilege to render 'high justice', he could exercise the *ius gladii*, (the right of the sword), meaning that he could also impose the death penalty. Serfs had limited active procedural capacity, being able to call nobles to court only through their own lord, who was obliged to represent the interest of his serf in such cases, based on the paternalistic principle.

Serfs could not acquire noble estates. If this, however, took place, any nobleman had the right to take possession of the estate under the pretext that he who did not have the title of a nobleman was not member of the Holy Crown (a mediaeval doctrine of statehood embodied by the Holy Crown of Hungary itself, that is, of the state perceived as a unity of territory, the king, and the nobility), and therefore could not hold landed estates.

We must distinguish the existence of legal capacity from the exercise of that capacity. The person's ability to exercise his legal capacity is that prerogative conferred upon him to acquire rights and to assume obligations in his own name and on his own initiative. The private law of the time established the exercise of legal capacity according to the so-called 'intellectual census'. Because the intellectual maturity and abilities of natural persons were objectively impossible to verify for each person in turn, certain age limits were also set as an external criterion in addition to the requirement of discernment (soundness of mind). Sex, status within a certain estate, and the existence or, as the case may be, absence of honour (the state of infamy) were additionally listed in the law before 1848 among the influencing factors for the exercise of legal capacity.

A. *Age*. According to *Tripartitum*, a person who is *impuberant* does not have exercise of his legal capacity. This was the case for girls who had not reached the age of 12 years and boys under the age of 14 years. Women were considered to be of age, and thereby gaining full exercise of their legal capacity, after reaching the age of 16 years, and men came of age at 24 years. People aged between the extreme points of these ranges were considered to be in an intermediate state called *puberty*. They could benefit from the limited exercise of legal capacity. Girls who were at least 12 years old could marry, while boys could accept donations from the age of 14 years. At the age of 16, the latter could contract loans, constituting their estate as collateral, and at the age of 18 years they could even conclude perpetual assignments (act of permanent disposal over real property rights).

B. *Discernment*. The unsound of mind did not have exercise of their legal capacity, and only representatives could act legally on their behalf.

C. *Sex*. The exercise of legal capacity of women was restricted because prior to marriage they were under the power of their father, and subsequently they came under the power of their husband.

3. Family Law

The family is the community of parents, children, and their closest relatives, and it was the basic unit of mediaeval society but also of the state and the church. The family relied on blood kinship, but some members belonged to it also by virtue of the maintenance to which they were entitled (being in a relation of *affinity* with other family members).

In old Hungarian law, the family usually consisted of two generations: the community of parents and their unmarried children (the so-called nuclear family). The extended family was composed of four generations, with 28-30 members, who came from several families which were related on the paternal lineage. In extended families, usually the head of the family was the oldest man: he had the right to dispose of the family estate, led the moral life of the family, represented the family towards others, and determined the people who could be received into the family. Family members participated according to age and sex in the household chores. The head of the nuclear family was the husband, who had the right of disposition over other family members, exercised paternal authority over children, the wife also coming under the authority of her husband. The father was the legal representative and administrator of the property of any persons under his power and authority. István Werbőczy points out in his *Tripartitum* that the obligation of parents with regard to raising their children was a natural obligation that parents could not be exempted from by any legislative power.[24]

One of the most significant acculturation achievements of the Christian civilization of the Middle Ages was the development of the model (and basic patterns) of marriage. Following the collapse of the Western Roman Empire and the storms of the Migration Period, the development of Christian marriage, which came to be generally accepted by the European society as a social, legal, and religious institution, took almost a millennium. In parallel, 'fornication', cohabitation, polygamy, abduction, or purchase of wives and divorce became criminal acts.

According to canon law, *marriage* is the covenant assumed by a man and a woman of their free will, for the entire duration of their lives, its natural purpose being the conception and raising of children for the benefit of the spouses. Free will had the meaning of 1° the absence of any coercion to which the parties could

24 Dósa 1861. 22; Roszner 1887.

have been subjected; 2° the absence of impediments in the form of prohibitions set forth in ecclesiastical or natural law. This covenant between the baptized was elevated by the church to the rank of sacrament (Corpus Iuris Canonici, Article 1055, paragraph 1). The covenant of marriage was bound by God himself, so the marriage concluded and perfected between the baptized parties could not ever be dissolved (Corpus Iuris Canonici, Article 1141). Only the so-called separation from bed and board (*a mensa et thoro*) led to the termination of cohabitation by the spouses, without affecting the covenant between them. The church, starting with the Fourth Lateran Council (1215), managed to attract marriage under the authority of canon law and in general to draw it under the jurisdiction of ecclesiastical courts. Canon law, to the extent permitted by the conditions of the era, strengthened women's rights regarding marriage.

During the reign of King Coloman the Learned of Hungary (1074?–1116), at the Synod of Esztergom held around 1116, it was ordered that 'every wedding is to take place in the presence of the church, with the presence of the priest, before proper witnesses, by some sign of the engagement, and having the consent of both parties' (Coloman II 15).

A new stage in the development of Hungarian matrimonial law – with effects reaching into the present – began with the resolution of the 24th Session of the Council of Trent, held in 1563, which initiated a Catholic revival. It was at that time that the rules of procedural and material law for the valid conclusion of marriage were set forth. Marriage was separated into two parts: 1° the engagement, the formal requirements of which were not regulated in detail but which would constitute beyond any doubt a firm promise of marriage that could only be revoked for well-founded reasons; 2° marriage, which was valid only if the parties stated their mutual intention to marry before the parish priest having jurisdiction according to the domicile of one of them, in the presence of at least two witnesses.

In the Kingdom of Hungary, the *vow of fidelity* became part of the ceremony thanks to Cardinal Péter Pázmány (1570–1637), in Hungarian the term itself being at the origin of the word that also designates wedding (*esküvő*, in literal translation having the meaning of 'vowing' or swearing an oath). The text of the vow is as follows: 'So help me God, Our Great Lady, Blessed Virgin Mary, that I love XY present, I take him as my husband (I take her as my wife) out of love, according to the order of God, according to the law of the Holy Mother Church, and that I will not leave him (her) until my death and until his (her) death in no time of trouble, so help me God!'

The Council of Trent established the cases when a marriage was subject to annulment:

Consanguine marriage: when the spouses were related by blood up to the fourth degree included, which was later relaxed to refer only to relatives up to the second degree included – third degree relatives being allowed to marry

on the basis of a special authorization granted by a bishop, without having the possibility of obtaining this authorization subsequent to the conclusion of the marriage – (this way of determining degrees of kinship constitutes the so-called Germanic system); *affinity:* the consanguine relatives of one of the spouses of a certain degree are by law *affines* (in-laws) of the other party of the same degree, the prohibition on marriage between consanguine relatives being applied to them accordingly; *spiritual kinship*: the relationship between godparent and godchild; *lack of minimum age* (12 years for girls, 16 years for boys); *known insanity* (in case of the lack of exercise of legal capacity); *infamy* (in the case of unmarried persons); *accession by a person to a monastic order*; *ordination as a priest* even if the person is not a monk or nun; *bigamy* – if a previously concluded marriage was still valid; *known impotence*; *uxoricide* (murder committed against a previous spouse); *marriage concluded under coercion, threat, malice, or fraud* (which, however, had to refer to a significant physical or mental characteristic of the other spouse).

Prohibitive impediments to marriage were constituted by cases which do not result in the annulment of the marriage but in another sanction applied to the persons who disregarded the prohibition: such a reason for prohibition or prohibited periods were the times of fasting and a period of at least 10 months (the 'year' of mourning) which must pass since the death of the previous spouse before the widow or widower could remarry.

On the first three Sundays from the date of the engagement, the future wedding had to be announced in church so that the impediments to marriage, if any, could be revealed.[25]

In the 16th century, in parallel with the establishment of the ecclesiastical organization of the Protestant churches and the recognition of their religious freedom, adherents of Protestant denominations concluded marriages before their own pastors. The law governing the marriage of Lutherans and Calvinists (Reformed Protestants) was also recognized by the Resolution of 1731 of Charles III King of Hungary (1685–1740). According to the Protestant theological point of view, marriage – although not devoid of spiritual significance – as a legal institution belongs to the system of secular law. For this reason, civil marriage was first introduced in Protestant countries, a trend later followed by Catholic states. In Hungary, the Patent on Marriage by the Emperor of Austria and King of Hungary Joseph II (1741–1790) issued in 1786 (which was null and void according to Hungarian constitutional law) described marriage as a civil contract. However, the Hatted King's decree[26] was withdrawn after his death, the Diet

25 Csizmadia 1983, Erdő 2001, Péter 2008.

26 King Joseph II of Hungary was pejoratively called 'the king with a hat' because he refused to be crowned with the Holy Crown of Hungary so that he would not have to confirm the Constitution of the Kingdom of Hungary by the inaugural oath he would have needed to take during the coronation ceremony.

of 1790–1791 restoring the previous modus of legal regulation. The issue of civil marriage re-entered the legislator's agenda only after the Austro-Hungarian compromise of 1867. In 1868, it was for the first time that this legislator attempted to regulate certain issues in connection with so-called mixed marriages. After that, each spouse adherent of an accepted denomination became subject to the general jurisdiction of ecclesiastical courts belonging to their own denomination in this matter. The following of the religion of the parents of different religious denominations by their children according to their sex was also enshrined in law (the daughters were to adopt the mother's religion while the boys the father's).[27]

In Transylvania, the various accepted denominations established the rules which governed marriage.

Due to the chaos that prevailed at that time, the Diet of 3 May 1615 made a resolution that a man whose wife had been abducted into slavery (by the various armies, usually the Ottoman, which ravaged the region) would be allowed to remarry.

The accepted denominations regulated the dissolution of marriage differently, so at times persons willing to initiate divorce would proceed according to the rules of the denomination more favourable to them, determined according to their own needs. For this reason, the Diet of 24 May 1625 declared such practices to be tantamount to polygamy.

4. Property Law

Property law, as an abstract, comprehensive notion began to take shape in the science of European law during the Middle Ages. Institutions belonging to this branch of civil law were analysed as absolute legal relations by the Glossators, the Commentators, and German Pandectist jurisconsults, who built their theories upon the foundations of Roman law in spite of the fact that private property as the notion known to Roman law was applicable to private feudal law practically exclusively in what regards movable property. The separation of property rights from claim rights was developed by the Pandectist jurists of the 18th/19th centuries. In their view, property law encompasses those legal rules which apply to legal relations associated with natural things subject to the power of man. Thus, the static concept of private patrimonial rights was formed, which has as its aim ensuring the prerogative that the entitled person should enjoy his property peacefully.

Delimiting property law from the law of obligations (the legal relationship characteristic of claim rights) is necessary because property law regulates the long-term protection regime of already acquired rights, while the law of obligations refers to the legal and dynamic circulation of rights established over

27 Degré 1941, Hanuy 1904.

movables and immovables. Property law has an absolute character and requires compliance with the legal relationship to which it gives rise, to property, by all persons (therefore, it benefits from an *erga omnes* character, the party who owes compliance being 'everyone' but the owner), while a right of claim gives rise to only a relative, transient legal relationship, between creditor and debtor, whose parties are well determined in their persons.

The set of real rights is closed, while the set of claim rights is open. The continuous development of the economy can give birth to new obligations every day. Public interest is imposed more strongly in the field of property law, and for this reason the norms of this branch of law are largely imperative in the formulation of the various rules, while obligational legal relationships are most often governed by dispositive rules. Persons' right to dispose as parties to an obligational legal relationship can be freely manifested.

Hungarian law and legal systems in the Romano-Germanic legal family divide things into movable and immovable property according to their nature. This classification was first used in Roman law. The setting apart of tangible assets in this way occurred when a certain degree of development of abstract legal thinking was attained. As a general principle, Werbőczy linked the notion of movable property to the possibility of its movement from its place, without this resulting in the depletion or other prejudice to the substance of the object (*Tripartitum*, Part I, Article 95, paragraph 2; Part III, Article 26, paragraph 15). The differentiation between movable and immovable property gained importance in feudal law. In general, Roman law made no distinction between movable and immovable property in terms of how the acquisition of rights over them occurred (notable exceptions being the *res mancipi*, the institution of usucaption, and the effects of theft over the property of certain objects). Feudal law subjected buildings to a special legal regime, while the issue of regulation in the field of movable property has been marginalized due to the lesser economic significance of property subject to the latter regime. Although feudal law took over the classification of goods initially used under Roman law, this was adapted according to its own regulatory needs.

In feudal law, money was considered movable property, just as clothes, weapons, or horses, but an immovable encumbered with a pledge was also considered a movable, being subrogated (substituted) by the amount of money loaned in return for the pledge; possession of the immovable could be regained by the owner after repaying the loan to the creditor. Interestingly, a stud (a heard of horses kept for purposes of breeding) of more than 50 horses was considered as immovable real estate. According to ancient practice, the money that came from the capitalization of the estate of the *gens* was itself considered to be an immovable. This classification had a high significance, immovables being the basis for the livelihood of the family. Werbőczy's work did not even entertain the possibility that the main assets of a nobleman's estate could be comprised

of money or obligations with a monetary value. The entirety of the mediaeval legal system was constructed not in the interest of ensuring the legal circulation of immovables (of real estate) but in the interest of hindering this circulation and maintaining the economic destination of immovables. The most significant part of national wealth was immovable by nature – the value of the property that was inherited most often exceeded that of the property that was acquired by purchase (property transferred *inter vivos*); preserving the emoluments (assets) of any estate at a constant value and within the family was given great significance (hence the institution of property of the *gens*).

In Hungarian feudal law before 1848, the system of economic dependence and property dependency were applied in close correlation with the hierarchical system of political subjection (vassalage). On their basis, the interaction between personal and economic dependence could be demonstrated, while no one owned veritable private immovable property or real estate in today's sense of the word.

Gábor Balás stated that in Transylvania the most common way encountered for acquiring ownership of property rights over immovables found in the property of the nobility was donation, especially the so-called mixed donation, which in reality disguised a deed similar to sale and purchase.[28]

The old laws of the mediaeval period restricted one's right to dispose of one's real estate but also restricted the right of the majority of the population to acquire real estate. Land holdings as a *sui generis* legal institution, interwoven with social status and power relations, were in fact not a form of property in the proper sense, being more similar to possession. Ignác Frank[29] opined that this was just property manifested over a right of use. Over the estate, the nobleman only held *dominion*, i.e. a power and right of use and possession. He could only dispose freely of the revenues generated by this estate. The most specific prerogative of the owner in relation to his property right was therefore absent, thus missing the one element through which the essence of the circulation of assets in a legal sense was exposed: free will.[30]

First, land ownership was limited by the prominence of the king's property right (*ius regium*), according to which all property rights over the land have royal donations as their wellspring (*Tripartitum*, Part I, Article 3). The right to dispose by donation of one's immovables was transmitted by the estates to the king by the act of coronation, the king in turn being subject to the authority of the Holy Crown. The donated land would be returned to the royal treasury in case the noble's male lineage would die out or for reason of infidelity towards the donee.

In such cases, the treasury regained only what were originally the king's own assets, so not even in this respect could the noble beneficiary of the royal donation

28 Balás 1979. 196.
29 Frank 1845. 193.
30 Trócsányi 2005. 62.

of an estate be considered as a genuine owner. Sale of the domain received by donation or any disposition over it by will was only allowed on the basis of royal assent. Without this, the king's procurator could easily claim restitution of the estate in question. The security of the circulation of property was thwarted by the treasury's right to regain control of the estate in court in case of extinction of the noble family that had benefited from the initial donation, even if the estate had already come into the legitimate possession of another noble family.

The property of the *gens* also limited the right to disposition of the owner of the landed property: the estate that was the property of the *gens* did not only belong to the person who exercised dominion over it but to the whole *gens*, by this notion being understood the original acquirer and all persons entitled to inherit after him or to acquire otherwise his estate, not only those alive but also those who were to be born later, all in joint ownership. The ownership of the *gens* had the effect of restricting the right to disposition by deeds concluded *inter vivos* or *mortis causa*, as the case may be, but also by will over the estate of the original acquirer, which was subsequently transmitted to the heirs by legal inheritance or by bequests confirming or ordering the mode of transmission for the eventuality of death, without the possibility of derogation by will from the rules applicable to legal inheritance. The property subject to the ownership of the *gens* had to be offered by the seller to be purchased with priority to those who would have a vocation to inherit it, according to the order applicable under the law of succession, and as if the party entitled to first refusal had actually inherited the estate. This was the so-called 'offer' or notification of the beneficiary of the right of first refusal (pre-emption). Relatives who did not inherit the estate of the ancestor of the *gens* or of his heirs, neighbours, and those with properties in the same fields also had to be invited to buy with priority through the so-called 'recommendation'. If the latter was omitted, the cancellation of the permanent assignment could be requested. The claims based on such rights of the *gens* were not subject to being time-barred, it being possible to invoke them in litigation even after several centuries. For this reason, up to the 18th/19th centuries, there were almost no wealthy families who were not interested in or affected by the outcome of such litigation either because they had been sued or because they sued others as claimants demanding some or some other feudal right over estates.

Feudal farming methods also limited the right of disposition of the landowners. As found in István Werbőczy's *Tripartitum*, although the owner of the entire feudal estate was the lord, the estates were in reality sub-divided into two distinct types of lots: 1° the *lots belonging to the mansion, which were utilized under the direct management of the lord*, and 2° *the lots of the serfs* cultivated by them in exchange for specific benefits owed to the lord [collectively referred to as the so-called 'urbarial' lots (from the German word 'Urbar', meaning a register of feudal fief ownership and rents owed to the lord), which later acquired the meaning of

land register (urbarium), including in the Romanian language]. Regarding the lots of the second type, a legal relationship between lord and serf somewhat similar to tenancy has developed throughout history, but which differed from tenancy in many ways. Because the tax base of the state was limited to the lots farmed by the serfs, on the one hand, the issue of the urbarium was attracted into the sphere of interest of the legislator, while, on the other hand, there was a tendency to prevent the lord from taking over these lots from the serfs, which would have resulted in diminishing the base of taxation. The lord's right of 'ownership' over the lots of serfs was in fact limited to the benefits owed to him by these serfs, the amount of which was also regulated by law. Urbarial lots were therefore approximately as valuable as the worth of any benefits actually provided by the serf to his lord in return for their use. Besides these obligations, the serfs had a limited right of disposal over the lots intended for them (of 'alienation'– in fact, assignment – and transmission as inheritance). The lord could not attach the lot used by the serf to the mansion's estate even if the serf died without leaving any heirs. In such situations, he was obliged to move a new serf to the vacant lot. The landlord could not acquire these lots, not even by purchasing them.[31]

5. The Law of Obligations

In Transylvanian private law, the law of obligations was not elaborated in a detailed measure, similar to real estate law.

The most significant legal transaction generating obligations was considered to be the contract. This was the legal form of economic exchange relationships, characterizing the circulation of goods in the Middle Ages. According to Hungarian legal science, the contract is formed by the concordant manifestation of the will of two or more parties (the principle of *consensualism*). The contract is a legal fact in the broadest sense: it gives birth to, modifies, or extinguishes legal relationships, benefiting from the protection of the state, its observance being possible to be imposed by means of judicial coercion.

In the feudal period, the normative framework applicable to contracts was the least developed segment of Hungarian private law. To guarantee the fulfilment of the contract, an oath was taken. Besides this, the binding power of the contract was reinforced by compliance with certain extrinsic formal requirements: for example, the *Almeschtrinken* (drinking to the blessing of the parties) was a prerequisite of certain contracts, or boys were caned at land boundary markers so that they would remember until the end of their lives the boundaries of the family estate, etc. Later, the written form became increasingly widespread. The

31 Both 1984. 328; Degré 1978. 536; Frank 1848; Händel 1944. 372; Illés 1941. 634; Kállay 1981. 702, 1982. 527; Kelemen 1926. 327; Murarik 1938; Párniczky 1942.

parties solemnly and orally declared before authentic places (usually constituted by a chapterhouse of a religious order, or a monastery) what kind of contract they wanted to conclude. Ecclesiastical officials then instrumented this statement in writing in accordance with legal requirements, and they applied their seal to the document for authentication. Simultaneously with the establishment of this novel solution, the birth of long-term contractual relations between the debtor and the creditor became possible.

Among the contracts, the most significant category was the one regarding the transmission *inter vivos* of the estates between the members of the nobility, the *perpetual assignment* (*fassio perennalis*). In the case of estates subject to the property regime of the *gens*, this type of alienation by perpetual assignment was possible only if the assignment was necessary for some well-founded reason such as imperative economic needs or redemption of a relative from captivity. The alienating landlord of the estate subject to the property of the *gens* was in these cases obliged, above this requirement, to offer the estate for sale to the heirs of the original acquirer first as they enjoyed a right of pre-emption over the estate. Failure to complete this prior procedure resulted in the possibility granted to the members of the *gens* and their heirs to regain the disputed estate at any time in the future. As I have previously shown, this right was not subject to any statute of limitations which would render it time-barred. For the alienation of some estates from royal donations, the king's assent had to be obtained.[32]

6. Inheritance Law

The law of succession is constituted by the totality of legal norms which regulate the fate of the assets of a natural person (the *estate* having the meaning of *legacy* in this case) following his death.

The purpose of inheritance law is that the estate does not remain without an owner after the death of the person who leaves the inheritance and to further ensure its use and conservation according to its intended purpose, which is to form the economic basis of the family's existence. Besides all these, the institution of inheritance confers upon the property right its complete character. Private property becomes fully effective only if there is a possibility to transfer this right by inheritance. Depriving a subject of civil law of the right to transmit assets by inheritance or restriction of this right leads to waste and frustrates the accumulation of economic value. In the later stages of human life, increasing wealth would not have been encouraged if the one who is to leave the inheritance knew that after his death his relatives (e.g. his children) would not benefit from the accumulated wealth.

32 Wenzel 1863. 607; Dósa 1861b. 493.

From a historical standpoint, inheritance law is characterized by the conflict of two great contradictory principles:

1. The right to free disposal over the estate.

2. Protecting family interests because the fate of property subject to transmission by means of inheritance should not depend exclusively on the whim of the head of the family. For this reason, free disposal by instruments drafted *mortis causa* was restricted. Customs applicable to the law of succession were not dispositive but, for the most part, imperative and therefore did not allow for any derogations.

From the Middle Ages up to this day, the development of European inheritance law has freed itself more and more from under the domination of the family, the freedom of disposal of the individual being gradually transposed to the centre of this institution. Along with this evolution, the significance of imperative norms decreased, these being replaced by dispositive rules.

In Hungary, feudal private law led to the elaboration of the law of succession by subordination to the public law of the time. The right to an inheritance depended on the feudal status of the one who left that inheritance but also on the person of the heir and on the origin as well as nature of the property due to be inherited. The main custom was legal inheritance developed in accordance with the above principles.[33] The custom regulated the order according to which the vocation to succeed was determined, applied separately to the land, the house, the weapons, family documents, personal belongings, animals, etc.

According to *legal inheritance*, the descendants inherited with priority, and in their absence the ascendants, while in their absence the collateral relatives. The descendants, all legitimate sons of the person who left the estate, would inherit in equal shares all the elements of that estate, except for the family home of the father, which belonged to the youngest son, as well as the family documents, which belonged to the eldest of the brothers (tasked with defending the rights of the *gens* to that property by using them as a means of proof). Female descendants inherited in equal shares with the males only the goods acquired during the life of *de cuius* on the paternal line. If the acquisition took place free of charge, the daughters would only inherit when the donor had allowed this inheritance, the right to inherit regarding the donated property being extended by the very act of donation to the daughters. The property of the *gens* and that acquired on the maternal line as well as the movable goods left by the deceased were also inherited in equal shares with the sons, with the exception of weapons and the family archive. The pledged immovable was considered movable property during the existence of the pledge, also for purposes of inheritance.[34]

33 Illés 1904, Magyary 1890.

34 Somogyi 1937.

The wife of the deceased was entitled to the *rights of the widow*: to proper housing and maintenance, and if she desired to remarry, to the provision of all necessities for marriage which were to be provided by male coheirs.

According to the old Hungarian civil law governing the status of nobles: through legacies contained in a testament, *de cuius* could only dispose of movable property and estates which had not been obtained by donation. Goods owned by the *gens* could be subject to such provisions only if *de cuius* had died without legitimate heirs. The act of last will took either the form of a unilateral statement from the disposer or of a will or of a succession contract. The will was the unilateral disposition made *mortis causa* in respect of the deceased person's property. The will was always revocable, whereas the succession contract could not be revoked unilaterally.

The *testamentary inheritance* (or that on the basis of the succession contract) has developed in Hungary from the roots of the institution identifiable in canon law and Roman law. King Stephen I of Hungary had already conferred upon all persons the right to leave their property to their widows, sons, daughters, and other relatives or to the church by will (Laws of St. Stephen, II. 5). The First Golden Bull (of King Andrew II, Law IV of 1222) allowed the serjeanty[35] (the persons obliged to come under arms) who had no male descendants to dispose freely of three-quarters of their estate. At the reissuing of the Golden Bull in 1351, however, the Crown expressly repealed this provision. Based on the right of property of the *gens* and for the protection of the interests of its members, the right of disposition by will was restricted to a very narrow framework by feudal law. Transmission by will was allowed only with respect to acquired goods (*Tripartitum*, Part I, articles 51 and 57). In what concerns rules relating to wills, the canon law was largely the defining source until the 18th century, the validity of the act being established for this reason by ecclesiastical courts. Law XXVII of the year 1715 established the formal conditions of the will and at the same time abolished the rule kept from Roman law according to which only the will by which the disposer disposes of his entire estate was valid.[36]

7. The Private Law of the Szeklers

7.1. Sources of Law

The rules of private law regarding Szeklers underwent changes during the existence of the Principality of Transylvania.[37] Law played an especially

35 The serjeanty of the king constituted an intermediary social class in Hungary during the 11th/12th centuries, between the magnate barons and the common men-at-arms.

36 Holub 1936, Murarik 1934. 497.

37 As a general example, see Bónis 1942.

important role in the history of the Szeklers because it had decisively contributed to the continued existence of the Szeklers as a community in the regions inhabited by them since ancient times.[38] The municipal law of the Szeklers was already appreciated by István Werbőczy under the title *Az erdélyi schitákról, kiket székelyeknek hívunk* [Regarding Scythians of Transylvania, Whom We Call the Szeklers]:

> Apart from these, there are also Scythians, privileged nobles in the parts of Transylvania, who descended from the Scythian people on the occasion of their first dismounting in Pannonia, those whom, by a debased name, we call 'siculus'; those who live according to completely separate laws and customs; being the most versed in the occupations of war; they share their estates and offices with each other (by the customs of the old) in order so as to divide them among the tribe, the gens, and the branches of the gens. (*Tripartitum*, Part III, Article 4)

The law of the Szekler 'nation' was based on privileges, statutes, and customary law.[39] Among the statutes, the most significant were: a. The Constitutions of the General Assembly of the Nation from Târgu-Mureş from 1451 under the leadership of Péter Vizaknai and Ioan Gereb de Wyngarth (written also as Wÿngarth); b. The Constitutions of the Assembly of the Nation from Odorheiu Secuiesc from 1505; c. The Constitutions of the General Assembly of the Nation from Lutița from 1506; d. the old statutes confirmed by voivodes István Dobó and Ferenc Kendi (also written as Kendy), compiled at the Assembly of Odorheiu Secuiesc of the year 1555. Among the privileges, the most important is the letter of privilege drawn up in Gherla in 1636 by George I Rákóczi.[40]

The privileges of the Szeklers provided not only the possibility of organizing their society but also the right for setting the rules that governed their daily lives. Obviously, this did not mean that the flood of decrees issued by the rulers of Transylvania would not have influenced the life of small Szekler communities, nor that they would not have been forced to subject themselves to these, but the statutes and laws of the various villages were adopted for achieving the organization and maintenance of their internal order, and they were created for the protection of ancient customs and traditions. By tradition and custom, we usually understand administrative self-organization and jurisdiction – dispute resolution, legislation, collection of taxes, organization of grazing, etc. – of the Szekler villages. It was the community that applied the adopted laws in all of the cases stipulated in the legal norm, being an enforcement body as a community and facilitating the solution of problems of public interest.

38 Benkő 1791, Székely 1818, Kállay 1829.
39 Zakariás 1992. 104–107.
40 Jakab 1888. 541–550.

The statutes of the Szekler villages were formulated and adopted by 'the whole of the village', so by the council composed of nobles and inhabitants belonging to the order of free men and serfs alike. The earliest statutes from Zălan and Suseni were adopted in 1581, but even older sources mention the 'conclusions' of the village.[41]

7.2. The Law Pertaining to Persons

The quality of Szekler meant that the person enjoyed a status – especially in the meaning of a subject of law – resulting from Szekler descent and benefited from all associated rights. These rights could be invoked by the Szeklers anywhere in the Kingdom of Hungary. According to *Tripartitum*, free Szeklers were considered to have the rights of noblemen. These rights extended to members of the three social classes of the Szeklers, that is, to the aristocrats (*primores*), the equestrian order (*primipili*), and the foot soldiers, also called *dorobanti*[42] (*pixidarii*).

The Szeklers managed to keep their status assimilated to the middle nobility of Hungary until the 16th century. The rulers of the Principality of Transylvania increasingly attempted to restrict the privileges of the Szeklers, which also meant subjecting them to the collection of a tax under the name of 'financial subsidy' (*subsidium*), set as an alternative to the in-kind tax constituted of giving an ox (the so-called *ökörsütés*, literally 'roasting an ox' but with the meaning of branding the ox with red-hot iron to be handed over to the heard of the king or of the prince). Elected King of Hungary John Sigismund Zápolya (1540–1571), also the first Prince of Transylvania, was the one who first engaged in open conflict with the Szeklers, and for this reason in 1562 the general revolt of the Szeklers broke out. Following the suppression of the uprising, the king, by the laws issued at Sighişoara, decreed that the Szeklers would become the king's serfs. Therefore, the common Szeklers (those not aristocrats, nor equestrians) were obliged to pay taxes.

Among the Transylvanian princes, the members of the Báthory dynasty[43] also tried to erode the ancient rights of the Szeklers. As a result, during the 1599 invasion by the voivode of Wallachia, Michael the Brave (1558–1601), the Szeklers in the seats of the Three Seats region, those of Ciuc, Gheorgheni, and Odorhei, allied themselves with the Romanian voivode (in a time when the Szeklers from the seats of Arieş and Mureş joined Andrew Báthory), due to which alliance the Voivode of Wallachia restored all privileges to them by the letter of privileges issued on 28 November 1599. Finally, following the defeat of Michael the Brave,

41 Imreh 1947, 1983, 1971, 1973, 1987.

42 The word 'dorobant' formed from the German 'trabant' in the meaning of foot soldier. See Szádeczky-Kardoss 1927. 149.

43 Stephen Báthory (1533–1586) was elected the King of Poland (1576–1586); Andrew Báthory (1563–1599), cardinal of Hungary, who was for a period of 7 months the Prince of Transylvania; Sigismund Báthory (1572–1613); Gabriel Báthory (1589–1613) was the last member of the Báthory dynasty to hold the throne of Transylvania.

Sigismund Báthory, the Prince of Transylvania, issued a letter of privilege at Deva on 31 December 1601 by which he returned the previous rights and freedoms of all Szeklers, whereafter the princes of Transylvania did not attempt to retract from these rights. On 16 February 1605, Stephen Bocskai confirmed the liberties conferred upon the Szeklers by Sigismund Báthory.[44]

Over time, more and more Szeklers were forced to degrade themselves to serfdom, perhaps due to the more secure living conditions but more rather because, unlike the rest of the inhabitants of Transylvania, Szekler men were still obliged to take up arms in case of invasion by a foreign enemy. During the Diet of Bistrița of 8 October 1622, Gabriel Bethlen revoked all conventions by which the Szeklers had given up their freedoms, subjecting themselves to voluntary servitude as serfs, concluded since the reign of Voivode Mihai. For this reason, the overwhelming majority of Szeklers remained free.[45] The *Diploma Leopoldinum*[46] issued in 1691 recognized the Szeklers' exemption from taxation – moreover, in this diploma, it stands recorded that the Szeklers are the most militant people of the globe –, but at the same time this act of legislation regulated the long-term status of Transylvania, within it that of the Szeklerland, and also the freedom of movement of its population. After the defeat suffered in 1711, which ended the war of independence under the banner of Francis II Rákóczi (1676–1735), the Szeklers, together with the entire Hungarian population of Transylvania, would soon feel the revenge of the Habsburgs in the form of targeted anti-Hungarian policies. Following the repeated reforms of the fiscal regime between 1754 and 1769, in spite of any tax exemptions still in force, the Szeklers were required to pay taxes set arbitrarily.[47] On 7 January 1764, imperial troops attacked the Szeklers from Siculeni, who were protesting against forced conscription. During the ensuing massacre, more than 200 people were killed, most of them unarmed.

7.3. The Law Pertaining to Immovable Property

From the perspective of land ownership, the Szeklers enjoyed a more favourable legal regime than the Hungarian nobles, the land domains of the Szeklers being considered not only holdings of the nobility but also holdings initially acquired by first occupation (*bona primaevae occupationis*)[48] (*Approbatae Constitutiones*, Part III, articles 76 and 7; the statutes of the Szeklers). From the vacant lots of communal land, any person could take possession of a lot at any time but only as long as it could be cultivated by his own effort. If a lot remained uncultivated for

44 Szádeczky-Kardoss 1927. 141.
45 Balogh 2005. 63; Balás 1984. 163.
46 Horváth 2009. 16.
47 Hermann 2014. 100.
48 Dósa 1861b. 233.

three years or was proved to have been leased, it became part of the commonly held lands again and could be taken possession of by other Szeklers.

Until 1562, the ruler could not donate domains on Szekler land to his acolytes, only Szekler noble title (or peerage). Even in cases of treason (*nota infidelitatis*) or lèse-majesté or upon the extinction of a family on the male lineage (*defectus seminis*; remaining without an heir), the right of property was returned to the community, not the Crown treasury. With the exception of the Seat of Arieş, the king's right to donate property was also introduced to Szeklerland, being later abolished in 1636 by George I Rákóczi.

7.4. The Law of Obligations

When transferring land ownership between Szeklers by *inter vivos* instruments, not only relatives but also neighbours had to be granted a right of first refusal, and immovables could be sold to third parties only if they did not exercise their right of pre-emption (*Approbatae Constitutiones*, Part III, articles 76 and 16). Land ownership could not be sold at a price higher than the real value of the lot. If this took place, the lot could be redeemed by the seller's relatives at a price set following valuation (*Approbatae Constitutiones*, Part III, articles 76 and 16).

7.5. Inheritance Law

The basis of the privileged status of the Szeklers was the legal status of first occupation of their lands, to which royal law was not applied at all until the middle of the 16th century. Therefore, the Szekler estate was acquired or inherited by relatives and neighbours as first occupants, even in case of conviction for infidelity or extinction of the male lineage of the family of the previous owner. The one who was the first to place a claim marker on a lot belonging to a vacant estate after the death of the former owner who left no heirs would inherit the lot in such situations.[49]

Inheritance was possible only for lineal descendants. Usually, the male descendant inherited, and in the absence of such descendants the inheritance would be transmitted to the female descendant. In lack of descendants, the lot was added to the lands destined for communal use by the Szeklers (as opposed to the feudal custom according to which it would have been transmitted to the Crown or the local lord).

Paragraph 20 of the Constitution of the National Assembly of the Szeklers from 1555 provided that the inheritance belonged to the sons, and the daughters were entitled to all that is necessary for marriage. In the absence of male heirs – unlike in Hungarian law –, the daughters inherited (paragraph 21). In case of infidelity,

49 Sándorfy 1941. 97, 61; Tüdős 2008. 205.

the estate would be passed on to the heirs, not to the Crown. 'The Szekler cannot lose his heritage in any way, even if he were to lose his head for treason; it is to be inherited by his relatives who reside in the same place.'[50] In case of extinction of the male lineage, the relatives of more distant degrees came to inherit, and not the Crown, as was the case in the Kingdom of Hungary.[51]

8. The Private Law of the Saxons

8.1. General Norms

The Saxons have always strived to create a unitary legal system applicable to the entire King's Land (*Fundus Regius*).[52] This trend was based on the *Diploma Andreanum*[53] (1224) of King Andrew II of Hungary (1176–1235) – which referred to the privileges granted by King Géza II of Hungary (1130–1162) –, considered since ancient times by the Saxons as 'their golden charter of freedom'.[54]

Werbőczy, on the other hand, makes no mention of the separate private law of the Saxons.

Originally a peripheral territory of the Kingdom of Hungary, the region inhabited by the Saxons became a determining factor in the framework of the Principality of Transylvania. The rapid development of the movement of goods also required the modernization of the original customary law applied to trade. This was the purpose of Thomas Altenberger's code,[55] drawn up primarily on the basis of the law books of Nuremberg, Magdeburg, and Iglau – the mayors of Sibiu would later take the oath of office at their official inauguration on this book written in ornate Gothic characters and richly illuminated with initials.[56]

The Altenberger Code was composed of three parts. The first part was formed by the Mirror of the Swabians (*Schwabenspiegel*),[57] which contained the Nuremberg law. The Saxons quickly developed their own customary law and drew up several statutes. Unfortunately, these have not been preserved.[58]

Johannes Honterus (1498–1549) was a humanist polymath of Transylvanian Saxon origin, a Lutheran reformer and organizer of church affairs, a natural scientist, pedagogue, book publisher, and lawyer. He wanted to modernize the

50 Lötsei Spielemberg 1837. 117.
51 Oláh 2008. 56; Szabó 1875. 592–622.
52 Reiszner 1744, Albrich 1817, Incze 1837.
53 Teleki 1857. 289–303.
54 Hanzó 1941. 20.
55 Lindner 1885. 67–384.
56 Lindner 1884. 161.
57 Blazovich–Schmidt 2011. See also: Kocher 2013; Blazovich 2009. 535–545; Blazovich 2011. 18–22; Blazovich 2006. 477–482.
58 Wenzel 1863. 99.

statutes of the Saxons based on Roman law. Honterus contributed two works of legal scholarship to the spread of humanistic legal science in his homeland. The one with the title *Sententiae ex libris Pandectarum iuris civilis decerptae*, of almost 100 pages,[59] published in 1539, was composed of quotations taken from Justinian's Digests. Complying with humanistic teaching methods, he wanted to make short and easy-to-understand legal adages available to law students and those who practised law and at the same time to facilitate a return to ancient sources. He dedicated the book to John Zápolya, King of Hungary and Voivode of Transylvania, by stating: 'Nothing is more sublime among the graces of God conferred upon mankind than justice, which in itself merges all virtues.'[60]

Honterus's other great work, bearing the title *Compendium iuris civilis in usum civitatum et sedium Saxonicarum*, was published in 1544. Neither in Hungary nor in Transylvania was there another work published before it that summarized the provisions of Roman law with comparable precision and depth. At the same time, Honterus succeeded in creating a code of law that unified the Saxons as a community. Following Luther's ideas and those of Philip Melanchthon, he argued against the canon law of the Catholic Church. According to his position, within a community, only political power is entitled to draft laws.

In the first book of the *Compendium*, Honterus disserted on the general principles and the sources of law and then proceeded to listing the stages of the civil trial. The second book is composed of his treatise on the rules governing marriage, adoption, guardianship, and inheritance. Then, without following any obvious logical schema, he lists the rules regarding use and usufruct, rural easements and *operis novi nuntiatio* (protest against the erection of a new building by a neighbour, which harms the interests of the protester). In the third book, Honterus examines the law of obligations. He defines the notion of pacts and contracts and then moves on to the presentation of different contracts: donation, loan for use and the loan for consumption, sale, lease, deposit, association, and mandate. Subsequently, he returns to the analysis of the institutions more widely belonging to the general part of the law of obligations such as contracts concluded by persons under the power of others, the surety, the pledge, payment, compensation, assignment of debt, loan, and undue payments. The first eleven chapters of the fourth book deal with different kinds of actions, discussing in the meantime also the rules regarding the ways of acquiring property and usufruct. The next eight chapters deal with criminal law.[61]

Through the work of Honterus, the influence of Roman law in the Saxon-inhabited regions grew, reaching almost full reception. The statute of the Saxons

59 http://real-r.mtak.hu/103/ (last accessed: 20.06.2019).
60 P. Szabó 1999. 25, 2001. 28–54.
61 Nagy 1962. 219; P. Szabó 1999. 29.

became the only legal norm in Transylvania in which *ius commune* appears as a (secondary) source of subsidiary law.[62]

In the interest of unifying judicial practice and taking into account the specifics of the Saxon nation, Thomas Bomelius (?–1592), councillor of the city of Sibiu and notary of the General Assembly of the Saxons,[63] prepared – in both German and Latin – a textbook of law consisting of 30 articles, titled *Statuta iurium municipialum civitatis Cibiniensium reliquarumque civitatum et universorum Saxonum Transilvaniae*. Although his work did not appear in printed form, its handwritten version was used in the course of jurisdiction.[64]

Bomelius's work was later used by Matthias Fronius (1522–1588), member of the Senate of the City of Braşov.[65] Son of patricians from Braşov, he studied at Wittenberg and Frankfurt am Oder, later becoming a lecturer in science in the school of Honterus in Braşov and finally notary in the city. Based on the request received from the Saxon University (a body of self-government and collective leadership of the Saxon community, not an educational institution), until 1570, he completed his work with the title *Statuta iurium municipalium Saxonum in Transilvania, Der Sachen inn Siebenbürgen. Statua, oder eygen Landrecht*, which followed the structure of Justinian's Institutions[66] and was confirmed as law by Stephen Báthory in February 1583, being published in the same year in both Latin and in German. The statute of the Saxons in Transylvania, composed of four parts and 31 titles, remained in force for almost three centuries, up until 1853, being repealed only due to the entry into force of the Austrian Civil Code.[67]

8.2. The Law Pertaining to Persons

Owing to the privileges granted to the Saxons, they could not become either serfs or nobles in principle. Thus, the wealthier Saxons were considered as belonging within the burgher estate, even if in reality only the Saxons who lived in fortified cities ('burg' in German) had this name within their community. The inhabitants of the villages are usually mentioned by historical sources as being peasants. However, as free smallholders, they had rights identical to those of the burgher inhabitants of the cities.

Saxon priests tried to prevent the spread of Hungarian customs among their parishioners, wearing hair and clothes in the Hungarian style being, for example, completely banned.[68]

62 Zlinszky 2007.
63 Gernot 2006. 137–141.
64 P. Szabó 1999. 38; Földesi 2010. 116.
65 Derzsi 2017. 43.
66 Bónis 1972. 59–140.
67 Hermann 2013. 43–44.
68 Pukánszky 1936. 462.

The Saxon University allowed the establishment of guilds, controlling their operations and setting the price of their products.[69]

8.3. The Law Pertaining to Immovable Property

The territories inhabited by the Saxons remained the property of the Holy Crown, for this reason bearing the name of the 'King's Land'. When the Saxons endeavoured to use the name 'Land of the Saxons' in their diplomas, Maria Theresa Queen of Austria (1717–1780) warned them by issuing the following instruction to her gubernatorial office: 'We note with sadness that the Saxon nation claims property and inheritance over Our Crown's Land, inhabited by it. Express to that people in our name our special displeasure with such audacity.'[70] The land therefore belonged to the Hungarian Crown, but the Saxon community possessed this territory collectively.

The land was cultivated jointly by the Saxon peasants; moreover, the commune established the type of crops that could be cultivated in a certain area in accordance with certain compulsory rules. Feudal power relations did not develop in this territory, the agrarian population of the villages rather accepting the authority of the cities. This form of legally regulated agriculture (*Flurzwang*) did not sufficiently encourage agricultural production, severely limiting the free initiative of the owner, instead strengthening the cohesion of the Saxons, who were thus not divided into mutually hostile social strata.

8.4. The Law of Obligations

In the territories inhabited by the Saxons, Werbőczy's *Tripartitum* was not used, but in the sale and purchase of land relatives and neighbours were still considered to benefit from a right of pre-emption. They had to be granted priority at the purchase of land (*Saxon Statute*, Book III, Article 6, paragraph 7).

At the sale and purchase of immovables, strict conditions were set: 1° the seller and the buyer had to indicate by contract the land sold and the sale price established by the parties, 2° the contract for sale had to be published three times at the place where the land sold was located, 3° then followed the Almeschtrinken (drinking to the blessing of the contracting parties) and induction into possession in the presence of neighbours (*immissio*, *statutio*). At this point, it was still possible to oppose the sale. Those who were not announced of the sale still had the opportunity to claim the right to pre-emption within one year (*Saxon Statute*, Book III, Article 6, paragraphs 5–8).

69 Hermann 2013. 43–44.
70 Orbán 1870. 15.

8.5. Inheritance Law

As within the matrimonial regime of community property used by the Saxons a share of 2/3 of the common property belonged to the husband and a share of 1/3 to the wife, this proportion was used to liquidate the community property also in the field of inheritance law. In matters of legal inheritance, in the case of descendants as heirs, their sex and lineage did not have any significance, each descendant of equal degree having identical rights of succession. Customary law was applied for centuries in the matter of sharing (partitioning) of the estate, the house returning into the property of the youngest son subsequent to partition. If there were no male descendants, then the youngest daughter inherited the house, with the obligation of compensation to the other coheirs for their shares of inheritance in it. The lands outside the villages and the pasture lands were divided proportionally between the heirs, but in the case of lands under the administration of towns and cities the youngest child was usually excluded because s/he would inherit the house.

During this period, Saxon law was characterized by the specific institution – then scarcely known in foreign legislation – of the legal reserve of certain heirs: the legal share of the descendants' inheritance could not be infringed upon by testamentary dispositions, this quota being composed of 2/3 of the estate left by *de cuius*. Saxons made no difference between the property inherited from an ancestor or acquired during the life of *de cuius*. As a consequence, they did not limit the right of *de cuius* to dispose of either category of property by will. In the absence of heirs (in case of vacant inheritance), the property right would be inherited by the community. Forests and pastures were always jointly utilized by the community.[71]

9. The Private Law of the Romanians According to Romanian Legal Literature

9.1. Family Law

Society in the Middle Ages and at the beginning of the Modern Age was built on a series of legal relationships based on the family. Thus, family relations of kinship (natural and civil, resulting from adoption and taking into the family as a brother, as well as those created by marriage) formed the basis of social interaction in those times. According to the requirements of the time, the system of organizing kinship relations was constituted by patrilineality in Transylvania too. The status of the descendant born out of wedlock was inferior to that of the

71 Wenzel 1863. 366.

one born of marriage. In order to protect orphans and widows, the institutions of guardianship and curatorship played a significant role, being thoroughly regulated and often enforced – even in the absence of a Romanian term specific to these in this period – also among the population of Romanians of Transylvania.[72]

In order to create civil kinship relations, the Transylvanian legal system knew the institution of 'taking as a son' (adoption) also among Romanians. However, 'taking as a brother' or 'taking as a sister' (*adelphopoiesis*, *adelphopoiia*), thereby creating civil kinship of brotherhood between the parties (including in the form of the brotherhood by the cross – as a result of a religious ceremony –, known also in Moldova and Wallachia, and in the form of estate brotherhood – joint cultivation of the estate – in Wallachia), were also practised. While adoption had as its main purpose the transmission of title and fortune to the adoptee, *adelphopoiesis* (*adelphopoiia*) was meant to increase the sentiment of solidarity between brothers or sisters, especially by conferring mutual inheritance rights on the parties and by allowing the brother to obtain rights over communal property, thereby eluding any rules that would have excluded this possibility.[73] In addition to attracting the extension of parental power over the legitimized descendant, legitimation of the child born out of wedlock (through subsequent marriage with the mother, by the rescript issued by the prince or by mercy of the Pope) conferred on him the rights of a descendant from legally concluded marriage by virtue of birth.[74]

The foundation of the family was marriage, preceded by the formality of engagement. Regarding this institution, the resolutions of the Council of Trent (1545–1563) took effect in Transylvania including among the faithful of the Christian Orthodox denomination. Requirements for the validity of marriage manifested by the precondition of mutual consent expressed in solemn form before the Church (before three members of the clergy in the case of the Christian Orthodox rite) and the requirement to utter the vow were meant to ensure the legality and publicity of this institution.[75] Impediments to marriage (old age, kinship and affinity to varying degrees, coercion, error, monastic vows, difference of religion, bigamy) remained governed by canon law, complemented by the requirements of publicity imposed by the Lateran Council (1215).

Giving a dowry was an essential element of marriage and had certain peculiarities. Among Romanians, both customs and written law regulated this institution. Such a custom worth mentioning here is that in certain parts of Transylvania it was usual not to give land as dowry but instead movable property, according to the provisions of old Romanian customary law (*iure Valache*

72 Hanga–Marcu 1980. 491–492.
73 Hanga–Marcu 1980. 502–503.
74 Hanga–Marcu 1980. 503–504, 513.
75 Hanga–Marcu 1980. 507.

requirente). In the written law, wedding gifts, paraphernalia (*res parafernales*) had a special property regime: it was not possible to take them back by those who had provided the dowry, and the right of disposal over these goods was governed by the rules pertaining to property jointly held by the owners (in this case, the spouses). The literature states that the *douaire* (*dotalitium*) was also practised – in this case, according to Hungarian law.[76]

During the period under review, the family was specifically governed by multiple regimes of subordination: of the wife to the husband and of the whole family to the head of the family (paternal power).[77]

Unlike in the extra-Carpathian regions, where both customary law and written law allowed the divorce in certain situations (in the latter case by sending a letter of separation), in Transylvania, divorce was prohibited under the regime of Catholic canon law, being allowed only after the Reform and only for members of Protestant denominations. Using the peculiarity of Transylvania in terms of many different legal norms applicable to the institution of divorce at the same time (Protestant denominations enjoying different regulations both among themselves and towards Catholics), situations were known under the name of 'Transylvanian marriage', in which members of the Austrian aristocracy converted to Unitarianism in order to marry according to the canon law of the Unitarian Church, thereby reserving themselves the possibility of divorce, after which they re-converted to Catholicism.[78]

9.2. The Law of Obligations

The development of the law of obligations is not fully compatible with the stage of complexity of economic exchange during the Middle Ages and the beginning of the Modern Age. In the Transylvanian historical space, this branch of law experienced a stagnation during the period of 'natural economy',[79] in which trade relations were largely limited to the division of wealth and noble titles by the Crown and after 1540 by the Prince. Among the contracts regarding property law, donation was the fundamental legal operation of the feudal economy, which concerned the donation of both movables of a lesser value and of immovables of considerable value. Donations could be grouped into two categories: those performed by subjects of private law and those granted by the king – royal gifts – or prince – princely gifts. The crown was considered to possess eminent domain (*dominium eminens*) over all land in the country, so that even Werbőczy considered that all immovable property come from donations granted by the

76 Hanga–Marcu 1980. 510–511, 531.
77 Hanga–Marcu 1980. 512.
78 Hanga–Marcu 1980. 515, 517.
79 Hanga–Marcu 1980. 560.

Crown (also regarding a small number of Romanians in Transylvania). The deed of donation sometimes included severe limitations in what concerns the right of disposal over immovable property. Among the population of Romanians in Transylvania, of more modest material means than the inhabitants of the extra-Carpathian regions, donations of movable and immovable property to the church were of lesser importance. The donations were made mostly between individuals; the institution of accounting for donations as an advance of the inheritance of the donee thereby reducing the share of the donee upon partition of the estate was known as well as the possibility of exempting the donee from such treatment.[80]

> In feudal Transylvania, the sale and purchase contract was the most important and most frequently used of contracts between members of the noble class, between townspeople, and among the peasants alike. By the former, in order to distinguish it from the pledge, which was considered a temporary sale, it was called an eternal contract (*perennalis fassio*).[81]

The sale of real estate was strongly formalized, the conclusion of a contract in writing being necessary before the so-called authentic places (places of attestation). In the case of the sale of donated property, it took place by the permission contained in the deed of donation or with the consent of the donor (the prince, the Crown), and the property could only be alienated after justification of the reason provided that the alienation operation was rational from an economic point of view. In terms of participation in acts of sale and purchase, the Romanian nobility in Transylvania enjoyed the rights conferred on the nobility of other nations.[82]

The free peasants living in the 'King's Land' had the right to alienate their estates, which was prohibited, however, in the case of serfs who had no right of disposition over their respective lots.[83]

The economic circulation of property between the subjects of private law was based largely on exchange (barter) agreements, which were prevalent in the case of both movable and immovable property (barters having as their objects serfs, i.e. human beings, are also documented).

Tripartitum, when regulating exchange, provides the implicit guarantee against eviction,[84] this rule indicating that, in all likelihood, there were situations of legal uncertainty in which the co-permutants were evicted from the possession of the property thus acquired. Fraudulent or simulated exchanges could be revoked by means of judicial proceedings.[85]

80 Hanga–Marcu 1980. 561–562.
81 Hanga–Marcu 1980. 568.
82 Hanga–Marcu 1980. 568–569.
83 Hanga–Marcu 1980. 569.
84 Hanga–Marcu 1980. 578–580.
85 Hanga–Marcu 1980. 562.

Regulated in Transylvania as early as the 11th century, the loan underwent a significant development during the Middle Ages and the Early Modern Age. Initially conditioned by the establishment of a guarantee (the pledge) over the property of the debtor, by the 13th century, this guarantee was transformed from a condition of validity of the loan agreement to a credit insurance method. Interest on loans had been allowed since the time of King Béla IV of Hungary (1206–1270), some limitations to its amount being introduced later on.[86]

The lease (*locatio-conductio*) was less frequently used in Transylvania in the time period examined, both in the form of leasing goods and the lease of services (labour), the latter contract usually taking the form of an enterprise contract (*locatio operis faciendi*) for specialized works (e.g. erecting stone buildings). The lease in its various forms (of land, the fiscal lease regarding rights to collect taxes and customs duties, of allodial property as, for example, pubs, inns, fairs, mines) was practised in Transylvania, there being sufficient documentary evidence for the attestation of the existence of numerous such operations, which were regulated according to the specific area in which they were conducted.[87] As a way of formally demonstrating the birth of the agreement by consenting wills of the parties, the Almeschtrinken (in the case of property transfers having an immovable object) as well as the custom of the handshake (using the right hand) were practised in Transylvania among Romanians as well.[88]

Obligations born were most often secured by a pledge, which took the form of handing a movable or an immovable property item to the creditor. Regardless of the material object used for the constitution of collateral, the pledge usually involved the dispossession of the guarantor of the object intended for the guarantee during the existence of the debt.[89] Thus, even immovable property was handed over to the creditors to be used for the duration of the existence of the obligation, resulting in a pledge.

10. Conclusions

As we have seen in the period examined, Transylvanian private law gradually diverged from that of the Kingdom of Hungary, and modernizing tendencies manifested themselves. These built in part on the result of earlier efforts by Werbőczy, *Tripartitum* being applied, but also complemented earlier norms by new sources of codified legislation.

86 Hanga–Marcu 1980. 564.
87 Hanga–Marcu 1980. 570.
88 Hanga–Marcu 1980. 576–577.
89 Hanga–Marcu 1980. 578.

Therefore, this region followed the European trend towards the compilation and consolidation of legal norms prevalent at the time. A convergence to the norms of the Habsburg Monarchy may also be detected once domination of this entity was extended to Transylvania in the latter half of the 17th century.

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*** *Approbatae constitutiones regni Transylvaniae et partium Hungariae eidem annexarum, ex articulis ab anno millesimo quingentesimo quadragesimo ad praesentem huncusque millesimum sexcentesimum quinquagesimum tertium conclusae, compilatae; ac primum quidem per dominos consiliarios revisae, tandemque in generali dominorum regnicolarum, ex edicto... principis... Georgii Rakoci... in civitatem Albam Juliam ad diem decimumquintum mensis Januarii anni praesentis congregatorum conventu publice relectae, intermixtis etiam constitutionibus sub eadem diaeta editis* Varadini, apud Abrahamum Kertesz Szenciensem, MDCLIII.

*** *Compilatae constitutiones Regni Transylvaniae et Partium Hungariae eidem annexarum. Ex articulis ab anno millesimo sexcentesimo quinquagesimo quarto, ad praesentem huncusque millesimum sexcentesimum sexagesimum nonum conclusis excerptae*. Claudiopoli, apud Michaelem Szentyel Veresegyhazi, MDCLXXI.

*** *Verböczi István törvény könyvének compendiuma, melly közönséges magyar-versekre formáltatván iratott, és ki-adatott Homord Sz. Pali N. Ferencz által*. 1699. Kolozsvár.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 307–345

DOI: 10.47745/AUSLEG.2020.9.2.06

Private Law in Transylvania as Part of the Habsburg Monarchy

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Abstract. In the course of our following study, we present the transformation of feudal institutions of private law in force in Transylvania in the early modern period and their modernization during the time when this historical region was under the control of the Habsburg Monarchy both in its absolutist (imperial) and dualist forms. We show that the sources of private law in this period were initially those enacted during the Middle Ages, which were gradually updated by the enlightened absolutist Habsburg rulers, resulting in norms fit for the bourgeois period of capitalist development at the end of the 19th century. We observe that law applicable to legal capacity and its exercise by natural persons and to families gradually developed to undo the feudal bonds and incapacities prevalent during the Middle Ages. The same was true for property law, as well as the law which governed inheritance. Also, a previously less significant field of law, commercial law, evolved spectacularly in this era, creating the framework for modern economic exchange, vibrant trade, and security of credit. The perspectives of Romanian legal history literature regarding this era are also presented.

Keywords: legal history, Transylvania, Habsburg Monarchy, dual monarchy, modernization, Romania

1. The Sources of Law

The diploma signed by Emperor Leopold I in the month of October 1690 and solemnly proclaimed on 4 December 1691 (*Diploma Leopoldinum*) determined the integration and positioning of Transylvania within the Habsburg Empire from the point of view of public law. Legislative power was still vested in the Diet with a single chamber, while executive duties were performed by the government elected by the Diet. Its members and the governor who led the executive had to be confirmed in their positions by the emperor. Administration of the territory

of Transylvania remained in the hands of the Hungarian counties as well as the Szekler and Saxon seats.

The *Diploma Leopoldinum* mainly regulated the public law status of Transylvania within the Habsburg Empire, yet some of its provisions confirmed the continued existence of some institutions of private law. This also applied to sources of law in force in Transylvania because from the point of view of the development of private law the Diploma did not constitute the boundary between various periods of regulation. Relationships between people remained defined during the period of the Habsburg Empire by the sources of law of previous centuries. The two main sources of law were constituted by customary law and statutory law; daily judicial practice was also based in Transylvania on István Werbőczy's *Tripartitum* and on collections of laws in force, the *Approbatae Constitutiones* and the *Compilatae Constitutiones*. This was also confirmed by the *Diploma Leopoldinum*. Empress Maria Theresa also ordered the collection of norms adopted later, thus giving rise to the *Articuli Novellares* ('the New Articles'). Among the members of the Szekler community as well as among the Saxons, however, the norms recorded in their own statutes continued to regulate private law relationships, of which the laws of the villages acquired a special significance for the Szeklers.[1]

> As the statutes and laws that have long been confirmed by the customs of Sepsiszemerjafalva are recorded in part in writing and partially corroborated usu antiquo, for this reason we proceeded comuni voto et unanimi consensu, so that our beautiful ordinances and the old laws accepted by our ancestors when ratio status ac temporis allows, to confirm them both untouched and unaltered [...] (Szemerjafalva, 1771)[2]

In addition to confirming the old sources of law, the Diploma also confirmed the old donations of estates made by kings and princes of Transylvania and ensured that the assets which fell to the royal treasury with the title of extinction of a family on the male lineage can be donated exclusively to worthy inhabitants of Transylvania (those 'of the land').

Preservation of the sources of law and privileges in force in Transylvania – with the exception of the right to insurrection – was confirmed by Leopold II in his inaugural diploma, its content being summarized in Act II of 1790.

> [...] all common freedoms, immunities, privileges and local government bylaws, common rights, laws and customs [...] of our ancient kings and ancestors of illustrious memory permitted and confirmed [...] of Hungary

1 Dósa 1861a, Haller 1865, Imreh 1983.

2 Imreh 1983. 16. Translation by the author. All translations in this work of non-English quotations are by the author unless otherwise specified in the footnotes.

> and the Parts annexed to it [...] we will keep with strength and sanctity [...] (Act II of 1790)

Although the Diet convened in 1790, similar to the case of Hungary, the so-called 'regnicolar commissions' were constituted, but they did not adopt significant measures affecting private law. Acts XVI and XVII of 1791 provided that the nobles who lived on the territory of Transylvania would have the same rights as the nobles of Hungary.

> [...] on the status and freedoms of the nobles and sons of the homeland, the principle of reciprocity, like nobility, will continue to apply as in Hungary also here in Transylvania, and the nobility of Transylvania in noble Hungary shall be considered without any impediment that could be invoked as veritable members of the same Crown and as beneficiaries of the same noble privileges.

Act XXVI of 1791 ordered the cessation of obligations of serfs in terms of disposition over their persons, and if they fulfilled the services due to the lord the right to free relocation was also ensured for them. Other property issues linked to feudal property were debated only by the Diet of 1847, after the Hungarian Diet of 1840 had allowed the voluntary release of serfs, and Miklós Wesselényi published his work *On Prejudices*, in which he also demanded the abolition of feudal duties for the Transylvanian serfs.

In the matter of marriages, Act XXXIV of 1791 kept the right of the secular authorities to proceed, and Act LII provided for the care of orphans and guardianship. By Act LIII of 1791, the freedom of religion was confirmed as a privilege attributed by Leopold I to the four accepted denominations (Catholics, Lutherans, Reformed Protestants, and Unitarians). Significant changes in the development of private law intervened only in 1848, when the Diet convened on 29 May 1848 pronounced by Act I the union of Transylvania with Hungary and through the same law enshrined full equality of rights between citizens.

> [...] in the homeland of Hungary, the equal rights of all inhabitants is stipulated and is in force and in the same way as here with regard to all the inhabitants of our homeland, without distinction of nation, language, and religion, stands recognized as an eternal principle and unchanged, and all contrary laws thereby are declared repealed.

Through this law, 'the estates abrogated those privileges which they enjoyed under the old feudal laws'.[3]

3 Egyed 2001.

In connection with equality before the law stood also the declaration by law of religious freedom (Act IX), freedom of the press (Act VIII), equal bearing of fiscal burdens owed to the public budget (the principle of fiscal equality, Act VII), and to all this was added the liberation of serfs (Act IV). According to the last normative act, including in Transylvania, the institution known as *avicitas* (ius aviticum), which provided for family land ownership in the form of the property of the *gens* – a whole feudal system for the limitation of property rights over property inherited from ancestors –, was abolished, the feudal property rights being themselves repealed, and the system of obligations of the serf to the lord was also abolished as a result of the liberation of the serfs. In the Hungarian counties of Transylvania, in the provinces of the Szeklers and Saxons, all obligations in kind imposed on serfs were repealed, and – as was provided by law – the households used by them were transferred to the ownership of liberated serfs. Compensation of landlords for the liberation of the serfs was to be achieved – similarly to the solution used in Hungary – from public funds. By this measure, the peasantry would have been exempted from the burden of paying any compensation. A special problem consisted in the situation of the *coloni*, who did not have much land which they farmed in their own right but who lived on the domains of the mansion, granted to their use by the lord, because these lots remained in the lord's property, and, despite the fact that the *coloni* became free in their person, they still had to bear the burden of providing work and other benefits in exchange for the use of the lot. Moreover, although they were the owners of the house built on the lot of the landlord, this was not applicable to their ownership of the lot on which their house stood. The *coloni* who lived on the lots subject to the regulation of a Szekler estate faced similar difficulties as the law considered the Szekler estate as equivalent to the domains of the mansion, which could only be used by the *coloni* in a temporary, precarious fashion. (The historical development of the Szekler estate and its legal meaning was described by Ákos Egyed.)[4]

> In the Szeklerland, the Szekler estate (siculica haereditas) is considered the domain of the mansion free of any burden and for this reason – because the wealth of the Szeklers who pay their dues and come under arms most often constitutes, as commonly known, a burden-free Szekler estate – to the coloni who inhabit these lots, the exemption which to other serfs by effect of this law shall extend as soon as it enters into force, shall be extended only in those cases in which [...] the Szekler owners [...] should be unable to prove that the lot or any other land in the hands of their coloni belongs to the Szekler mansion or estate. (Law IV of 1848, paragraph 6)

4 Egyed 2016. 348–367.

Laws adopted by the Cluj Diet and promulgated by the emperor in 1848 ensured equality of rights, religious freedom and, by removing the regime of feudal property, have established the principle of sanctity and inviolability of the right to property for the nobility and peasantry alike. Formation of the state and a bourgeois society created an opportunity for the transformation of legal relations under private law in accordance with this model. The problem was caused by the lack, both in Hungary and in Transylvania, of a code that brings together the main rules of civil law and that the legal institutions that formed the basis of feudal society had to be replaced by new rules.

Following the proclamation of the union, it would have fallen to the Diet of Hungary – in accordance with the provisions of Act XV of 1848 – to require the competent ministry to draft a bill to regulate legal relations under private law. The period of the Revolution and that of the War of Independence of 1848, however, did not allow the peaceful finalization of the codification, so the solution to this problem was given by the Austrian imperial court following the crushing of the independence movement. Although Ignác Frank[5] was asked to prepare a proposal to this effect, he did not accept the task. Following his refusal, the court decided to forcibly apply to Hungary (as of 1 May 1853) and to Transylvania (starting with 1 September 1853) the Austrian Civil Code (ABGB) adopted in 1811, which had already been in force in the hereditary provinces of Austria since 1812. Thus, the imposition of foreign law to these territories was achieved. But not even the entry into force of the ABGB did in itself solve all problems. Although the ABGB's structure corresponded to the customary regulation of private law applicable to property relationships, the rules that governed property and inheritance relations, still characterized by feudal concepts, could not be immediately replaced by new norms. Also, the ABGB did not produce retroactive effects, and therefore transitional measures were required, which were intended to be implemented by the so-called *Patent on the Abolition of the Property of the Gens* (1852). Through this, not only was the repeal of the feudal limitations of the right of disposition in matters of inheritance and property confirmed, but the system of donations from the Crown to the nobility was also abolished. By these measures, the limitations of the right of disposal over the property of the (feudal) *gens* could be finally supressed, but the ABGB maintained the institution of perpetual *fideicommissary substitution*, a form of trust (*fideicommissum familiae*) which prevented the alienation of property from the family estate by the heirs; this led to significant difficulties in Hungary, but not in Transylvania.

> In our country, the desire to create a Civil Code takes birth in the midst of the reform movements of the 1840s. After the legislature of 1848 had overthrown the feudal state and created Hungary based on the principle

5 Horváth 1993.

> of equal rights, Act XV of 1848 ordered the Minister of Justice to elaborate on the basis of the complete removal of feudal restrictions and to propose to the Diet a Civil Code. Following the suppression of the War of Independence, Austrian absolutism transformed our legal life into a *tabula rasa*, imposing the entry into force of the Austrian Civil Code and the Patent on Land Registration.[6]

Due to the desire of the bourgeois economy to achieve freedom of circulation of immovable property, old pledge contracts on immovables had to be deprived of their effects. Only so was it possible to determine exactly who the owner of a certain immovable was. The Patent for the Abolition of the Property of the Gens retained the effects of pledge contracts when the loans had not yet reached maturity, but if the duration of the contract of pledge had already expired before the entry into force of the ABGB, but no more than 10 years had elapsed, the debtor who owned the property had to declare within one year from the entry into force of the Patent whether or not he wanted to maintain his ownership of the immovable or relinquish this right in favour of the creditor. If more than 10 years had elapsed from the deadline set in the contract, the right of ownership on the immovable was transmitted by law to the creditor, the pledge extinguishing itself in this way.[7]

All this was necessary for the rules of the ABGB to become applicable in practice in Hungary and in Transylvania.

Following the issuance of the so-called October Diploma of 1860, the Palatine of Hungary (the head justice of the Crown), György Apponyi, convened in 1861 what was later called the Conference of the Palatine. In addition to restoring the rules of old Hungarian law, the collective thus established received the task to coordinate these rules with the laws of 1848 and those adopted during the time of Austrian neo-absolutism. The result of this work was the Temporary Rules of Jurisdiction, which had the effect of repealing the ABGB in Hungary, but it provided that in any matter relevant to the land registry the rules set forth by the ABGB had to be kept in force – only temporarily, until the completion of the Hungarian Civil Code (Temporary Rules of Jurisdiction, paragraph 21).

All this was not applicable to Transylvania, where the ABGB remained in force; and, moreover, Act XLIII of 1868 confirmed the Ordinance published on 27 June 1867, which provided that 'jurisdictional and judicial rules currently in force in Transylvania are to be maintained in force temporarily, and county, rural, and Szekler seat courts and judicial authorities are required to continue their activity in accordance with them.'[8]

6 Kiss Albert előadmánya a polgári törvénykönyv tervezetéről 1914.
7 Tóth 1854.
8 Menyhárt 1914a. 8.

All this had the effect of leading to the development of private law in Transylvania according to the framework of the ABGB, which entered into force in 1853, with the reservation that following the Austro-Hungarian compromise of 1867, if the National Assembly regulated any matter of private law, the provisions of Hungarian law would prevail over those contained in the ABGB – for this reason, in Transylvania – among others, the rules of: Act XX of 1877 on Guardianship and Curatorship, Trade Act XXXVII of 1875, Act XVI of 1876 on the Formal Requirements [for the Validity] of Wills, Act XVI of 1884 on Copyright, Act XXXIII of 1894 on Matrimonial Law, and Act XXV of 1896 on the Property of the *Coloni* Located on the Estates of the Mansion and on Lots Assimilated Thereto. From the point of view of the study of the sources of law, this modus of regulation resulted in the achievement on the territory of Transylvania of a reception of foreign rules of law, and in addition to this process, beginning in 1867, Hungarian laws governing certain institutions of private law also came into force. No wonder that, including in Transylvania, the urgency of codifying Hungarian private law was increasingly invoked, and in 1913, when the second draft of the Code of Private Law was finalized, Gáspár Menyhárt, professor at the University of Cluj, committed himself to preparing the scientific analysis of the Austrian Civil Code.[9] Unfortunately, the events of the First World War changed everything, the work on the Hungarian Civil Code was not completed, and the ABGB remained in force in Transylvania.

2. The Law Applicable to Individuals and Families

Following the abolition of feudal relations, some factors which had influenced legal capacity disappeared and the principle according to which any human being as a subject of law has full legal capacity, which exists between the moment of birth and the moment of death, became generally accepted. In some cases, the law would protect the foetus itself.

Feudal private law conditioned the establishment of the fact of death by the existence of a corpse. The countless cases prevalent in daily judicial practice, when, for example, a spouse drafted in the army did not return from the battlefield, demanded relief from under this regulation by legislative means. This improvement has occurred in the form of the procedure for the judicial declaration of death, regulated by the ABGB, the regulation of which was taken over into Hungarian law. The procedure could be initiated at the district court established according to the last domicile of the missing person by any person who justified legitimate interest. The district court then published an announcement on the search for the missing person, and if it remained without result, the last

9 Menyhárt 1914b.

known place of residence and the last known date on which the person was known to have been alive were set as the place and date of presumed death. The initiation of the procedure could take place at different times depending on the circumstances of the disappearance and the age of the missing person. The establishment of death by court only instituted a relative presumption of death which could later be overturned if it was proven inaccurate (ABGB paragraph 24, paragraphs 112–114).[10]

Exercise of legal capacity was influenced by several factors as follows:

Age: children under the age of seven did not have the exercise of any legal capacity, while minors under the age of 14 were considered to have restricted exercise of legal capacity as being underage, but under Austrian law they already had the right to acquire property over immovables and accept donations if they were not granted under any encumbrance a patrimonial value. Minors aged 14 years or older were considered pubescents and could hire an attorney, while upon reaching the age of 18 years consent to a valid authentic will could be granted.[11] Natural persons were considered to be of age, i.e. adults, upon reaching the age of 24 years.

Discernment: The mentally insane lacked the ability to exercise their legal capacity, but Austrian law knew the doctrine of intermittent *lucid intervals* (*lucidum intervallum*), according to which the person stricken with insanity would still have the exercise of legal capacity during the so-called moments of lucidity.

Honour: conviction for a criminal offence that attracted the penalty of infamy resulted in loss of the exercise of legal capacity. In the second half of the 19th century, laws no longer provided that this reason should result in loss of the exercise of legal capacity.

Naturalization and citizenship: a child born of legally concluded marriage acquired the citizenship of his/her father by birth, while a child born out of wedlock acquired that of his/her mother in the same way. Foreigners on the territory of Transylvania could acquire citizenship by grace of the prince and with the approval granted by the Diet by means of naturalization. Subsequently, the acquisition of Hungarian citizenship was regulated by Act L of 1879, whose significant novelty was the imposition for the acquisition of Hungarian citizenship of proof of the place of residence, instituting the necessity of having a residence in the country as a censitary condition for citizenship (thereby denying political rights to non-residents).

For people without the exercise of their legal capacity or with this exercise restricted in practice, a guardian or curator could be appointed, including according to old customary law. Hungarian law distinguishes between the guardian appointed by means of a will, the guardian established by law, and the guardian

10 Haller 1865. 32, 62–63.

11 Dósa 1861b. 7.

appointed by the authorities. If the father of the minor appointed a guardian for him/her by his will, taking this designation into consideration was mandatory. If such an appointment had not taken place, the child's legal guardians could be selected from the father's male relatives, who were followed by the mother's male relatives. If a legal guardian could not be appointed in this way, the court of guardianship established according to the domicile of the minor appointed the guardian. Guardians were required to submit an annual report. The report of the guardian[12] was regulated initially in accordance with the rules developed over the preceding centuries in the matter, by Act LII of 1791, which was subsequently amended according to the requirements of the bourgeois era by Act XX of 1877.

Act of 1877 also provided for adoption, continuing the ABGB's normative tradition in this area. In the sphere of law applicable to the nobility, based on customary law, the institution of 'adoption as a son' and 'adoption as a brother' were both known, which mainly allowed inheritance of the nobleman's estate. The adoption occurred through the contract concluded between adopter and adoptee. If the adoptee was a minor, the contract could be concluded for him/her by his/her legal representative. The ABGB permitted the institution of adoption both of the minor and of the adult. As a limiting condition, it was provided that outside the situation in which the spouses adopted together, any natural person was allowed to adopt only one other person. The adopter had to be at least 50 years old, and there had to be an age difference of at least 16 years between him and the adopted. The contract of adoption had to stipulate if the adoptee would keep his/her previously used family name or assume the surname of the adoptive parent. The adoptee would maintain kinship with his/her blood relatives, a significant aspect mainly from the perspective of his inheritance rights. The adoptee acquired civil kinship through adoption exclusively with the adopter. The adopter had an obligation to raise, maintain, and educate the adopted person.

In connection with these institutions of family law – mainly in the interest of the protection of minors and orphans –, a special role was fulfilled by the guardianship courts. Following the entry into force of the Act on Administrative-Judicial Authorities (Act XLII of 1870), all counties and cities that had the right to render decisions as administrative jurisdictions had to organize guardianship courts (dependency courts), to which a particularly broad set of attributes had been given. Their duties did not consist only in the appointment of guardians and curators but also in controlling their activity and in the insurance as well as the supervision of the orphans' estates. These courts also acted in matters that concerned the inheritance rights of orphans, and as a rule the guardianship courts represented the interests of orphans before judicial courts.

In the field of family law relations, some of the most significant institutions are those of matrimonial law. 'Marriage is the legal association of two persons

12 Dósa 1861b. 86–87.

of the opposite sex with the purpose of giving birth to and raising children.'[13] In Transylvania, the coexistence the four religions (denominations) which were legally accepted resulted in the applicability of the matrimonial law of the Reformed, the Lutheran, and Unitarian churches in addition to the ecclesiastical law of the Catholic Church. Moreover, church marriage law was influenced by the Patent on Marriage issued by Emperor Joseph II in 1786. In the imperial patent which proclaims the entry into force of the ABGB, the law of Protestant denominations was recognized, so that the matrimonial law contained in the ABGB referred exclusively to Roman Catholic marriage and to that of the Greek (Byzantine) rite denominations not united with the Catholic Church (mainly the Eastern Orthodox Church).

According to the canon law of the Roman Catholic Church, marriage is a sacrament, and for this reason it cannot be dissolved, while Protestant denominations viewed marriage as a contract concluded between two parties. The marriage covenant was also protected by these denominations, but undoing it was considered possible in certain circumstances provided by law.

In the case of mixed marriages, however, the Roman Catholic Church considered as valid only those marriages that have been officiated before the competent Catholic parish priest. In Transylvania, the denomination of children born of mixed marriages was determined by Act LVII of 1791, according to which boys followed the denomination of the father and girls that of the mother, this rule being later confirmed by Act LIII of 1868.

According to tradition, marriage could be preceded by the conclusion of an engagement, but the ABGB no longer attributed any legal effect to engagement, wherefore marriage could not be forcibly concluded by invoking it.

The conditions of validity of the marriage were regulated similarly by the different denominations themselves. Grounds for ineffectiveness of the marriage in the form of annulment, according to the rules established at the Council of Trent, remained the following: kinship in a descending line, collateral kinship up to and including the second degree (third- or fourth-degree collateral relatives could marry on the basis of a special dispensation), affinity relationships between in-laws, failure to reach the minimum age set for marriage, lack of discernment, the monastic oath, if one party was an ordained priest, the existence of a previous marriage not terminated by annulment, divorce or the death of the spouse. Christians could not marry non-Christians.

Grounds for ineffectiveness of the marriage in the form of relative nullity (reasons of annulment possible to invoke only by the spouses) were constituted by coercion, in the meaning of threat or violence, by deceit (fraud), and by error.

In addition to these, canon law also provided for so-called prohibitions, which, however, usually did not result in the annulment of the marriage. Marriage was

13 Dósa 1861b. 22.

prohibited during a fast, and the widow or widower could not enter into a new marriage in the 10 months following the termination of the previous marriage due to the death of the spouse.[14] These grounds were traditionally accepted by Protestant denominations as being also reasons for annulment of the marriage at the request of any of the spouses.

Because the Roman Catholic Church could not dissolve a validly concluded marriage covenant, the institution of separation from bed and board (*separatio a mensa et thoro*) for when the relations of the married parties were significantly altered was provided. By comparison, Protestant denominations did not qualify marriage to be a sacrament and considered the covenant thus created subject to dissolution in court in cases strictly provided for by law. These reasons were still stipulated by Emperor Joseph II in his Patent on Marriages, also adopted by the Diet of 1790 regarding Protestant denominations. These cases of dissolution of marriage were adultery and abandonment of the spouse, which constituted the oldest reasons, to which later were added irreconcilable hatred, serious crimes committed, or unjustified violence exercised against the spouse.[15]

Protestant denominations provided that before initiation of the civil procedure that results in the dissolution of the marriage, the spouses were obliged to appear before the competent pastor who was to try to reconcile them. At the same time, Protestant denominations already utilized the possibility of separation from bed and board, but only for a specified duration. The dissolution of the marriage fell within the jurisdiction of the secular courts, the court being obliged to designate in such cases a so-called marriage advocate ('marriage defence procurator' in the wording of the Patent of 1791).[16]

Act XXXIII of 1894 introduced civil marriage, which entered into force on the entire territory of Transylvania and therefore had to be respected. The marriage was concluded before the officer of the state having jurisdiction according to the domicile of one of the future spouses, who testified in the presence of two witnesses their intention to marry and, following this solemn statement, the officiating officer declared the parties to be married. Lack of the conditions of validity of the marriage provided by law resulted in annulment.

Marriage conducted in this way was considered as a contract between the spouses, and thus it could be dissolved by the courts for the expressly stated reasons provided by law. The act introduced in the matter of dissolution of marriage the principle of guilt, according to which the spouse who had given reason for or otherwise caused the dissolution of the marriage was at fault or, in case of common fault, both spouses had to be declared as being at fault for the dissolution of the marriage. The reasons based on which fault was established

14 Wenzel 1874. 316–328.
15 Dósa 1861b. 53–54.
16 Sztehlo 1885, Kolumbán 2009. 447–465.

were in fact those also recognized by Protestant denominations for dissolution of the marriage: unjustified violence against the spouse, abandonment, adultery, or if one of the spouses committed a crime against the other, for which criminal law provided for a prison sentence of minimum five years or more.

The reasons shown were designated by law as grounds for the unconditional dissolution of marriage, and proof of the existence of one of them required the judge to pronounce the divorce without any margin of appreciation. But the law also provided for reasons to conditionally dissolve the marriage, which allowed the judge to assess whether their seriousness was able to justify divorce. The institution of separation from bed and board was kept for these same situations. If the judge ordered this second measure, the wife was entitled to a so-called temporary alimony for this period regardless of whether or not the subsequent final decision established her guilt in the dissolution of the marriage.

When undoing the covenant of marriage, the court had to declare one or both spouses to be at fault for the divorce, indicating the reason for applying this measure. The judge had to decide at the same time regarding the assignment of minor children of the spouses, if it was the case, and also with regard to the patrimonial relations between the parties and to the bearing of the family name of the former husband by the former wife. In the case of the husband's fault for the dissolution of the marriage, the court also decided with regard to the maintenance and alimony obligation due to the former wife.[17]

As an effect of the ABGB, the institution of community property became generalized in the patrimonial relations between the spouses, according to which any asset acquired by the spouses during marriage, except for those gained by donation or inheritance, was considered the joint property of the spouses. In addition, the spouses had full disposal of certain separate categories of assets, a significant provision especially for women. Feudal private law recognized the husband as the main acquirer of property and expressly listed those titles under which the wife could acquire and dispose of movable or immovable property in her own name. These were the rights over the so-called paraphernalia: the engagement gift, the dowry, the douaire, and the legal reserve of 1/4 over the inheritance of the husband, the *quarta puellaris*.[18] Among the Saxons, joint ownership was previously applied as a general rule.[19]

In the bourgeois age, the norms of matrimonial law also suffered changes because, in addition to the assets held in joint ownership, the spouses could also own personal property separately. At the same time, the institution of dowry was preserved, which consisted of a donation granted to the wife for alleviating the material burdens of marriage. The dowry constituted the personal property of the

17 Grosschmid 1898, 1901.
18 Wenzel 1874. 358.
19 Wenzel 1874. 366.

wife, but the husband exercised the right to dispose of its contents throughout the existence of the marriage. Therefore, the assets which constituted the dowry could be exhausted in their entirety during the existence of the marriage. Following the termination of the marriage, the dowry had to be returned to the wife or her heirs. The dowry was, however, regarded as part of the husband's estate if he preceded the wife in death, thereby reducing the extent of the wife's inheritance rights over that estate by the amount of assets which constituted the remnant of the dowry.

3. Property Law

The ABGB's effects were felt mainly in terms of the regulation of legal relations in the field of property law. Abolition of the system of limitation of the right of disposal over the property of the *gens* liberalized the civil circulation of immovables (real estate) and led to the disappearance of the pledge of immovables, thereby resulting in the clarification of existing real estate relationships in Hungary. For this, however, a crucial institution of immovable property law, the land register was also necessary. Prior to the elaboration of the Patent on Land Registration, the name of the owner and the title under which the property right was acquired over immovables had to be registered in the so-called Books of Instruments, the *Instrumentenbücher* (similar to the Registers of Transcriptions and Inscriptions used under the regime of the Romanian Civil Code of 1864), which registered in chronological order excerpts from titles by which immovable property was transferred.

After the keeping of the land registers was assigned by the provisions of the ABGB to district courts and tribunals, the Patent on Land Registration of 1855 gave jurisdiction to the royal district courts with regard to the keeping of land registers in Hungary too. Judges delegated to the land register had to take a separate examination: in the disciplines of the institutions of material and formal (procedural) law related to land registration. The ABGB-regulated land registers had a decisive significance in the formation of property relations and in the matter of lending. 'It is a well-known truth that in well-organized states land registers form the main precondition for strengthening the security of real estate relations and property security, internal and external commerce, private and public lending, and more so the correct establishment of obligations for contribution to the public budget.'[20]

The very establishment of the land register system had a significant duration because in all cases where possible licensed cadastral engineers had to first prepare a schematic of the immovable and prepare the minutes of registration when performing measurements – because during the initial development of the

20 Herczegh 1900. 2.

land register the system of data organization was set according to the owner (called *Personalfolium*), not according to the lot (a system to be later called *Realfolium*).[21]

During the measurements, immovables located outside of settlements were registered according to their respective owner. Under this procedure, all immovables found in the property of the same person in the constituency of a commune were registered in a single sheet of the land register prepared for that person (the register itself is called the *land book*, *Landbuch* in the German language).[22] This system of land record raised multiple problems because the immovable assets in the property of the same person were physically situated in different locations. One person could own arable land, vineyards, orchards, houses, cellars, etc. If such assets formed legal units subject to a common economic purpose, such as former urbarial property or land affected by the former regime of property of the *gens*, then these were considered in the land book system as a single unitary body of property. A particular difficulty was determining the area of immovables because in different areas of the country the records of the areas of the former urbarial lands were kept in different units of measurement. In places where the old Hungarian acre, with an area of about 1,200–1,400 square fathoms was previously used, the cadastral acre of 1,600 square fathoms was introduced instead.[23] When drawing up the minutes for the registration of immovable property, the name of the locality, the cadastral number of the body of property, the name of the owner, and the elements of the property body according to their local name and their areas had to be recorded while performing measurements in the field.

When drawing up the minutes for registration, an additional problem was caused by the necessity to determine the owner of the property by the agents who drew up these minutes. In practice, it was during this period that a problem arose even after the application of the provisions of the Patent for the Abolition of the Property of the Gens, from the fact that the limitations imposed on the legal circulation of immovable property and the institution of the pledge made it difficult to establish the owners of a real estate. When drawing up the minutes of registration, officials could register as the owner of the property only the person they found during the measurements as being in possession of that property. If the immovable constituted property of the gens in a state of indivision (joint ownership), it was registered as common property co-owned in shares by the heirs, the share of each co-owner being listed separately. If the owner was the creditor secured by a pledge, the ascertaining agent had to record this creditor in the minutes of registration as the owner of the property, while the debtor could state that he wants to exercise his right to repurchase the property. In the latter case, the agents could only record this fact in the minutes. If the person found

21 Kolosváry 1902. 260.
22 Szladits 1937. 235.
23 Zlinszky 1902. 43.

in possession was a tenant, then the landowner was recorded in the minutes, mentioning the lease in favour of the tenant. After drawing up the minutes, the real owner had to state his claims and prove his ownership by the means provided for by law if he was not in possession of the immovable at the time of the first registration, under the sanction of forfeiture of the right of ownership. Exceeding the legal deadline set for performing this – by any owner – resulted in the final registration of the possessor as the owner.

The land book is a system for registering immovable property, which ensures publicity of rights constituted over immovables, with the effect of general opposability, so 'its purpose is: that from it everyone should be able to know the legal status of the property, by which the legal quality of the property is understood, as are its owner, the limits of his right of ownership, and the encumbrances applied to the immovable'.[24] For the system of land books to be able to fulfil this role, certain principles had to be applied consistently, these being the principle of the constitutive character of the registration, the principle of publicity, the principle of specialty, the principle of legality, and the principle of priority of rank. *The principle of constitutive character of registration* means that the right of ownership over an immovable registered in the land books could be acquired or transferred by instruments concluded *inter vivos* exclusively by registration of the new owner (the title would pass to any owner only as an effect of registration). When acquiring the right of ownership over an immovable, of special significance was the fact that *simple consent of the parties to the deed was insufficient to cause the transfer of title on its own*. Property over immovables could be acquired exclusively as an effect of registration. Rights encumbering an immovable – such as an easement or other encumbrance (e.g. immovables transmitted in exchange for maintenance), a mortgage, etc. – could be brought to fulfilment only upon registration.The records in the land books could be accessed by any person, while copies and extracts could be requested of them, whereby the principle of publicity was put into practice. Following this principle, no one could invoke ignorance of the content of the land book. *The principle of legality* was defined by Mihály Herczegh as follows:

> [...] to be binding according to the law and the dispositions of the court [...] the right subject to registration may be acquired only if the land registry authority having jurisdiction, after examining the application and the deed on which it is based, considers it to be valid and of such a nature that no objection to the agreement of the parties nor to that of the wording of the text and its content can be made.[25]

24 Szladits 1937. 233; Kolosváry 1902. 259.
25 Herczegh 1900. 2.

This principle ensures the character of general opposability of records in the land books since the ABGB established that the transfer of property rights over immovables and their encumbrance can be registered exclusively on the basis of a written instrument recording the agreement of the parties, valid from the point of view of formal requirements and having the required content. 'Only those rights produce effects over immovables which are registered in the land book.'[26]

Realizing the principles that have developed as a result of introduction of the immovable property registration system through land books was possible only if these land books were supported by a unitary code of private law. In Transylvania, this requirement was met by the ABGB.

In view of the rights and obligations that concerned or encumbered the immovable, the same rules of the Austrian Civil Code had to be applied in Hungary and in Transylvania regarding the contracts that substantiate the acquisition of a right of ownership or possession over immovables. The land book registration of each immovable was composed of three parts: the inventory sheet, the property sheet, and the encumbrance sheet.[27]

The inventory sheet contained the description of the registered property, the cultivation method and category, and the area determined in cadastral acres. By the *principle of specialty*, it was understood that registered immovables were to be recorded according to the units of cadastral measurement because they formed the basis for calculating the tax due after each immovable. The encumbrance that burdened the immovable had to also be determined according to its nominal value. During the implementation of the land books, inventory sheets had to show what the category of real property of the immovable had been prior to registration. For this reason, property formerly belonging under the regime of feudal property, the existence of perpetual fideicommissary substitution, and, in the case of immovables owned by the peasantry, whether the lot was owned by liberated serfs ('former urbarial fund' – formerly affected by the property regime of the *gens*) had to be displayed in the land books. This aspect had significance in terms of compensation for former landlords. In addition to these, the character of an immovable subjected to a secular or church purpose was also subject to registration. If an immovable belonging to church property was registered, then the inventory sheet had to include the denomination and the diocese or, as the case may be, the parish which was the owner of the immovable. From this moment on, compliance with the provisions of Act LV of the year 1791 became extremely significant.

> [...] to the churches of the four accepted denominations, it is provided that during the use of places of worship, bell towers, cemeteries, lower and

26 Zlinszky 1902. 26.
27 Gościński–Kubacki 2020.

> higher schools owned by them at the date of entry into force of the cited law and erected anywhere and anytime in the future they should be in no way hindered.[28]

The name of the owner was recorded on the *property sheet*, just as their share of ownership, the title by which the right of ownership was acquired as well as any restrictions affecting the rights of the owner such as: the owner being a minor, or an adult under guardianship, the extension of the status of minor, the right of pre-emption or an option to redeem the property.

The *encumbrance sheet* showed any rights of third parties that encumbered the immovable as, for example, praedial servitude or personal easement, a mortgage which burdens the immovable, etc. After the entries were recorded in order of their calendar date, it could be easily determined based on them exactly who had priority in the realization of the claims and in the case of several competing creditors who invoked rights over the immovable.

Ordering of registration into or deletion from land books of any information was the exclusive right of the courts and was possible only on the basis of original documents. Recording data in land books was called 'tabulation' and could manifest itself by registration or deletion. Anticipated registration was also known in Hungarian judicial practice. This gave the entitled person the opportunity to request, for example, the early registration of his ownership and to prove the title for tabulation within 15 days by presenting the original document in case s/he did not have the appropriate document at hand (ABGB, paras. 438–439).[29] The basis of tabulation was the body of immovable property, and only those rights could be tabulated which were known by law as the so-called main or accessory real property rights: 'possession, ownership, pledge, easement, and right to inheritance' (ABGB, para. 308).[30]

The royal district court as the land registration authority operated the land register in a non-contentious procedure. It could decide to make a registration or a deletion only on the basis of a tabulation application. Within the limits of the application, the judge was obliged to examine the title for which tabulation is requested, i.e. whether the transfer of ownership is to take place on the basis of sale and purchase, property exchange, donation, inheritance, or usucaption, and, taking into account the principle of legality, he had to check whether the conditions set for tabulation are met. Thus, the right of ownership could not be tabulated if the contract on the basis of which it was acquired or the document which constituted the annex to that contract did not contain express permission granted by the current owner to the future owner, authorizing the latter to proceed

28 Dósa 1861b. 232.
29 Szladits 1937. 241.
30 Zlinszky 1902. 83.

to the tabulation in the land books of the newly acquired property right to his name. If an authorization was required from the guardianship authority or the guardianship court for the acquisition of the property right over an immovable owned by a minor, the existence of such authorization had to be verified by the judge operating the land book. In the case of the rights encumbering the immovable, they had to be indicated with their respective nominal values expressed in currency. For tabulation, the ABGB did not provide the need for the transaction to be recorded in an authentic instrument.

Because the title by which the tabulation was performed was given by the contract underlying the transfer of ownership, the question was raised in the literature as to whether a contract of sale and purchase in which the object consisted of an immovable was valid only if it was recorded in writing by the parties or if even an oral agreement was valid.[31] Because the contract arises from the agreement of the parties, it was considered as being validly concluded if the parties had agreed on each of its essential elements. From the point of view of registration in the land book, however, the permission for tabulation had to be granted in writing by the seller and in accordance with the concluded agreement. Thus, the position was outlined according to which a written instrument was not necessary for the validity of the contract itself. This solution gave rise to significant controversy and, as a consequence, in the late 19th and early 20th centuries, the written form became a condition of validity for all contracts having an immovable as object. If one desired to extinguish any right that encumbers an immovable, a written authorization had to be issued to the entitled person to request the deletion of the right from the land books.

During neo-absolutism, the Austrian authorities withdrew the right of authentication from the 'authentic places' where contracts were recorded in authentic instruments in previous centuries, replacing them by notaries public as persons entitled to draw up such authentic instruments.

The conditions of validity of the contract were set out in the ABGB: the parties had to have full exercise of their legal capacity; the object of the contract could not consist of an impossible obligation; the contract could not contravene the imperative provisions of law and was required to respect public morals; the contract concluded under duress (coercion), threat, as a result of violence, fraud, or by a person in error could be annulled. If the object of the contract consisted of an immovable it had to be drawn up in writing. If a contract met the conditions of validity, the registration or deletion of a right subject to registration in the land book could be requested based on the authorization granted by the registered party. The question arises: in the case of which contracts was it possible to request tabulation? Such contracts were those by which rights subject to registration in the land register were transferred from one party to another: the contract of sale

31 Fekete 1908.

and purchase, exchange, and donation. Paragraph 431 of the ABGB provided in the sense that the property right which refers to an immovable item of property could be validly transmitted only if it was tabulated in the land books, the property right being transmitted to the buyer only as an effect of tabulation.

Tabulation in land books was a precondition for the acquisition of the property right even in case of inheritance, being established as such by the ABGB. 'If the property right over the immovable must be transmitted as an effect of a final judgment, letter of judicial partition, or the surrender of a certain inheritance in court, then it is also necessary to tabulate these documents' (ABGB, para. 436). A similar condition was provided in the case of testamentary inheritance, where, in addition to the will, the minutes finalizing the procedure by which the inheritance was devolved (the certificate of inheritance) were also required.

If a person invoked usucaption (acquisition by prescription), he could request the tabulation of his property right. In the regulation of usucaption, the Hungarian customary law system operated with rules different from the Austrian ones as a requirement of good faith was not listed among the conditions of usucaption in the legal system of Hungary. If the prescribed term expired, the possessor acquired the benefits of usucaption regardless if he was of good faith or not.[32] As an effect of the influence exerted by the ABGB, this situation changed as only the possessor of good faith was granted the right to acquire the property of an immovable by usucaption, after the expiration of a prescribed term of 32 years and only after the tabulation of his property right under this title of acquisition.

When implementing the land books, so-called *old burdens*, such as a tabulated invoice, a letter of debt, dowry, engagement gift, lease, or easements, were registered on the encumbrance sheet.

Since ownership could only be acquired through tabulation, during the implementation of the land book system, special attention had to be paid to those tabulations that concerned common (joint) property rights according to shares or special categories of common property. Under *common property rights according to shares* we understand situations when a certain determined object is held in co-ownership by several persons, in this case the nominal shares of property of each co-owner being recorded separately on the property sheet. Each co-owner could freely dispose of his nominal share from the co-owned property. Repeal of rules specific to the regulation of the property of the gens – with their characteristic limitations regarding the right of disposal over certain immovables – did not mean the simultaneous dissolution of the co-ownership which existed on some of these estates; more precisely, the owners of estates in co-ownership could not be obliged to partition those estates. If the owners wanted to put an end to the state of indivision, then, according to the norms of the feudal age regarding partition of property, the division of the co-owned property had to have

32 Frank 1845. 241; Zlinszky 1902. 114.

been carried out according to the principle of proportionality (*divisio*) by creating lots and tabulating them as new property units in the land books. Subsequent to this partition, the former co-owners were obliged to issue to each other the authorizations for tabulation of the ownership over the newly created lots. If sharing by agreement of the parties was not possible, the state of indivision could be terminated by litigation.

The property owned in co-ownership could have components that were not divisible in kind without causing a significant decrease in value. The so-called *noble commonages* also belonged to the category of indivisible jointly owned property. Pastures, forests, or the right to receive minor benefits subject to the monopoly of the Crown, such as the right to operate mills, taverns, fish farming in ponds, etc., were usually exercised jointly by the members of such commonages. These remained unchanged under old feudal law and were later tabulated as jointly held property in the land books.

A significant consequence of the implementation of land books was the possibility of knowing the rights that encumbered an immovable tabulated by any person, namely that rights which encumbered the immovable were also passed *ope legis* onto the new owner at the time when transfer of ownership took place. From the point of view of the science of legal regulation (legal dogmatics), the concept of so-called real property over the things of another person (*iure in re aliena*) what modern law calls dismemberments of ownership – has developed as an effect of the influence of the ABGB. The birth, content, and extinction of such dismemberments were all subject to the rules provided by the ABGB and later legal norms.

> As a result of the dispositions of our laws after 1848, which in this respect were left untouched by the Conference of the Palatine, both the easements regarding lots and personal ones have acquired a certain and independent legal existence.[33]

The various codification projects of private law had already regulated in detail the legal institutions belonging to these new categories, based on the judicial practice formed following the adoption of the Temporary Rules of Jurisdiction, which later evolved into drafts for the codification of private law, the most important being the one from the year 1928, these rights being called ‘limited real property’, giving rise to a genuine and independent new institution of property law. The rights ‘of encumbrance’ had to be tabulated according to the norms of procedural law applicable to the land books. Of the limited real property rights (dismemberments of ownership), Hungarian law knew easements, the right of superficies, the right of pledge, and the burden of immovables.

33 Wenzel 1874. 52.

Easements were already known in the old system of feudal law even though neither *Tripartitum* speaks of them nor do the authorities of legal literature of the time. The generally accepted perception, including the one in the legal literature of the bourgeois age, was that easement rights could not be realistically incorporated in the system of Hungarian private law preceding 1848.

> Hungarian and Transylvanian private law existing until the year 1848 [...] apart from the right of pledge, was not very conducive to the emergence and independent legal development of real property rights which would bear on another person's possessions, as special easements would.[34]

János Suhayda recorded the following: '[...] easements, in our country, although they may have been in vogue from the very beginning, have not appeared either by the name "servitus" or by regulation of easement as a right as they appear, for example, in Roman law or in the laws of other states'.[35] In judicial practice, both the system of personal easements and that of easements bearing on a lot can be recognized, this fact allowing the definition of the notion of easement by Bálint Ökröss: 'Easement is either linked to a certain lot – and then it exists either as a right or as an obligation to another lot – or it is granted to a person to allow him the proper use according to his own needs of a certain property, without being allowed to exhaust it.'[36]

Following the liberation of serfs, the need to ensure use of pastures and forests as related measures imposed the exact stipulation of rules on rural easements. During the delimitation of pastures intended for the use of the peasantry and of their former feudal landowners, the easement both to access drinking water and for passage with animals had to be ensured, just as passage for accessing land used for logging and harvesting of firewood or timber used in construction. In regulating these rights, the Austrian Civil Code was without doubt helpful. In reality, the entry into force of the ABGB did not create a new institution in the system of easements but reconfirmed with the force of law the norms formed by local custom. The introduction of procedural law applicable to the land books allowed registration of easement rights with the application of the principle of constitutive character. Easements over lots needed to be tabulated on the encumbrance sheet of the subject lot as well as the related right to them on the property sheet of the dominant lot, thus ensuring that the owner of the dominant lot could benefit from the given easement.

Serfdom was abolished in exchange for the compensation of the landlords, the feudal lands in the possession of the former serfs being assigned to the full

34 Wenzel 1874. 52.
35 Wenzel 1874. 51.
36 Ökröss 1861. 82.

property of the now liberated peasants. However, this legal measure did not refer to the *coloni* (serfs on the lot of the mansion and servants) who lived on the lots attributed to mansions; the landlords continued to claim from them benefits in kind because the houses of the *coloni* were built on land owned by the landlord. At the suggestion of Ferenc Deák, this situation was remedied by replacement of benefits – in cash, in natural or industrial fruit, purchase of gifts, etc. owed to the landlord by *coloni* in exchange for use of lands on the lots of the mansions according to contracts under feudal norms – with periodic annual instalments set in a predetermined amount of money as 'rent' or 'lease'. In this way, the perpetual lease was introduced into Hungarian private law, according to which the tenant was 'entitled to use the property of another person for a definite or even an indefinite period in exchange for annually determined benefits, without restrictions, as a usufructuary [...] to alienate this right and pass it on as an inheritance, the owner being able to object against the entitled person only if he sees the property endangered in his hands'.[37] This solution gave rise to numerous misunderstandings and created a unique situation when the minutes for the registration of immovables in the land book were drawn up. The ABGB called perpetual lease a 'divided property'– *geteiltes Eigentum* –, where 'the main owner' was the owner of the lot and 'the owner of use' was the person who used that lot. This situation was attenuated when drawing up the land books by registering the landlord as the owner of the lot, and the person in whose ownership the house built on that lot was became a usufructuary of the lot, the right of the latter being recorded on the encumbrance sheet of the property in the land book. The fact that the usufructuary was at the same time the owner of the building erected on the lot had to be indicated there as well. Thus, the lot and the building were transformed into one and the same property item from the point of view of the land book, which could no longer be separated subsequently.[38] This solution was not optimal, and many times there was a need to find a way to unify the right to ownership of the lot and of the building standing thereon. The solution became possible as a result of Act XXV of 1896, according to the provisions of which the holder of the lot could acquire it by accession (with the payment of a fee); at the request of the landlord, he was even obliged to acquire the right of ownership over the lot this way – a provision that is found also in the Urbarial Patent of 1853. The law required proof that the owner of the structure erected on the lot or his predecessors had already been in the ownership of the lot before 1 January 1848. The law allowed the advance of the value of the lot by the state, the 'debtor' being required to repay the advanced amount directly to the state as a loan, in instalments.[39]

37 Kolosváry 1907. 422.
38 Szladits 1937. 302.
39 Kolosváry 1907. 519.

Among limited real property rights (dismemberments of ownership), the *burden on immovables* was listed, an obligation *propter rem* by virtue of which the landowner was obliged as a consequence of his right of ownership to render to the entitled person certain benefits in natural or industrial fruit, currency, or labour. In the feudal era, serfs provided under this principle 'the equivalent' of their right to use and possess the land subject to the regime of feudal property in the form of tithe to the church, set at 1/10 of the harvest, and also an amount equal to the tithe (called in Hungarian 'the ninth part') to the lord, obligations in labour and various gifts due in money and in kind, also to the lord, and, finally, the rent due to the state. Even after the abolition of serfdom, such obligations persisted in the legal category of burdens on immovables, instituted by law: the disbursement of compensation to replace the tithe due after viticultural lands, compensation due for gaining property of the land now owned by the *coloni* located on the domains of the mansions, compensation due for the remainder of the lot, and payments of loans contracted to finance the fight against the effects of grape phylloxera (a pest of the vine plant introduced from North America which obliterated Hungarian viticulture almost entirely at the end of the 19th century).[40]

Mortgage also appears among the limited property rights, a collateral that allowed the secured lender in the general sense that in the event of non-performance of the debt due to seek enforcement in accordance with the contractual provisions from the debtor and to cover the debt by foreclosure and the subsequent sale of the property affected by this guarantee.

Significant changes occurred after 1848 in the field of regulations applicable to various forms of collateral. Feudal private law knew the system of *pignus*, which involved handing over an immovable (pledge) or a movable (pawn) possession to the creditor, the immovable property being affected by this form of guarantee. The pledge contract was mentioned by Werbőczy among the temporary acts of disposition (which do not lead to the transmission of naked ownership), and thereby, from the point of view of legal science, it has become an institution of real property law. In reality, the pledge contract concealed the fact that a mortgage had been constituted over an inalienable property item to secure a loan contract. After the Patent on the Abolition of the Property of the Gens abolished the pledge contract by prohibiting the delivery of the possession over real estate to the creditor to guarantee the contracted claim, the accessory character of mortgage – as an institution of real property law – was highlighted, and it was classified among limited property rights, in compliance with the system established by the ABGB, as a guarantee of an obligation. From then on, over time, the mortgage came to exist in Hungarian private law in two distinct forms: the *pawn*, where the object could be exclusively a movable item, and the right of *mortgage*, a guarantee which could be constituted exclusively of immovables. Following the entry into force of the ABGB,

40 Kolosváry 1927. 181.

immovables could be encumbered exclusively with a mortgage, in such a way that the mortgaged immovable remained the property of the debtor, while the creditor was bound to tabulate his guarantee on the encumbrance sheet of the land book in which the immovable was registered, along with the amount of the claim due in nominal terms, with prior authorization received from the debtor. The mortgage could be set up only on the property units registered in the land books, and the tabulation could be authorized exclusively by the owner of the immovable, himself being registered in the land books as such. An exception to this rule was setting up a mortgage as collateral for debts owed to the creditors of an heir of the tabular owner, himself not yet being registered as owner of the immovable.

4. Commercial Law

The Hungarian customary law system was not familiar with the autonomous institutions of commercial law. These began to differentiate themselves from the private law system only in the first third of the 19th century. The ABGB did not contain any rules regarding this field, and in Hungary the need arose to create a law for trade regulation that met the requirements of economic life, in the absence of a unitary codification of civil law. István Apáthy was appointed to draft the Trade Act. This draft was adopted by Act XXXVII of 1875. The new norm entered into force in Transylvania and became a source of civil law in parallel with the ABGB. The norms of commercial law contained in the act could be classified into two large groups: some contained provisions regarding traders, while other rules concerned commercial companies, regulating the general partnership, the (simple) limited partnership, the joint stock company, and the cooperative. The companies established could be considered as commercial companies and hence as legal persons if they were registered with the court having jurisdiction according to their commercial headquarters.

Persons who carried out commercial activities were considered traders in their own name (under their own firm) with a professional character and had to obtain registration as such. By registration, on the one hand, the name of the merchant's firm was protected, and it became forbidden to others to engage in a similar trade under the same name (firm) or a similar one. If, however, this took place, the trader who was registered later could be sanctioned and prohibited from using the same firm as the one registered before by another trader. On the other hand, the registered trader acquired the right to keep the commercial books of the company, which in the case of possible litigation were evidence with full evidentiary value in the hands of that trader. The company/firm as a trade name did not only serve to distinguish the trader from other traders, but it also defined the way in which the trademark or registered trademark indicated the origin of goods produced

or marketed by the trader. The name of the trader, the company/firm as a name which showed the commercial nature of its activity, and the registered trademark are those attributes of identification of the trader which are referred to by the modern expression of 'product-related intellectual rights'. The basic tenets of legal protection of these were already put into place during the application of the old customary law and then by Austrian law. The legal basis of this protection was constituted by the Trade Act and Act II of 1890 on Trademarks.[41]

The Trade Act regulated commercial companies in a detailed manner. The assets of general partnerships and limited partnerships were composed of the patrimonial contributions of the partners, which could be paid in currency, real estate, or other goods with a monetizable value. Given that the partners of the general partnership or of the limited partnership were liable jointly and severally, in a direct and unlimited fashion for the partnership's activity towards non-partner third parties, the partnerships' assets and liabilities could not be differentiated from the own assets and liabilities of the partners. For this reason, a controversy persists to this day in legal literature regarding the correct answer to the question of whether these two company types can really be considered veritable independent legal entities.

The restoration of economic life in Transylvania can be dated to the second half of the 19th century, or rather to the last third of that century. Partly due to the activity of the Transylvanian Commercial Bank and Credit (Joint-Stock) Company and partly due to the influx of foreign capital, primarily mining – gold, ferrous metals, salt – and then the steel sector based on it were the ones that allowed for the organization of joint-stock companies in addition to smaller commercial companies.[42] The first joint-stock companies could be organized in Transylvania only after the Austro-Hungarian compromise.

> The form of joint-stock company was established primarily in the network of lending as well as in industry. Maybe our statement is sufficiently proven by the fact that thirty-four industrial joint-stock companies – taken in the wide sense – were set up in Transylvania between 1867 and 1873. [...] In the lending network, in turn, 43 investment banks and savings banks were founded in the form of joint-stock companies.[43]

Revitalizing the development of economic life in Transylvania also resulted in the application of legal norms of commercial law and primarily of the rules of the Trade Act. Trading companies founded after 1875, primarily joint-stock companies and cooperatives, already had to be set up according to the rules of this act.

41 Vida 2012. 52–58.
42 Szász 1986. 1543–1563.
43 Egyed s.a. 39.

Joint-stock companies and cooperatives could start their activities only after the registration of the act of incorporation adopted by the general meeting of the resp. company, i.e. after the registration of the contract of association. The law precisely determined the structure of these two forms of companies. The share capital of the joint-stock company was formed by the subscription of shares by shareholders, each share having an identical nominal value. Shareholders could not be held liable with their own assets for claims by the company's creditors. The stock is a security that does not only embody the nominal value of the title but grants its owner the exercise of rights with regard to the operation of the company. The shareholder benefits from voting rights by virtue of the shares held, being able to elect the members of the bodies of the joint-stock company and having the right to be elected to these bodies. He has the right to challenge the decisions of the general meeting or assembly before the courts and, on the basis of the stock held as well as depending on the economic performance of the company, also the right to any dividends. The main collective management body of the joint-stock company was the general meeting, each shareholder being a member thereof. The general meeting had the right to elect the members of the board of directors and of the commission of censors. The board of directors was responsible for the operation of the company, under the control of the commission of censors, which was independent from this board.

The capital needed for business development in Transylvania was not concentrated only by bankers and banks set up by large 'foreign' industrialists as smaller agricultural enterprises also benefited from the activity of accessible and easy lending carried out by savings and loan cooperatives. One such institution was the Auxiliary House of Savings established in 1858 in Cluj, followed by the lending institutions with cooperative character established after 1867 in Bistrița, Braşov, and Târgu Secuiesc.

Mutual solidarity manifested in cooperative forms prevailed primarily in the establishment of savings cooperatives. However, the organization of consumer and trade cooperatives cannot be overlooked either. The patrimony of the cooperative as a commercial company was formed from the contributions of the cooperating members, but, unlike the joint-stock company, the contributions were not paid necessarily in currency, each member being able to contribute with any goods. The corporate form of the cooperative spread rapidly in Transylvania, in particular in rural areas, where cooperatives had gained prominence in industrial milk processing and animal insurance.[44] The Act of 1875 allowed the operation of cooperatives in the system of limited liability, but also with unlimited liability, which meant that if the cooperating members accepted the form of unlimited liability, they became liable to third parties not only with the assets of the cooperative but also with their own assets. The latter form was subsequently suppressed by an amendment to this

44 Egyed s.a. 46.

Act in 1920. From the point of view of structure, cooperatives had to be organized in a similar way to joint-stock companies.[45]

The other significant group of rules contained in the Trade Act are the rules applicable to commercial operations, more precisely the rules of commercial contracts. Commercial operations were considered to be the commercial purchase (for resale), the contract of carriage, contract of deposit in warehouses, the consignment agreement, the insurance contracts, and publishing contracts (multiplication, publishing, and marketing of publications). Only contracts expressly enumerated and qualified as such by law were considered to refer to commercial operations. These contracts were divided into two different groups by the legislator, as objective and subjective commercial operations. Subjective commercial operations were those in which at least one of the parties had to hold the status of trader according to the law, for example, consignor or carrier. In other cases, the legal object of the contract was such that it could transform the contract into a commercial operation, for example, the purchase of movable property.

Since the ABGB remained in force in Transylvania even after the conclusion of the Austro-Hungarian Compromise, in the field of contracts drawn up after 1875, the contracting parties and, in the event of a dispute, the courts had to turn their attention to two laws. Sale and exchange of real estate, lease and loan agreements were governed by the rules set out in the chapter on real property – obligations – of the ABGB, while in the case of commercial operations these rules were efficiently supplemented in daily activities by the Trade Act.

The consignment note issued by the carrier, regulated by the Trade Act, had its content set by law. It had to contain the name of the consignor and the carrier, their place of business, the object of the transport, the name and business of the consignee, the place and date of delivery and acceptance, and the transport route. Other securities, such as the stock subscribed by the stockholder, the deposit receipt issued by the warehouse keeper for the deposited goods, and the bill of exchange issued by the debtor, have all contributed to the development of securities legislation in Transylvania and Hungary.

The regulation of the publishing contract contributed to the development of copyright. The ABGB did not contain provisions on intellectual creations and, implicitly, had no provisions regarding copyright. The Temporary Rules of Jurisdiction provided for the protection of 'ideal assets'; however, this was insufficient to protect the particular rights of authors, poets, and composers. Commercial law aimed to solve this issue from the perspective of publishers and regulated the content of the publishing operation as well as the rights and obligations of authors and publishers.[46]

45 Kuncz 1928. 494.
46 Kuncz 1938, Nagy 1884.

5. Inheritance Law

Following the abolition of the feudal property system, with the rules of inalienability related to it, free disposal of property *inter vivos* and *mortis causa* could be achieved. From this, the freedom of disposition by will also resulted. Neither the right nor the possibility of drawing up a will constituted a novelty in the bourgeois age. They also existed within the rules of customary law of the feudal era, but the validity of the act of disposition was influenced by the existence of restrictions applicable to certain categories of property in the field of real property law. Wills are primary historical sources not only for the discovery of the patrimonial conditions of a nation or a smaller community but also for gaining knowledge about family relationships and a description of the history of those communities. From this perspective, the surviving wills drafted among the Szeklers constitute an especially important source.[47]

The wills of this period raise multiple questions in practice. Did *de cuius* (the person to dispose of his estate by will) have the possibility to exclude from the inheritance all members of his family? Did *de cuius* have the right to disinherit his prodigal heir?

During the existence of the system of restrictions applicable to feudal property, from the point of view of the right of disposal, and within its framework of the family property system (property of the gens), legal heirs could not be excluded from the inheritance; only the possibility of requesting the partition of co-owned assets existed against the prodigal heir. The applicable rules were precisely recorded by Werbőczy in his *Tripartitum*, but this situation changed as a result of the entry into force of the ABGB. The right to free disposal through testament provided in principle for the disposer the possibility to leave his estate as a legacy to anyone, even without taking into consideration all his legal heirs. However, the ABGB set the circle of 'necessary' heirs (heirs who benefitted from a legal reserve): the children of the one who disposed of his estate by will and, if there were no children or all children have preceded *de cuius* in death, his parents were reserved heirs (para. 762). The children as necessary heirs were entitled to half of their share of legal inheritance as a reserve and the parents to one third of their share of the legal inheritance (paras. 765–766).

The one who had left the inheritance had the opportunity to bar his necessary heirs from inheriting by disinheriting them (exheredation) if they became unworthy. The reasons for unworthiness to inherit were expressly listed by the ABGB (para. 768).

The necessary heir became unworthy to inherit if s/he:

– had threatened the life of the person who left the inheritance;

47 Tüdős 2003–2006; Rüsz-Fogarasi 2014; Tüdős 2016. 308–326.

– had committed acts of unjustified violence against the person who left the inheritance;

– had committed an offence for which the law provided for the punishment of life imprisonment or a minimum imprisonment for a duration of 20 years;

– had prevented the person who left the inheritance form drafting a will;

– being the child of the person who left the inheritance, had renounced his Christian faith;

– had not offered help to the person who left the inheritance in a time of need;

– lived an immoral lifestyle.

In the case of parents, an additional reason was provided for disinheriting them: if the parent had abandoned the upbringing of his/her child (ABGB, para. 769).

> [...] he who in bad faith has harmed the honour, the body, or the patrimony of the person leaving the inheritance or of his/her children, parents, or her husband, or attempted such injury in so severe a manner as against the perpetrator criminal proceedings could be initiated ex officio or upon complaint by the injured person according to criminal law shall remain unworthy to inherit until such circumstances arise as to determine that he who leaves the inheritance has forgiven him/her. (ABGB, para. 540)

Exheredation could take place only if the reasons were provided by the disposer for the unworthiness of the heir, by his/her will. If the person who left the inheritance had forgiven his/her heir, no unworthiness could be invoked.

The necessary heir could request from the heir who would inherit according to the will the handing over of the reserved part of the estate that was due to him/her, the testamentary heir; however, s/he was not obliged to hand the reserved part over in kind. It was considered sufficient to surrender the value of the reserve by paying a sum of money to the necessary heir. The Royal Curia (the Supreme Court) has consistently ruled in this regard in its judicial practice.[48]

Regarding the formal requirements of the will, the ABGB established no distinction between the private will (drafted under private signature) and the authentic will (authenticated by a notary). The authentic will could be drawn up in a valid manner exclusively by the notary public. According to the rules applicable to the private testamentary form, a will had to be written by the testator in person, in which case the simultaneous presence of two witnesses and the application of their signature on the will thus drawn up was required, or the testator could request the drafting of the will by another person, in the latter case the simultaneous presence and signature of four witnesses being a prerequisite to its validity (Act XVI of 1876, para. 1).[49]

48 Staud 1913.

49 Teller 1938. 233; Wenzel 1874. 458.

Privileged wills were also known in the legal system regulated by the ABGB, when the testator could dispose of his/her property orally in the presence of four witnesses, in the cases provided for by law. This will, however, was only valid for a period of three months from the date at which it was uttered. Situations in which a privileged will could be used were the following:

– in areas affected by an epidemic,
– in areas affected by military operations,
– if the testator provided exclusively in favour of the legal heirs,
– when the testator was at sea,
– when the testator ordered that his/her entire estate be used for charitable purposes.

The norms of the ABGB allowed the institution of the codicil to be preserved, this being an amendment by which the original content of a will is modified or completed without resulting in the revocation of the will regarding its unmodified parts. Thus, the testator was given the opportunity to subsequently complete a will which he had drawn up previously. As a rule, the provisions of the main will could not be altered in their entirety by the codicil, which could only include changes to them.

As to the content of the will, the rights of the testator to dispose in the form of vulgar substitution and simple fideicommissary substitution (also called a unique substitution, with the designation of a sole substituted person) were significant.

The *vulgar substitution* meant that in the event that the designated principal heir would have preceded the testator in death or could not inherit after the testator for other reasons, this first heir was replaced with a subsidiary heir designated by the same will.

Simple fideicommissary substitution was allowed if the testator stipulated a condition for the transfer of the estate from the first designated heir (the instituted) to the final heir (the substituted). Until the condition was fulfilled, the instituted came into possession of the estate but had only the right of its administration and its use because it had to be preserved in its entirety for transmission to the substituted. The substituted in this case was considered an heir apparent of the estate.

The simple fideicommissary substitution has caused many difficulties in practice. Although we cannot speak of the existence of perpetual fideicommissary substitutions in Transylvania, the simple fideicommissary substitution still presented characteristics somewhat similar to that of the perpetual version of this institution. In the case of perpetual fideicommissary substitution, the one who provided *mortis causa* in this way could establish by will the person entitled to inherit the estate or part of it. Here the principles of primogeniture, seniority, adulthood, the status of puberty or impuberty alike could also be taken into consideration in the sense attributed to them by feudal law. In this

case, the instituted heir also had to maintain the estate that was the subject of perpetual substitution to be passed on to the substituted (as in the case of simple substitution), but the substituted heir, upon receiving the estate, would him-/herself become an instituted heir in turn, thereby the estate never leaving the family of the one to leave the inheritance, into perpetuity.

Regarding the legal inheritance, the general rule was applied in the ABGB system that, based on the principle of *favor testamenti* (favouring the will of the deceased), if the will was valid, then the succession had to be devolved on its basis. If *de cuius* did not make a will or the will was ineffective for any reason, the rules of legal inheritance became applicable.

The legal heirs of the person who left the inheritance were first his/her children – sons and daughters –, who inherited the estate in equal shares (*in capita*). If one of the children was unable to inherit, his/her place was taken – based on the principle of representation (*per stirpes*) – by the grandchildren of the child.[50] If the one who left the inheritance had no descendants, then, on the basis of the parentelar-linear system, ascendants and collateral relatives up to and including the sixth degree collected the inheritance, always in equal shares, per capita, according to the principle of proximity of the degree of kinship (relatives in a degree closer to the deceased removed from his/her inheritance relatives in a more distant degree).

In the absence of legal heirs, the estate was inherited by the surviving spouse. This rule established by the ABGB was a significant difference from Hungarian practice for in the absence of descendants, according to Hungarian judicial practice, the elements of the deceased person's estate acquired during his lifetime at a certain price were inherited by the surviving spouse. The parts of the deceased person's estate which were acquired free of charge returned to the family branch whence they came, as an estate of the respective branch of the family (gens) of the deceased. The Temporary Rules of Jurisdiction provided in this sense, but their provisions were not applicable in Transylvania.[51] Based on long-time practice in the Hungarian judicial system, however, the system of parentelar-linear inheritance was applied also in Transylvania if the one who left the inheritance did not leave descendants.

On the surviving spouse – whether the former husband or the former wife –, the ABGB conferred a lifelong right of usufruct. With regard to this provision, the ABGB derogated from the right of the widow recorded by Werbőczy. In Hungarian judicial practice, only the widow was entitled to the rights of widows, which had a more extensive content than mere usufruct. The widow had not only the right of possession, use, and harvesting of the fruits of the estate left after her deceased husband but also had the right to maintenance.

50 Sándorfalvi Pap 1938. 52.
51 Sándorfalvi Pap 1938. 75.

The ABGB did not regulate this right to maintenance, referring to it within the norms in the field of family law when regulating the rights and obligations of parents and children.

Following the entry into force of the Marriage Act (1894), with regard to the granting of widow's rights, the wife separated from the husband acquired another status. Hungarian judicial practice was of the opinion that the wife was in fact separated from her husband without the dissolution of the marriage and remained entitled to claim the rights of succession that were owed to the widow following the death of her husband if she was not at fault for the separation and therefore did not become unworthy of receiving the rights conferred on the widow.[52]

Among the rules of succession law of the ABGB, the institution of imputation must be mentioned. The entire estate transmitted free of charge *inter vivos* by the one who left the inheritance to one of the legal heirs must be imputed upon (that is deducted from) that heir's legal inheritance. This rule was also applicable to property transmitted free of charge for the purpose of handing it over to the reserved heir.

The ABGB provided for the obligation by the heir to declare during the succession proceedings whether s/he accepts the inheritance or not. Until the moment of the declaration of acceptance, the heir could not take possession of the estate and could not apply even for an early registration of ownership in the land books. This solution ran contrary to previous Hungarian judicial practice in which, applying the principle of *ipso iure* transfer of title, the heir acquired the right to property over the estate from the time of the death of the previous owner from whom it was inherited.

6. Perspectives of Romanian Legal Literature on Private Law Applicable in Transylvania in the Period between 1690 and 1918

6.1. Overview

From the perspective of the Romanian population in Transylvania, in the period examined, the attempt at gaining knowledge of the legal system of the Austrian Empire by translation of sources of law deserves mention. An example of this effort is the translation into Romanian of the Prefaces of the Austrian Codes.[53] Ştefan G. Berechet indicates the fact that a large number of such codes, in fact almost the entire result of Austrian codification of the late 18th and early 19th

52 Homoki-Nagy 2009. 22.

53 See Berechet 1933. 503–504.

centuries (the Community Court Procedure of 1782–1787, the Criminal Code of 1807, the Civil Code of 1811), has been translated into the Romanian language within a few years of their publication in Latin. This trend continued in the case of the Austrian Civil Code implemented in 1853.[54] It should be noted here that in the western regions of today's Romania, which were not part of historical Transylvania (Banat and Partium, known as Crişana and Maramureş), as an effect of the Austro-Hungarian Compromise of 1867, the customary Hungarian civil legislation was (re)applied, while in historical Transylvania most civil legal relations had been regulated by the Austrian Civil Code since 1853. The legal literature in Romania does not analyse in detail the provisions of customary civil law applicable in Hungary and in the above-mentioned regions between 1868 (when resumption of its implementation occurred) and 1918.

Following the union of Transylvania with Romania, the issue of 'interprovincial law' proved problematic as the need for comparison and determining the applicability of the rules of law in force in the various regions of the country arose in the case of certain persons and legal situations.[55]

6.2. The Law Applicable to Individuals and Families

Following the Diploma Leopoldinum (1691), the privileges of the nobility were preserved and consolidated in Transylvania. During the 18th century, a significant attempt at the modernization of many legal institutions occurred by the reforms of Emperor Joseph II, which was, however, doomed to failure. Regarding the political and civil rights of the Romanian population of Transylvania, a major change occurred due to the Imperial Ordinances of 1781 and 1782, which recognized the equality of rights of Romanians living in this region with the Saxon population from the 'King's Land' (a principle called *concivility*). Although these ordinances, like the other reforms of Emperor Joseph II, were subsequently revoked, their effects could not be completely suppressed.[56]

The organization of the border regiments in the 18th century allowed the Romanian population in Transylvania to constitute a new free social class, that of border guards, which benefited from the right to own real estate and use public goods (forests, pastures) to its economic benefit. This social class later contributed to the development of Romanians' participation in the army, the education system, the clergy, and public administration.[57]

Improving the situation of dependent peasants (serfs, *coloni*) constituted a legislative priority in Transylvania during the 18th century, numerous ordinances

54 See Berechet 1933. 300–319.
55 Firoiu–Marcu 1987. 348.
56 Firoiu–Marcu 1984. 241.
57 Firoiu–Marcu 1984. 242.

and patents being issued there with this object. The *Certa puncta* Patent of Empress Maria Theresa (1769) reformulated the obligations of dependent peasants on the basis of previous acts of legislation, clarifying their rights as well. By his acts of 1783 (the Rescript of 16 August 1783)[58] and 1785, Emperor Joseph II gave the serfs the freedom of marriage and the free choice of occupation without the need for the consent of the landlord. By the Patent of 22 August 1785, he restored to the serfs the right to free movement, a measure later reconfirmed in some respects by Leopold II in 1790 as well as by the *Articuli Novellares* adopted at the Diet of Cluj in 1791.[59] Personal easements were later abolished by the revolutionary acts of 1848 and the Patents of 1853–1854.

In the matter of protection of natural persons, a significant development was the establishment of guardianship commissions within the framework of Romanian border regiments by the Regulation of 1766 in view of supervising the administration of the estate of orphans and widows and of controlling the activity of guardians. The regulation allowed the attribution of guardianship by will, in the absence of such provisions assigning it to the closest relatives. Documents from the years 1775 and 1782 were also intended to improve the situation of orphans and widows of officers of the border guard.[60]

In the matter of family law, it is necessary to mention the reorganization of the rules for drawing up, issuing, and keeping documents regarding marital and family status. The reform in the field, carried out at the beginning of the 19th century, imposed the keeping of birth certificates as well as certificates of baptism, marriage, and death by churches in the form of so-called church protocols.[61]

The regime applicable to marriages in the area of the military border should also be mentioned, this institution of family law together with its patrimonial effects being subject to oppressive and militaristic norms and the family as an institution being subordinated to the military interests of the Habsburg Empire (here we mention the need for marriage authorization by the bodies of military command, subjugation of the extended family to the power of the head of the family defined in a quasi-military manner, etc.).[62]

Implementation by the Habsburg Empire (initially with an oppressive, revanchist intent) of the Austrian Civil Code (ABGB) in Transylvania on 1 September 1853 led to profound changes in what concerns the legal rules applicable to persons. At least at a declarative level (and maintaining inequalities due to sex and social status within the family), this code was based on equality between citizens.[63]

58 Firoiu–Marcu 1984. 259.
59 Firoiu–Marcu 1984. 243.
60 Firoiu–Marcu 1984. 246.
61 Firoiu–Marcu 1984. 249.
62 Firoiu–Marcu 1984. 260–261.
63 Firoiu–Marcu 1987. 139–140.

The ABGB set the age of majority at 24. Full exercise of legal capacity was associated with attaining the status of adult in case of marriage, the minimum age for its conclusion being 16 years for women and 18 years for men, with the possibility of granting an age exemption by the Ministry of Justice. Following the union of Transylvania with the Kingdom of Hungary, special norms (Act XXIII of 1874) – by way of derogation from the ABGB – conserved in the benefit of the spouses the status of adult acquired through marriage if it was dissolved due to the death of one of the spouses or through divorce and the spouse had not yet reached the legal age of majority. Until reaching adulthood or attaining emancipation, the minor was under the parental authority of the father. In the event of the latter's death, the procedure for appointing a guardian was initiated by the effect of the law. The institution of guardianship was profoundly reorganized by acts XX of 1877 and VI of 1885 regarding the supervision of the way in which the estate of the person subject to this measure was managed.[64]

The civil status registers were secularized by Act XXXIII of 1894, this being regarded as a veritable public registration system of births, marriages, and deaths managed by civil servants.[65] Act XXXI of 1894 repealed the provisions of the ABGB on matrimonial law. Civil marriage in front of a civil servant became mandatory, and the conditions of validity of the marriage and the consequences of their absence (or the existence of a negative condition) were regulated by the same normative act. Authorization of separation of the spouses in fact and, as the case may be, divorce could be requested only if reasons expressly provided by law were met, the guilty spouse being required to provide maintenance according to his/her means to the spouse who was not at fault for the dissolution of the marriage.[66]

6.3. Real Property Rights

At the beginning of the period examined, the real property rights in Transylvania remained governed by the sources of mediaeval law (recorded mainly in *Tripartitum*) as resumed and amended by *Approbatae Constitutiones* and *Compilatae Constitutiones* as well as the statutes of the Saxon cities and towns. Organization of the border guards' regiments and the creation of the category of ownership called the border guard's lot, the continued possession of which required the continuation of military service, including in this regard, by the person of the heir, have produced profound effects on the organization of the real property rights of the serfs over their lots located in the areas affected by the organization of border defence in the Habsburg Empire. This organization of property rights, also

64 Firoiu–Marcu 1987. 140.
65 Firoiu–Marcu 1987. 140.
66 Firoiu–Marcu 1987. 145.

known among the Szeklers, was a manifestation of the *confiniary* system (under which inhabitants of border regions had supplementary military obligations for the defence of the border, being subjected in their persons and in their assets to various forms of state oppression), the land of the extended families of border guards being considered part of the family estate from ancient times (hence the name of *moşie* in the meaning of both 'ancient' and 'estate' in Romanian).[67]

The reorganization of real property in Transylvania owes much to the reforms of 1848, which, despite their retraction, had the indirect effect of imperial patents being issued in 1853 and 1854. These regulated the property regime by organizing the gradual transition and development of urban lands owned by peasants, thus initiating the process of attaining ownership. In parallel with this process (although in Transylvania land record systems had been in existence since the 15th/16th centuries, and in the border regions a separate system of land registration had already been established since the years 1770–1780), the reorganization of land records on the Austrian model took place, the system being initially applied to the military border districts but later expanded.[68]

Subsequently, the land book system was reorganized and regulated in detail; in 1855, the land books were established based on the Austrian model in the Banat, the Crişana, and Maramureş, this system being extended to historical Transylvania only in 1870. Romanian legal literature recognizes the superiority of this real estate registration system compared to the system of registers of inscriptions and transcriptions of French origin, applied at that time in the extra-Carpathian regions.[69]

6.4. The Law of Obligations

The organization of the military border had a profound effect on the law of obligations applicable to the Romanian population in the districts inhabited by border guards, the sale of lots of land being allowed, but only to another border guard, and being subject to the prior approval of the bodies of military command.[70]

The ABGB, in force in historical Transylvania (in Banat, Crişana, and Maramureş the norms of customary Hungarian civil law becoming applicable), did not regulate obligations according to the classification of the Romanian Civil Code of 1864 (as contractual, delictual, quasi-contractual, quasi-delictual) but instead considered that all obligations had their source in law, contracts, or acts which result in extracontractual liability. In the legal system of Hungarian customary law, the sources of obligations were considered to be – in addition to deeds –

67 Firoiu–Marcu 1984. 273.
68 Firoiu–Marcu 1984. 275–276.
69 Firoiu–Marcu 1987. 148.
70 Firoiu–Marcu 1984. 287–288.

any illicit actions and the law itself. The ABGB did not contain a definition of contracts, but one could be deduced from the elements required for its validity. The principle of consensualism has been applied to these, many contracts (loan for use, loan for consumption, pledge, deposit) being considered real contracts (i.e. only concluded at the moment at which the object of the contract was handed over). The categories of contracts already presented in other papers of this issue have received through the ABGB a detailed regulation, contracts of publishing, contracts between the owner and his employees, contracts by which companies are founded, prenuptial agreements, and various other contracts being added.[71]

6.5. Commercial Law

Unlike civil law, commercial law in Transylvania was regulated by the sources of law of Hungary. Thus, the main source of the rules was the Trade Act of 1875. Following the principles of commercial law of the time, this presented multiple similarities with the Commercial Code of Romania (1887), especially as regards the qualification of acts of commerce in objective and subjective acts, in order to determine the applicability of the provisions of these codes and highlight the mainly contractual nature of commercial obligations.[72]

Legal capacity to engage in commerce, as opposed to the regime of the Romanian Commercial Code, was not distinguished in the Trade Act of 1875 from the general capacity to engage in contracts. Another significant difference was that no commercial register has been established under the regime of the Romanian Commercial Code; instead, the Trade Act of 1875 established a Register of Companies (a measure emulated by the Romanian legislator only by the Act of 10 April 1931). The totality of assets of traders acquired a detailed regulation by Act LVII of 1908. Trade could be carried out by any person, with respect to the form in which the company was set up. Company registers could be kept in any language, having probative force *erga omnes* in the matter of acts of trade and only between traders in activities of trade.[73]

The sale and purchase contract, the transport contract, and the publishing contract, among others, were thoroughly regulated by the Trade Act of 1875, which did not regulate the contract of report.[74]

The late 1800s saw a dizzying increase in the number of companies in Transylvania.[75]

71 Firoiu–Marcu 1987. 154–155.
72 Firoiu–Marcu 1987. 165.
73 Firoiu–Marcu 1987. 167.
74 Firoiu–Marcu 1987. 171.
75 Firoiu–Marcu 1987. 169.

6.6. Inheritance Law

The law of succession did not undergo significant changes, at the beginning of the period examined in Transylvania there being only a series of derogations from rules established for border areas.[76]

Until 1918, the testamentary legislation of Transylvania was largely subject to customary law.[77] Form and content of the will, on the other hand, were regulated by special rules.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 347–361

DOI: 10.47745/AUSLEG.2020.9.2.07

Integration of Transylvania into Romania from the Perspective of Private Law (1918–1945)

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Abstract. In the following study, we present the legal history of Transylvania following the unification of this territory with Romania at the end of the First World War, and until the installation in Romania of the Soviet-type dictatorship. The heterogeneity of the Romanian legal system resulting from the country's territorial gains is discussed as well as the various attempts at integrating Transylvanian law into the nascent legal order of Greater Romania. We also present the short interregnum in which Hungarian private law was again applied between 1940 and 1944. The Romanian legislator, facing the imperative necessity of creating a unified national legal order, had the choice of two paths: extend the already outdated laws of the Old Kingdom of Romania to the newly acquired territories or adopt new unitary laws. Both paths were taken depending on the field of law and the historical period concerned, as presented. Finally, the legislator opted for the extension of the laws of the Old Kingdom at the end of the Second World War, even in fields where better-quality norms were enacted during the reign of King Carol II but were never implemented.

Keywords: Romania, unification, Transylvania, private law, codification, King Carol II

1. Overview: The Development of Romanian Private Law until 1918 and Beyond

Following the formation of the Romanian Principalities, as a result of the union between Wallachia and Moldavia (1859), the need for the modernization of Romanian law arose immediately. As early as 1864, at the initiative of Prince Alexandru Ioan Cuza, the country's first Civil Code was adopted, and a year later the first Code of Civil Procedure as well.

The Civil Code was drafted in six weeks based on the model constituted by the *Code Civil* of France (the *Code Napoléon*), on the draft Civil Code of Italy, on the Belgian Mortgage Law, and on old Romanian law. It came into force in 1865 and was used – regarding the norms of substantive law contained within it – until 1 October 2011 (the date of the entry into force of the 'new' Civil Code, Act 287 of 2009), while for certain norms of civil procedure it remained valid up until 15 February 2013 (the date of the entry into force of the 'new' Code of Civil Procedure). Obviously, the duration for the elaboration of the Civil Code, of only 6 weeks, had a relative character because the reception of French law into the legal system of Romania had been ongoing by the time its development began.

In the Romanian state which became a kingdom in 1881, economic development led to the need to recodify private commercial law. Although in Wallachia a Code of Commerce (*Kondika de Komerciu*) was introduced in 1840 based on the French model, and its effects were extended to the territory of the United Principalities in 1863, it was decided to adopt a new, modern code. The 'new' Code of Commerce (*Codul comercial*), which came into effect in 1887, was developed using Italian law as a source of inspiration: the model was constituted by the Italian Commercial Code (*Codice di Commercio*), but elements of German, Belgian, and French law may also be detected in its text.

In addition to the two codes already mentioned, many other special norms constituted the body of Romanian law in 1918, when the country acquired significant new territories as a result of the political efforts which led to the end of the First World War and the resulting international reconfiguration from which Greater Romania was born.

Following the integration of Transylvania into Romania in the sense of public law, enshrined in the Treaty of Trianon (1920), the need to unify the territory of Greater Romania from the point of view of private law arose immediately. All the more so as at the moment of integration, from the perspective of public law, various particular rules of private law remained in force on the territory of Romania. Just as integration in the field of public law, integration from the perspective of private law was a basic objective of the Romanian state, but its realization proved to be more difficult and to require further efforts due to the normative diversity in the field of private law relations. In Greater Romania, *six different regimes of private law* came to coexist, each with its own particularities. On the territory of the Old Kingdom of Romania (also called the *Regat* or 'Kingdom' using the traditional term), the Romanian Civil Code – developed on the basis of the Napoleonic Code – remained in force. In Dobrogea and in the so-called Cadrilater (a territory acquired from Bulgaria, literally 'the Square'), the law of the Old Kingdom of Romania was in force for the most part, but with significant derogations applicable to Muslims. In Bessarabia, in addition to Russian law, the Hexabiblos of Constantine Harmenopoulos (1345) was still in force, but since

1921, apart from negligible matters, the transition to the law of the Old Kingdom had been gradually taking place. In Bucovina, the Civil Code of Austria from 1811 (the ABGB) and its various amendments up to November 1918 was preserved in force. This code was also in force on the territory of Transylvania, but with the amendments put in place by Hungarian laws since 1867. Finally, in the regions of Banat and Crişana, the rules of Hungarian private law adopted before 1 December 1918 were in force, as was the case also in Maramureş.[1]

2. Partial Unification of Law

Due to the difficulties encountered in applying the law that arose owing to the parallel existence of several legal systems, each with its own peculiarities but also resulting from the political purpose of unification of the law, an ample process of legal integration was initiated following the formation of Greater Romania. As a first step, however, Ordinance no I of the Governing Council of Transylvania, Banat, and the Romanian Lands of Hungary maintained with temporary effects the law in force in Transylvania. A similar provision was included in Art. 137 of the Constitution of 1923.

Legal unification could only be accomplished by unifying the whole country, as a territory, subject to a single normative regime. This solution could be implemented with any measure of speed only by extending the laws of the Old Kingdom over Transylvania. This was the proposal of Minister of Justice Constantin Hamangiu (1869–1932), who as of 1 January 1932 would have wanted to see the law of the Old Kingdom in force in Transylvania, except for a few areas where the implementation of Romanian law would have meant a significant regression in the evolution of regulation (especially in what concerned the age of adulthood for women, matrimonial law, guardianship, the land books, or the inheritance rights of the surviving spouse). The proposed solution resulted in vehement protests. For example, the Bar Association of Cluj considered the extension of the laws of the Old Kingdom over Transylvania to be no less than catastrophic and called on fellow bar associations to formulate positions in a similar wording.[2] Because of this reluctance and the death of Minister Hamangiu, this plan was doomed to failure. The immediate and total introduction of the law of the Old Kingdom to Transylvania was also considered by Romanian scholars of Transylvanian law as being contrary to the interests of Transylvanian Romanians.[3]

Another way of the complete unification of law was the development of new normative acts and new codes with valences in the field of private law.

1 Ujlaki 1936. 7–8; Balás 1982. 156–157.
2 See: *Budapesti Hírlap* 8 July 1931, no 152. 8.
3 Negrea 1943. 6.

This process began after the territorial unification but was the longest-running solution for unifying the law.

The unification of the law could be achieved in part, i.e. by the temporary unification of the rules governing a narrower circle of social relations until complete unification took place. Partial unification was seen as a measure imposed by necessity, a component part of the final unification process. Partial unification, in turn, could be achieved by extending the law of the Old Kingdom on the one hand – as happened, for example, in the case of the Romanian Forestry Code of 1910, the applicability of which was extended in 1923 throughout the territory of Greater Romania. The other, much more common way of going about the partial unification of law was the drafting of new laws that regulated certain domains identically. The partial unification of the law was a continuous process until the outbreak of World War II. Such laws of partial unification were, among others, contained in the following acts, to highlight only the most significant ones: The Act on Literary and Artistic Property of 1923; The Act for the General Regime Applicable to Cults of 1928; The Civil Status Act of 1928; The Act on the Sale on Credit of Industrial and Agricultural Machinery and Motor Vehicles of 1929; The Mining Act of 1924[4] (known at that time as the 'Tancred Constantinescu Act') and then the Mining Act of 1929; The Labour Contracts Act of 1929;[5] The Act on the Prevention Concordat of 1929;[6] The Act on Bills of Exchange and Promissory Notes of 1934;[7] The Check Act of 1934; The Act for the Unification of the Provisions Concerning the Land Books of 1938 (entered into force only in 1947), etc.[8]

> The partial unification of the law, by the very nature of the enterprise, is a process that always takes place gradually, the results of which appear as the pieces of a mosaic in the various fields of law, intertwining repeatedly the legal regimes that previously governed these domains with norms equally in force in all domains…[9]

Following the partial unification of the law, the system of sources of law as still in force in Transylvania was structured as follows:[10]

1. Hungarian legal norms adopted before 1 December 1918 (laws, ordinances, customary law, and judicial practice), including the ABGB;

4 Letső–Domokos 1924.
5 Rozván 1933.
6 See Fenichel–Weisz 1929.
7 Kormoss 1934, Szeghő 1934.
8 For details on this topic, see Ujlaki 1934.
9 Ujlaki 1936. 12. [Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.]
10 Ujlaki 1936. 11–12.

2. Romanian laws and ordinances that amended the Hungarian norms adopted before 1 December 1918, which were maintained in force on a temporary basis;

3. the laws initially in force only in the territory of the Old Kingdom which were later extended to the entire territory of the country;

4. legal norms born after the formation of Greater Romania and which were in force throughout the country.

The partial unification of the law led to the gradual repeal of norms of law previously adopted and applicable in Transylvania.

Teaching and applying Hungarian legal rules in the Romanian language began immediately. This process was facilitated by the editing of several legal dictionaries,[11] while under the auspices of Ferdinand I University of Cluj numerous university courses of civil law were published in Romanian, based on the ABGB. An important role was played by University Professor *Camil Negrea* (1882–1956) in teaching of the ABGB in Romanian.

3. Agrarian Reform and Mining Laws

The agrarian reform (land reform) was carried out by the expropriation of large estates (by the Decree with the Effect of Law of 12 September 1919 for Agrarian Reform in Transylvania and the Act of 30 July 1921 for Agrarian Reform in Transylvania, Banat, Crişana, and Maramureş).[12] The expropriation was carried out in exchange for compensations, but the compensation paid in the Old Kingdom was more consistent than the amounts paid in the newly acquired territories (40 times the amount of rent applicable to the land area in the Old Kingdom as opposed to only 20 times the amount of rent in Transylvania). The lands thus expropriated were to be sold to peasants, but this proved to be a slow and arduous process. Until 1934, the peasants came to own just 60% of the land expropriated. Areas of agricultural land acquired from the state through such a purchase could not be sold or encumbered by mortgage until the moment of extinguishment of the existing claim of the state against the buyer consisting of the sale price. The agrarian reform of the year 1921 was evaluated as follows:

> although it did not solve the agrarian question, it had a positive effect in terms of economic and social life because it improved the situation of the peasantry and gave a new impetus to the development of capitalism

11 For example: Gerasim 1920, Pop 1921.

12 For details, see: Az erdélyi agrártörvény (Törvény az erdélyi, bánáti, körösvidéki és máramarosi agrárreformról). 1921; Erdélyre, Bánátra, Körösvidékre és Máramarosra vonatkozó földbirtokreform törvény 1921; Az agrár-reform törvény végrehajtási rendelete Erdély-, Bánát-, Körösvölgy- és Máramarosra vonatkozólag 1921; Móricz 1932.

in the agricultural sector, but at the same time seriously affected former landowners, reducing their economic power and political influence.[13]

The Act of 19 March 1921 abolished the pledge as a guarantee over immovables in the parts of the Old Kingdom where it was still practised.[14]

By the act adopted on 20 August 1929 for the Free Movement of Agricultural Property, prohibitions on alienation of land acquired as a result of the agrarian reform were practically abolished.[15] This was a normative act adopted as a result of the Great Depression (1929–1933), its purpose being to defend the interests of creditors as it opened the possibility of enforcement over the lands acquired as a result of the agrarian reform with the purpose of forced sale for extinguishing of claims. Almost simultaneously, however, the interest of debtor relief became imperative.

In 1924, the Mining Act was adopted, which – in accordance with the policy of the National Liberal Party – favoured Romanian indigenous capital in the procedures for granting mining concessions.[16] Concessions could be acquired exclusively by companies registered in Romania (Art. 32), having exclusively shares registered to the name of the shareholder. The shares could not be transferred to foreigners without the consent of the board of directors (Art. 33). A percentage of 60% of the company's capital had to be owned by Romanian citizens, and two-thirds of the members of the board of directors, of the audit committee, and the chairman of the board of directors had to hold Romanian citizenship. Previously granted mining concessions were maintained through the new law but only if foreign investors had obliged themselves to achieve a ratio of 60%–40% between Romanian and foreign capital within the corporation in a period of 10 years and to ensure with immediate effect that the majority of the members of all collective management bodies and the executive director of the enterprise were Romanian citizens.

The law had been widely criticized by foreign investors (especially in the oil sector, at that time of European significance), including through the exertion of diplomatic pressure. As a result of these tactics, the mandatory quota of Romanian capital was reduced to 50.1%. After the National Peasant Party had come to power, a new Mining Act was adopted (in 1929), implementing an open policy and repealing the provisions that had benefited local capital.[17] This change was due, inter alia, to the need to contract external loans with the purpose of

13 Cernea–Molcuț 1996. 260.

14 Balás 1982. 158–159.

15 Oberding 1932.

16 Legea minelor adnotată cuprinzând: Legea minelor din 4 iulie 1924, observațiuni, jurisprudență, dezbateri parlamentare, rapoartele de la Cameră şi Senat, expunerile de motive, deciziuni ministeriale, index alfabetic de Grigore Zamfirescu şi Constantin Zamfirescu 1927. Regarding the opposition against this act in other countries, see: Buzatu 1998. 215–216.

17 Legea minelor din 1929, însoțită de expunerea de motive a domnului ministru V. Madgearu, avizul Consiliului legislativ, rapoartele de la Senat şi Cameră 1929.

stabilizing the Romanian economy in order to be able to counteract the effects of the Great Depression, the creditors requesting the abolition of restrictions in exchange for encouraging lending. The Mining Act adopted in 1937 during the rule of the National Liberal Party was the third such law.[18] It partly reintroduced norms that favoured indigenous capital.

4. Company Law

In the field of company law, several different legal regimes coexisted in parallel: in the Old Kingdom, the Commercial Code of 1887 remained in force, while in Transylvania the Trade Act (Act XXXVII of 1875) was still applied.

In 1924, the Act on the Marketing and Control of Economic Enterprises[19] was adopted, which, with regard to companies owned by the state, introduced unitary regulation in the spirit of the protectionist economic policy of the National Liberal Party, similar to the Mining Act of 1924. The rule divided state-owned companies into two groups: companies that contribute to the achievement of a public interest and companies with a purely economic purpose. The companies that contribute to the pursuit of a public interest functioned as state monopolies, but companies with a purely economic purpose could operate with the participation of foreign capital, even up to a maximum of 40%. So that the shares would not be sold to foreigners, such companies were allowed to issue shares registered exclusively to the name of the owner, and the assignment of the shares was linked to the assent of the board of directors. At least one third of the members of the governing bodies, the president of the board of directors, and the executive director had to hold Romanian citizenship. In a period of seven years, the proportion of Romanian citizens in the workforce had to reach the quota of 75% both in terms of the number of employees and in terms of salaries according to the payroll. This norm was in force until 1929, when, following the accession to power of the National Peasant Party, the Act on the Organization and Administration on a Commercial Basis of Enterprises and Public Wealth was adopted.[20] This new rule repealed the threshold of 40%, allowed the issuance of bearer shares, and abolished restrictions applicable to members of management bodies in the regard of citizenship. In the context of the Great Depression, however, long-awaited foreign investment has not materialized.

18 Legea minelor, adnotată de Mihail Ciocâlteu, cu jurisprudența instanțelor judecătorești și însoțită de expunerea de motive, avizul Consiliului legislativ și raportul Comisiunii Camerii 1937.

19 Legea privitoare la comercializarea și controlul întreprinderilor economice, însoțită de expunerea de motive 1924.

20 Legea pentru organizarea și administrarea pe baze comerciale a întreprinderilor și avuțiilor publice 1929.

5. Reform of the Regulation Regarding Legal Persons

According to Act 21 of 1924 on Legal Persons, legal entities under public law could be established exclusively by an act of legislation and legal persons of private law in the form of associations and foundations, in the forms established by the Commercial Code or by other special laws. Legal entities already in existence were obliged to present evidence within 6 months from the entry into force of the act regarding the legal personality they had enjoyed until then (to submit their statutes), having to request re-registration in the registers of legal persons held by the courts based on their statutes. New associations and foundations could be established by decisions admitting their incorporation issued by the courts. To set up an association, at least 20 members had to join it. The state exercised a right of supervision and control over all legal persons under private law.[21]

The cooperative movement played a significant role in the survival of the Hungarian community in Transylvania and in realizing its economic potential, in complementing the deficient services of the state. Act 35 of 1929[22] on the Organization of Cooperation modernized the law of cooperatives, and the persistent situation of legal uncertainty due to the lack of proper regulation ceased.

> The Romanian law of cooperation of 1929 ensured – with certain limitations – the possibility of free economic organization by members of the Hungarian minority and recognized the cooperative movement of Hungarians as being under the control of its own centres – the Alliance of Hungarian Economic and Credit Cooperatives and the 'Hangya' ['ant' in Hungarian – *note by the author*] Consumer Cooperative Centre – as a national cooperative movement.'[23]

The law granted 10 years for bringing the statutes of Hungarian cooperatives into compliance with the requirements of Romanian laws on cooperation. The Act on Cooperation of 1935 did not modify the original concept, but the 1938 Act on Cooperation adopted during the Carlist dictatorship assigned central control of the cooperative movement to the National Institute of Cooperation (INCOOP), thus winding up a vital pillar of the independent cooperative movement.[24]

21 Balás 1982. 157.
22 See Borbély 1935.
23 Nádas 1940. 591.
24 For details, see: Nádas 1940. 591–592; Hunyadi 2002. 65–76.

6. The Consequences of the Great Depression

The Great Depression, which began in 1929 and that has already been mentioned, had as an effect the intervention of the legislator in the legal relations of private law. Both the means of civil law and those specific to criminal law were employed against usury (see the Act against Usury no 61 of 1931). The interest permitted could not exceed by more than 6 percentage points the (interest rate) set by the National Bank. The legal interest rate was 1 percentage point higher than the interest rate of the National Bank in civil (non-commercial) cases and by 2 percentage points in commercial ones.

In December 1931, a law was enacted on the suspension of enforcement proceedings. Between 1932 and 1934, the parliament has passed several laws on the payment of claims. The first law, in 1932, aimed to absolve smallholders farming on a maximum lot of 10 hectares or 20 acres from the payment of 50% of the debt due. According to the norm, the second half of the claim was to be borne by the state, to be repaid by the debtor over a period of 30 years and at a reduced interest rate of only 4%.[25] For those who held lots larger than 20 acres, the rule would have granted a preferential reduction in interest, reducing the amount of interest due by 10% for debts newer than 5 years and by 50% for debts older than 5 years. Credit institutions protested against the proposed rules, the promised measures for their support not yet having been introduced. The Act for the Liquidation of Agricultural and Urban Debts of 1934 was finally adopted, which reduced agricultural debts by half and granted an extended repayment period of 17 years for the repayment of the remainder, with an annual interest rate set at 3%.[26] Urban debts were reduced by 20%, a repayment term of 10 years, with an annual interest rate of 6% being provided. Credit institutions' losses were partially offset by the state, but as a result of the measure many small banks ceased operations, and lending to the population stopped, banks not wanting to assume its risk.[27] The state also intervened in housing leases, in the interest of protecting tenants.

7. Attempts to Recodify Private Law during the Reign of King Carol II of Romania

Taking into account the failure to extend the civil law of the Old Kingdom to Greater Romania, unification of private law was considered possible by developing new codes. Therefore, the elaboration of the bills of the two codes of private law was initiated, these being the Civil Code and the Commercial Code.

25 Act for the Liquidation of Agricultural Debt. See Gáspár–Váradi 1932.
26 Scurtu 2012. 96.
27 Constantinescu 1943. 251.

The press reported in 1936 the success of these efforts in connection with the elaboration of the draft Commercial Code:

> In the course of the autumn, the draft unitary Commercial Code will be proposed for debate in parliament. The work of the commission which received the task of unifying commercial law is at such an advanced stage that the draft of the new Code may be submitted to the [plenary session of] parliament in the course of the autumn. Multiple laws in force were included in the bill which are closely related with industry and trade. Thus, for example, the Act on the Trade Register and the Act against Unfair Competition were introduced in full in the new bill. This draft introduces throughout the country the institution of companies with limited liability. This corporate form existed until now only in Bucovina. The main purpose of the company with limited liability – as we know – is replacing joint-stock companies. In connection with the regulation of joint-stock companies, the new Code introduces an increased liability of board members.[28]

In reality, the process took much longer.

The draft Civil Code and Commercial Code as well as the Code of Civil Procedure were adopted during the dictatorship of King Carol II of Romania.

The new Civil Code was published in the Official Gazette on 8 November 1939, the entry into force being expected to take place on 1 March 1940. The then Minister of Justice declared that he had to express the greatest gratitude and reverence to His Majesty King Carol II, at whose high instructions and initiative – concerned exclusively with the prosperity of the homeland – this work of truly extraordinary scale had been achieved.[29] The Commercial Code was adopted in 1938 and amended in 1940, and the rules on general meetings of joint-stock companies (articles 208–234) entered into force as early as 7 October 1939.

The full entry into force of all three codes was set for 15 September 1940, subsequently postponed to 1 January 1941, but, finally, on 31 December 1940, the date of their entry into force was again postponed, this time indefinitely. The reason was constituted, among others, by the territorial losses suffered by Greater Romania: Bessarabia was to be ceded to the Soviet Union (in June of 1940), and in the sense of the Second Vienna Award the north of Transylvania had to be ceded to Hungary (on 30 August 1940).

The three codes were considered to be works of great significance of Romanian legal thinking.[30] The territorial losses of Romania, the abdication and forced exile of King Carol II, the events of World War II, and the rise of the Soviet-

28 See *Keleti Újság* 7 August 1936, no 180.

29 See *Keleti Újság* 10 November 1939, no 259.

30 Negrea 1943. 22–23.

style dictatorship prevented the entry into force of the three codes, and thus the unification of private law by new codification could not be achieved.

8. Consequences of the Annexation of Northern Transylvania to Hungary in the Field of Private Law

The annexation of Northern Transylvania to Hungary by the Second Vienna Award (1940) also raised the issue of the need for the reorganization of private law. Through Act XXVI of 1940 (paragraph 3), the Hungarian legislator empowered the government to take all measures considered necessary in order to reconnect the system of private law of the re-annexed territories to the legal system in force in the rest of the country. The Hungarian government would have preferred the full integration of Northern Transylvania when it came to the regulation of private law. However, this process was not without difficulties. The purpose of integration could be achieved only by repealing the ABGB and (re-)implementing Hungarian private law – largely based on customary law. The laws of Hungary, however, especially in the fields of family law and inheritance law, presented fundamental differences from the ABGB, the rules of which had already gained the status of legal custom in Transylvania.[31]

The community of jurists in Transylvania would have preferred to maintain the ABGB in force until the entry into force of the Code of Private Law of Hungary. (The draft Code of Private Law of Hungary was completed in 1928, but it could not be adopted, among other things, precisely because the political élite of the time considered it would jeopardize the revisionist objectives of the time if Hungary and the territories it lost after World War I – the recovery of which was much desired – evolved divergently from a legal standpoint.) The ABGB is indeed a foreign law – according to the argument of Hungarian jurists of the time –, but it cannot be ignored that it was in force for several generations, and as a consequence Transylvanian lawyers had become accustomed to this law to such an extent that they no longer noticed its foreign character.[32]

The objections to the extension of Hungarian law were recapitulated by the Bar Association of Târgu-Mureş through an address.[33] Here we would like to highlight three groups of objections.[34] The first objection showed that the rules contained in the ABGB regarding matrimonial law and the law of succession were

31 For details, see: Burián 2014. 69–81; Szászy 1942. 29–61.

32 Schuster 1940. Rudolf Schuster (Mediaş, 1860 – Budapest, 1941) obtained his diploma at the Faculty of Law in Cluj and later became an attorney-at-law and then judge at the Royal Court of Appeals at Târgu-Mureş, justice of the Curia and patent judge. He was an author of legal literature.

33 See *Erdélyi Jogélet* 1942.

34 Túry 1942. 9–11.

congruent with both the sentiment and the patrimonial and economic relations of the Transylvanian population during the seven decades that the ABGB was in force, and in Transylvania the pertinent norms of Hungarian law therefore seemed foreign. According to the second objection, Hungarian private law was not codified in written form, so it would have been excessively difficult to have its rules made accessible to the population of Transylvania. The third objection, in turn, referred to the fact that statutory law would have been replaced by customary law: thus, the stable framework established by the ABGB would have been replaced by a system of customary law, which is much more fluid by its very nature.

> About customary law, theory teaches us that it is that norm in accordance with the feeling of justice among the people which exists in public perception and which derives its mandatory strength from this very general perception, which is characterized by the fact that it arises not by a single act of the legislature, through the usual forms of legislation, but through its continuous exercise. If this is how things are indeed, then the possibility of extending to the territory of Transylvania by an ordinance of the government of a normative complex of customary law that, in principle, does not live in the public conscience of the Transylvanian people, which is not even in concordance with the legal sentiment of this people and which was not used here for decades or maybe ever, is a little doubtful.[35]

The resistance was not against the unification of law in general but against customary law in particular. This was assessed as an effect of the accommodation of legal thinking in Transylvania to the current and widespread perspective in the second half of the 19th century, which considered legal norms not necessarily from the perspective of national culture but from the perspective of their usefulness and practicality.[36]

The government did not accept these arguments and decided in favour of the unification of the law, with the consequence of repealing the ABGB. Thus, the unification of the law applicable in the eastern territories and in the parts of Transylvania which were re-annexed to Hungary was completed and the system of private law rules of Hungary generalized, the ABGB being definitively repealed from among the sources of positive private law. The most important means of unification of law were as follows: in matters of real property law – the Order of the Prime Minister no 1440 of 1941; in the field of the law applicable to persons and family law – the Order of the Prime Minister no 1600 of 1941; in matters relating to the law of obligations and credit – the Order of the Prime Minister no 5460. The unification process was completed by the Order of the Prime Minister

35 Túry 1942. 11–12.
36 Túry 1942. 13.

no 740 of 1942 on the extension of the norms regarding the defence of possession, matrimonial law, inheritance law, and rights of the author (copyright) and by the provision with general validity that ordered the extension of the norms of private law over the territories annexed by Hungary. The point of view was formulated in the literature according to which, by repealing the ABGB, a legislative vacuum formed in Northern Transylvania because the transplantation of customary law had formally taken place, but the content of the law thus brought into force was not known. Hungarian customary law, formally in force, now had in fact to be created by its very application by the Transylvanian judge.[37]

The foreign law character of the ABGB, imposed on Transylvania by external force, was perceived as favourable to the unification of law in the sense of compatibility of customary law with the legal consciousness of the population of Transylvania, but the main reason remained that of a desire for restoring the unity of the legal system of the territories recently re-annexed with that of the mother country.[38] It was also argued that Hungarian law 'has a content established by custom, but the basis of its application on the territory of Transylvania is no longer provided by any custom but by the indirect manifestation (by reference) of the legislator'.[39]

The solution implemented by the Second Vienna Award was, however, quashed by the conditions prevalent at the end of the Second World War (the outcome being affected by the fact that the basis of the Vienna Award was a decision ultimately made by Hitler and Mussolini, by the successful realignment of Romania following King Michael's Coup, which resulted in an early exit from the alliance with Germany, by Stalin's attitude to the Transylvanian question, etc.). The Romanian legislator extended Romanian private law consisting in the Civil Code of 1864 to Southern Transylvania as early as 1943 and following the 1945 restitution (by Act no 260 of 1945) of Northern Transylvania – in this case, with lightning speed –, overwriting the substantiated scientific plan for the gradual integration of private law, which characterized the period before the Second World War.

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37 Balás 1942. 66–69.

38 For details, see: Túry 1942. 10–12, 17.

39 Túry 1942. 17.

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*** *Keleti Újság* 7 August 1936, no 180.

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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 363–396

DOI: 10.47745/AUSLEG.2020.9.2.08

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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Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 397–412

DOI: 10.47745/AUSLEG.2020.9.2.09

A Historical Outline of the Development of Civil Procedure in Transylvania as Part of Romania

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Abstract. The following study constitutes a historical outline of the evolution of Romanian civil procedure in the period between 1918 and 2013 from the perspective of the norms applicable in Transylvania as part of Romania. Romanian civil procedure in the period immediately after 1918 presented a diverse picture, with several procedural regimes applicable in the same country at the same time. This raised the necessity of unifying procedural norms, at first attempted by recodification and later accomplished by the extension of the Code of Civil Procedure of the Kingdom of Romania to Transylvania in 1943. As the Soviet-type totalitarian regime was consolidated in the late 1940s, a reform (much rather a recodification) of civil procedure occurred in the new spirit of the age, which, along with subsequent norms led to the reduction of judicial remedies and the introduction of a 'lay element' into the process by the presence of assessors, and it also increased the role of public prosecutors during the civil trial. Following the 1989 regime change, civil procedure in Romania at first, before a comprehensive reform, reverted to historical models, and then finally recodification was achieved.

Keywords: civil procedure, Romania, Transylvania, procedure reform, civil trial

1. Introduction

Civil procedure constitutes the basic framework for the judicial resolution of civil disputes. Therefore, it is intrinsically connected to the nature and character of private law regulation, constituting the means by which the observance of substantive rights stipulated by private law can be imposed. For this reason, the study of the development of private law cannot be envisaged without some reference to the norms of civil procedure. An example of this case is studying the development of private law in the geographic space known as Transylvania, from

the standpoint of legal history, a feat to which the authors of this issue of *Acta Universitatis Sapientiae – Legal Studies* have endeavoured.

In this paper, we shall attempt to provide an outline of the transformations to which Transylvanian civil procedure was subjected subsequent to the unification of this region with Romania. The scientific objectives we aim to achieve by this effort are multiple. Firstly, by using the developmental traits of civil procedure, we intend to exemplify the various modes for unifying the divergent systems of law which came to coexist in Romania after the political unification had occurred. Secondly, we would like to document the developmental schema of civil procedure during the period of the totalitarian, Soviet-type regime. Thirdly, we aim to demonstrate the divergent paths for the development of civil procedure taken by the Romanian legislator following the regime change in 1989, paths which have led it to attempt to reconstitute the elements of civil procedure which pre-dated the coming into power of the totalitarian regime and then to achieve an entirely new codification. Fourthly, we would like to underline similarities between the civil procedure applicable in Transylvania in 1918 and the one resulting from reform and recodification: the necessity of the parties to clarify and set forth – prior to the trial – their claims and statements of defence and the heightening of the role of attorneys-at-law during the procedure.

2. Civil Procedure in Transylvania between 1918 and 1943

Following unification, extending the public administration of the Kingdom of Romania to Transylvania and the region previously called the Partium (the regions known in Romanian as the Banat, the Crişana, and Maramureş) did not immediately result in the entry into force of the Romanian Code of Civil Procedure[1] of 1865 in these regions. Thus, in the period between 1920 and 1943, the provisions of Act I of 1911 (known as the 'Plósz' Civil Procedure after the eminent jurist Sándor Plósz) were preserved in force in Transylvania. As a significant innovation at the time – of relevance even today –, Act I of 1911 introduced a civil procedure divided into two main phases: the clarification of the procedural framework[2] and the trial itself (judicial investigation and debate on the merits), separated by the so-called procedural *caesura*, which enabled the parties to record their claims and statements of defence before the court, claims

1 Published in the Official Gazette of 9 September 1865. For the original text, see Boerescu 1865.

2 The procedural framework consists of the parties, the object, and the cause of litigation. Without knowledge of these elements as early in the procedure as possible, the court would find it difficult and time consuming to resolve the dispute brought before it, while the parties might find themselves facing a 'surprise judgement' which may either not be based on their initial claims or statements of defence or which may invoke other legal norms than what the parties have initially envisaged, thereby reducing the predictability of jurisprudence.

and statements that were then to remain substantially unaltered for the entire duration of the procedure.

Due to the continuous application of Act I of 1911, Transylvania was mostly unaffected in terms of civil procedure by the series of amendments to the Code of Civil Procedure of 1864 which occurred prior to 1925[3] (although the jurisdiction of the courts[4] was transformed by the Act of 4 August 1921). It is worthy of mention that the provisions of Hungarian civil procedure pertaining to compulsory legal representation before courts (from under which parties were exempted in lower-value litigations) were among the first norms to be repealed by the Romanian administration following unification, in 1920.[5] This measure brought civil procedure in Transylvania in line with the principle of freedom to address the court directly, present in Romanian civil procedure, but it elicited fervent protests from Romanian attorneys practising in Transylvania,[6] who viewed it as illegal and unpractical because it de-professionalizes representation during the civil trial.

Subsequently, the acts for the acceleration of trials of 1925[7] and of 1929[8] as well as Act 394 of 1943[9] – having an identical purpose of regulation – affected the rules of civil procedure in Transylvania, partly by reorganizing the subject-matter jurisdiction (jurisdiction *ratione materiae*) of the courts but especially by regulating the procedural conduct of the parties during the submission of the claim and during conducting of the judicial procedure.

The Act of 1925 aimed to emulate some elements of Hungarian civil procedure by placing emphasis on the content of the application which the claimant must submit to the court and on the statement of defence by the respondent (providing the compulsory elements of these written statements and prescribing sanctions if these elements were absent). Also, for a brief period between 1925 and 1929, compulsory representation by an attorney was reintroduced, only to be scrapped

3 These repeated modifications began a decade after the entry into force of the Code of Civil Procedure of 1865 and in large part altered its initial unitary concept and structure, placing jurisdiction *ratione materiae* in lower-value cases to justices of the peace, which had a pronounced 'popular' character (being lay judges, elected from the local – village – community), incompatible with that of a modern, independent judiciary. Other modifications performed later on substantially transformed litigious procedure in order to combat the increasing duration of trials. For details, see: Porumb 1960. 8–9.

4 See Herovanu 1932.

5 Ordinance no 4199–1920 of the *Consiliul Dirigent* (Directing Council, a body of interim government established for Transylvania after unification) of 27 February 1920. Published in the Official Gazette of the National Unification Commission in Cluj, no 9 of 21 May 1920.

6 See Mandicevschi 1921.

7 Published in the Official Gazette no 108 of 19 May 1925.

8 Published in the Official Gazette no 150 of 11 July 1929.

9 Published in the Official Gazette no 143 of 23 June 1943. On its content, see: Păduraru–Stoenescu–Protopopescu 1943.

again by the Act of 1929,[10] which further simplified the content of the application and the written statement of defence.

These later rules, beginning with the Act of 1929, have often assigned a less formal character to the procedure. However, these rules did not affect either the substance or the structure of the civil procedure or the norms of procedural conduct applicable in Transylvania.

3. Attempts to Unify and Modernize the Law of Civil Procedure

Several times treated but never cured, the increasing duration of trials became a malady of the civil process during the inter-war period. In Romania of the 1930s, the recodification of the norms of civil procedure began partly and in order to solve this problem. Another aim of this recodification was to achieve the unification of the various norms of civil procedure applicable in the several regions unified with the Old Kingdom of Romania and to thereby reduce the dizzying array of procedural systems at work in the country. The legislator's effort resulted in several proposals for the new code, of which the 1938 draft was promulgated on 8 November 1939, but it never came into force.[11]

A later draft and then as its final, reworked version, the Code of Civil Procedure of Carol II – named after the king still at the helm of the country at the time –, was inspired by the Italian Code of Civil Procedure of 1939 (known as Mussolini's Code of Civil Procedure) as well as by previous draft codes and by civil procedural law in force in Romania during the period of its development. The purpose of the recodification was defined by Minister of Justice Ion V. Gruia as – among other things – a need to develop a procedural regime qualitatively worthy to replace the Hungarian Civil Procedure of 1911, in force in Transylvania.[12] The date of 15 September 1940 was set for the entry into force of the new code, which eventually never took place.[13]

Had the Carol II Code of Civil Procedure entered into force, it would have introduced some institutions similar to the Hungarian Civil Procedure of 1911,

10 On the content of the Act of 1929, see Nádai 1935.

11 See the ministerial argumentation for the draft Code of Civil Procedure of the year 1938, Gruia 1940. 97. The text of the draft was also published in the Romanian Official Gazette no 1940/201. 3–95.

12 Gruia 1940. 96.

13 This can be deduced from the fact that the Romanian legislator, during the comprehensive recodification of civil procedural law by means of Act 18 of 1948, did not repeal the Code of Civil Procedure of Carol II (see Act 18 of 1948, Art. VI) even though, for safety's sake, the 21st-century legislator still provided for the repeal of the Code of Civil Procedure of Carol II in the text of Act 76 of 2012 regarding the application of the new Code of Civil Procedure of the year 2010, in Art. 83, letter b).

collectively known as preclusion, which would have required the parties to present their claims and defences in a timely and complete fashion under penalty of not being allowed to invoke them later on.

4. Civil Procedure during the Soviet-Type Regime

Following the Second World War, the need in Romania for the unification of civil procedural law in the territorial sense and with respect to the content of normative acts manifested itself so acutely that the legislator did not even wait for the adoption of the Constitution drafted in the new spirit of the age: the recodification of civil procedure occurred in the first months of 1948. The 1940 (draft) Code of Carol II was removed from among the possible sources of inspiration, and a bill for the substantial amendment of civil procedure (in fact, a new draft Code of Civil Procedure to all intents and purposes) was elaborated in its place, taking into account the provisions of the Code of Civil Procedure of 1865, of the acts for the acceleration of justice, and the practice of the High Court of Cassation and Justice. The reform of civil procedural law was preceded by the transformation of the organization of the judiciary, first by Act 341 of 5 December 1947. The greatest novel element of the new system of organization – in order to subjugate justice to political power – was constituted by the introduction of popular participation in the process of rendering justice, which was later generalized by the Decree of the Presidium of the Grand National Assembly no 132 of 1949 on Judicial Organization (Art. 5). This Decree extended popular participation to all courts outside of the Supreme Tribunal, by the presence of popular assessors[14] (persons without legal training, appointed by way of political procedures) within the activity of jurisdiction. This measure was meant to imprint a 'popular' nature on the activity of courts.

> At the celebration, the president and the secretary of the Temporary Committee of the District were present, being accompanied by the judge of the District Court. The working people of Ciucsângeorgiu unanimously elected as judge the poor peasant Imre Szőcs, the village of Bancu the small craftsman Ignác Jakab, the village of Armăşeni the middling farmers Klára Adorján and András Lukács. Following the solemn election of the people's judges, the youth of the commune and the stringed instruments orchestra of Bancu village held a musical show.[15]

14 On this institution and on the main characteristics of Soviet civil procedure, see Chenoweth 1977.

15 *Népújság* 1949. Translation by the author. Unless otherwise specified in the footnotes, all translations of quotes are by the author.

Unfortunately, the Romanian legal literature has not preserved the circumstances of the amendment of the Code of Civil Procedure. An article published on 1 February 1948 in the daily newspaper *Scânteia* (The Spark), the central press body of the Romanian Communist Party, announced with some fanfare the submission of the draft amendment to the Code of Civil Procedure to the National Assembly the day before. The author of the article summarized the novelties brought by this Code, and, in addition to mentioning the unification of law, he highlighted the placement of general jurisdiction *ratione materiae* for trials in the first instance to the district courts, the introduction of the principle of party disposition in the 'socialist sense', public legal aid free of charge, and the simplification of the rules of litigious procedure.[16] The issue of 5 February 1948 of the same daily announced the beginning of the debate of the draft by the Judiciary Committee and, in addition to listing the above, stressed the simplification of the divorce procedure and the repeal of the institution of marriage dissolution by the consent of the spouses.[17]

The publication of the comprehensive amendments to the Code of Civil Procedure in the Official Gazette of Romania took place just a week later.[18] The intention of the Romanian legislator towards the acceleration of the transformation of civil procedural law was evident, and so codification was not preceded by any debate within the legal professions nor by any form of scientific publication.

As an effect of this change, the principle of party disposition in the 'socialist sense' (which in Romanian legal literature wore the same name as in the Soviet Russian legal literature, that of 'the judge's active role') and the obligation to inform litigants were introduced. By application of the first principle, Art. 129 of the Code of Civil Procedure allowed the judge to move *ex officio* to administer evidence, even in spite of the opposition of both parties, thus strengthening the judicial role in the civil process. Article 130 of the Code of Civil Procedure defined the so-called obligation of information and stipulated that judges 'shall provide active assistance to the parties in protecting their rights and interests'.[19] The legislator also crammed into this last article the requirement of determining objective (material) truth, for which the judge was obliged to strive by all means, having to avoid any mistakes in the course of this endeavour, in the spirit of socialist materialist-dialectical legal philosophy.[20]

Civil litigation, as a framework for private law litigation of the parties, was thus put in the service of mass education, the construction of the socialist conscience, the realization of popular justice, the defence of the patrimony of

16 Lupaşcu 1948. 3.

17 Modificarea Codului de Procedură civilă 1948. 3.

18 Act 18 of 1948 regarding the Modification of the Code of Civil Procedure, published in the Romanian Official Gazette no 35 of 12 February 1948.

19 Porumb 1960. 300.

20 Moldovan 1949. 974.

socialist organizations, and the defence of the rights of 'the working people', as a manifestation of the branch of public jurisdictional law.[21]

Here it is worth mentioning that, despite the content of the norms introduced to implement the active role of the judge, the Code of Civil Procedure, as amended in 1948, has retained the structural specificity of the Code in its previous form, and thus not long after its entry into force it was considered an incomplete reform, a missed opportunity for remaking Romanian civil procedure in the likeness of the new regime.[22]

Even if there were trends of simplification, the rules governing the procedure before the courts of first instance have remained fundamentally unchanged in their essential content. Zilberstein, Stoenescu, and Porumb, authorities of socialist legal literature, explained this state of affairs by showing that although the normative text previously in force was often kept, it was charged with the new socio-economic content of the socialist worldview, being destined to serve in the future for the defence and promotion of the new social order.[23]

Act 5 of 1952, by which judicial organization was reformed, abolished the courts of appeal within the Romanian system of jurisdiction and thus made it necessary to amend the Code of Civil Procedure once more. This occurred through Decree no 132 of 1952,[24] which placed general jurisdiction *ratione materiae* of the court of first instance to the people's courts (the court at the base of the jurisdictional pyramid). These could decide in any litigation for which the jurisdiction *ratione materiae* of another court has not been expressly established by law. According to the Soviet model, the ordinary, or first appeal (on the merits and on points of law), meant to subject the decision of the court of first instance to a second degree of jurisdiction, was abolished. Thus, only the second appeal (exclusively on points of law) – previously intended in most cases to submit the decision of the court of second instance to review by a court of third instance – was preserved, which, due to the nature of this appeal, could only be exercised if some grounds for quashing the decision, expressly provided by law, were present. The role of resolving these appeals on points of law – thanks to the abolition of the courts of appeal – was placed in the jurisdiction of the courts in the second

21 Hilsenrad–Stoenescu 1957. 14; Rebeca 2013. 66.

22 Moldovan 1949. 977–978.

23 Stoenescu–Zilberstein 1983. 54; Porumb 1960. 7; Cracănă 2013. 83–84. This interpretation was called by Cracănă as the 'teleocratic' interpretation of law to signal that the judge was required to interpret the law in a positive manner, according to the expectations of the powers that be and to develop his judicial practice in accordance with the implicit but predictable expectations of these powers. See Cracănă 2014. 181.

24 Stoenescu–Zilberstein 1983. 54. Unfortunately, the normative content of the decree is only found in abbreviated form in the compendiums of Romanian legal norms, usually the part reproduced there referring to the restructuring of judicial organization, the rest of the provisions being able to be reproduced only from contemporary indirect sources.

tier of the Romanian judicial hierarchy, the so-called tribunals, which previously had jurisdiction to decide during the first appeal.

The drafters of Decree no 132 of 1952 already took into account the results of constitutional transformations to a totalitarian regime which occurred after 1948, and therefore they increased significantly the activity of the Public Ministry (the public prosecutors) within the civil procedure, generalizing the participation of the prosecutor and granting him de ability to make any assertions during the trial. Subsequently, Decree no 38 of 16 February 1959 extended the prosecutor's right to initiate litigation, as a rule, to all types of civil matters.[25] Functions of the prosecutor in the process – control of legality and representation of public interest – remained unchanged.

Act 58 of 1968, which replaced Act 5 of the year 1952 and which also referred in this case to judicial organization, consecrated the exceptional nature of the participation of assessors, restricting application of this institution to criminal and military courts. This way, Romanian civil procedure broke with the system of popular participation by the presence of assessors within the civil process – a mainstay of socialist totalitarian justice – and at the same time with the principle of popular jurisdiction, a measure unique at that time among the states in the region belonging to the socialist bloc.

5. Civil Procedure Following the Regime Change

5.1. Return to Previous Models of Regulation

Following the regime change, the Constitution of 1991 in its Art. 21, para. (1) ensured from the very beginning[26] the right of persons to address the courts for 'the defence of rights, freedoms, and legitimate interests', while para. (2) stated the exercise of this right as not being subject to limitation by law, consecrating the principle as an effective remedy against the violation of legitimate rights and interests. The Constitution did not provide for the possibility of appeal, through the exercise of at least one (hierarchical) appeal by which the decisions of the courts of first instance can be challenged, the consecration of the latter fundamental right being left to the practice of the Constitutional Court.[27]

25 Leş 1982. 204. The implementation of the Soviet-type model can be considered as belated in this case.

26 See Stancu 2011. 107. The author mistakenly states that this right was only provided for subsequent to the amendment of the Constitution in 2003 as a principle of civil procedure, an observation which she probably intended to make regarding the right to a fair trial, which indeed was first provided for by the amended Constitution of 2003 in its Art. 21, para. (3).

27 Decision of the Constitutional Court no 967/2012.

Act 92 of 1992 on Judicial Organization re-established the courts of appeal, reinstating the four-tier hierarchy of courts (courts of appeal were re-established, among other locations, at Braşov, Alba Iulia, Cluj-Napoca, Târgu-Mureş, Oradea, and Timişoara). In accordance with this structural transformation, Act 59 of 1993 reorganized the jurisdiction *ratione materiae* of the courts, reserving general jurisdiction to local courts (Code of Civil Procedure of 1865, Art. 1). County tribunals acquired special jurisdiction *ratione materiae* regarding certain disputes – expressly provided for by law – especially in higher-value litigations and in cases when rights in strict relation with the party's person were concerned as well as in cases of administrative litigation that did not fall within the jurisdiction of the courts of appeal. By re-establishing the courts of appeal, they became the third tier of the justice system. The jurisdiction *ratione materiae* of the courts of appeal extended to the trial of administrative litigation in the first instance if the defendant was a central government body. Besides these cases, the jurisdiction of the courts of appeal was limited to the solution of the recently reintroduced remedy of first appeal (on points of fact and of law), which could be exercised against judgments rendered in the first instance, and to resolving the second appeal (exclusively on points of law) that the former unique remedy permitted under socialist procedural law. The second appeal could be exercised against decisions rendered in the second instance, after the first appeal (reintroduced in 1993) was exercised, or against decisions not subject to first appeal.

The Supreme Court of Justice (later renamed the High Court of Cassation and Justice) has become an exclusive forum for cassation in civil litigation meant to decide – in addition to civil second appeals exercised in certain cases assigned by law to its jurisdiction – also in so-called appeals in the interest of the law (a means of unification of case-law) and in the extraordinary appeal in annulment, as the last degree of jurisdiction. These three types of procedures emphasized the exclusive role of this high forum, that of unifying jurisprudence in civil matters.

By redefining the role of the prosecutor in the civil process [Art. 45, para. (1) of the Code of Civil Procedure of the year 1865], Act 59 of 1993 partially returned to the original content of Art. 45, para. (1) of Act 18 of 1948 – the law for recodifying the Code of Civil Procedure adopted in a socialist spirit – in its original form, before the inflation of the attributions of the Public Ministry (the organizational form of public prosecutors) within the civil process, which was due to amendments enacted in the 1950s. The initial norm of 1948 limited the prosecutor's participation in civil proceedings to cases where defending the interests of a minor, of an adult without the exercise of legal capacity (or with a limited exercise of legal capacity, an institution still in existence for adults in 1948) was necessary, without the possibility of initiating civil action at this initial stage of the regulation. The legislator of 1993 did not return to the norms

contained in Decree no 38 from 1959,[28] which ensured the prosecutor the right to notify the civil court of his own motion (*ex officio*) and the right to participate in any process with the purpose of general defence of public interests. The new, quite progressive norm, however, did not remain in force for long. By Decision no 1 of 4 January 1995, in which it invoked the provisions of Art. 130, para. (1) of the Romanian Constitution of 1991,[29] the Constitutional Court of Romania considered this change – which was initially meant to limit the role of the public prosecutor – to be unconstitutional. This decision set out a retrograde solution to the anomalously wide role the public prosecutor enjoyed in civil procedures under the totalitarian regime. Following this decision of the Constitutional Court, the right of the prosecutor to participate in any civil trial has retained its general character; his right to seize the court with a civil action, however, was limited to actions initiated for the defence of the rights and legitimate interests of minors, of adults lacking exercise of their legal capacity, and of missing persons.

Perhaps the most significant aspect of the comprehensive changes to the Code of Civil Procedure of 1865 was the transformation of the system of remedies. Act 59 of 1993 reintroduced the first appeal as an ordinary appeal; in cases in which it was exercised, the sentence of the court of first instance (and its underlying conclusions) was retried in a devolutive[30] manner by the court hierarchically superior to the court of first instance.

5.2. Reforming Civil Procedure

Regarding Romania, the period between 1996 and 2003 was characterized in the field of justice by increasing pressure from the European Union, which made itself felt in civil procedural law. The country report published in 1998 criticized the dysfunction of the justice system.[31] In this period, marked by the ever more serious increase in the duration of civil procedures, the second structural change occurred to the law of civil procedure, by means of Government Emergency Ordinance no 138 of 2000.[32]

28 See Leş 1982. 204.

29 According to this text: 'Within the judicial activity, the Public Ministry shall represent the general interests of the society, and defend legal order, as well as the citizens' rights and freedoms.' For this text, see in English: https://www.presidency.ro/en/the-constitution-of-romania (last accessed on: 15.10.2020).

30 An appeal is said to be devolutive if, in its judgment, the hierarchically superior court to the court of first instance cannot be limited to verifying the legality of the judgment subject to appeal but may decide on the merits of the dispute also on the basis of the facts established during the proceedings subject to appeal, by administering new evidence or by re-evaluating evidence administered before the court of first instance.

31 Ruxanda 2012. 136.

32 Boroi–Ciobanu–Marian 2001a. 3.

One of the purposes of the reform, the more proportionate distribution of jurisdictional tasks between courts at different tiers of the jurisdictional pyramid, was intended to be achieved by the legislator through reorganization of the jurisdiction *ratione materiae* of local courts and county tribunals. In this spirit, the value threshold by which this jurisdiction of the courts and tribunals was determined in litigation with an object of pecuniary value was raised from the amount of 150 million lei to the amount of 2 billion lei. The law removed the jurisdiction *ratione materiae* of the local courts for the settlement of commercial disputes in the first instance, these being attributed until reaching the value threshold of 10 billion lei to county tribunals and above this value threshold to the courts of appeal.

The reform contributed to the dynamization of the registration procedure and the verification of court applications as well as of the procedure used for designating the judge(s) who would try the case (the panel of judges), also affecting the rules on court summons and the communication of documents during litigation. Increasing the activity of the parties manifested not only in the field of particular measures. Article 129 of the Code of Civil Procedure of 1865, with reference to obligations of the parties during the trial, was reformulated during the reform, the new text providing for them – in principle – the following obligations: to monitor, assist to, and comply with the procedural obligations imposed on them and finalize the dispute; to comply with procedural obligations established by law or by the court in the order, in the conditions, in the form, and on the schedule provided; and, most significantly, to exercise their rights and fulfil their procedural obligations properly and in good faith and according to the purpose for which they are provided; to prove claims and statements of defence. Another manifestation of the reform may be considered the new detailed regulation provided for the system of appeals. In the case of many types of litigation, the first appeal was removed by the legislator from among the available remedies.[33]

The legislator relocated the second appeal among the extraordinary appeals, which can be exercised against final judgements, but the expected effect, reducing the number of cases in which second appeal was exercised, was not realized.[34] The number of grounds for the second appeal – so-called grounds for cassation, that is, for quashing the sentence – has been greatly reduced.

In order to encourage the settlement of disputes by way of extrajudicial procedures, the mandatory procedure of preventive direct conciliation in the case of commercial litigation was introduced.[35]

Following various regressions which took place over time, the next wave of civil procedural reform swept the Romanian judicial system when Act 202

33 Boroi–Ciobanu–Marian 2001b. 6.
34 Boroi–Ciobanu–Marian 2001b. 15.
35 Veress 2009. 619–624.

of 2010 on Some Measures to Accelerate the Solution of Civil Procedures was adopted. Although it was actually an amendment by which different legislative solutions in several areas were reorganized, including in the field of civil and criminal justice, the major significance of this normative act was to 'advance' the entry into force of certain measures provided in Act 134 of 2010 (the 'new' Code of Civil Procedure, which was to enter into force only on 15 February 2013) – hence the name given to Act 202 of 2010, that of 'Lesser Reform' in the Field of Justice.[36] Some solutions of this reform were, however, clearly contrary to those adopted by the new Code of Civil Procedure, the 'Lesser Reform' for this reason being widely criticized.

The main reason for which the reform was enacted was the serious criticism – quite vehemently formulated by the European Union, both before Romania's 2007 accession and after that – on the operation of the Romanian jurisdictional and court system. This criticism generally concerned slowness in resolving lawsuits and unpredictability of court decisions.[37]

In the field of the formal conditions of the written application and the written statement of defence, the 'Lesser Reform' introduced the obligation to include in these documents the information necessary to identify the parties, their representatives, and the witnesses (including their telephone number and fax or e-mail address, when available) to facilitate summoning persons to court and communication of documents, made possible by telephone or fax.[38]

For the same purpose, in the case of persons represented by an attorney or legal adviser, the law allowed the direct communication of procedural documents between these persons.[39] As a novelty: if the party took delivery of the summons personally, his/her knowledge of the subsequent trial dates set in the case was presumed absolutely and irrefutably; thus, as a rule, summons to court were no longer to be issued twice at the same stage of proceedings before the same court.[40] At the same time, in the case of establishing the trial dates, the rule allowed the setting of short trial intervals, even setting the next trial for the following day. Regarding the role of the judge, the reform has not changed the rule that he is required to participate in an active role in proposing and administering evidence with a view to establishing objective truth, but it unified the regulation of this role completing it with the obligation to attempt to reconcile the parties, even by way of proposing their participation in a mediation procedure.[41] The 'Lesser Reform' retained the possibility of proposing and administering evidence by the court *ex officio*, but it ruled out using the failure of the court to take this action

36 Tabacu 2010. 171; Veress 2011. 126–135.
37 Briciu–Ciobanu–Dinu 2010. 20.
38 Briciu–Ciobanu–Dinu 2010. 35.
39 Briciu–Ciobanu–Dinu 2010. 33.
40 Tabacu 2010. 178.
41 Briciu–Ciobanu–Dinu 2010. 48–49; Tabacu 2010. 181.

as grounds for appeal, strengthening by this measure the responsibilities of the parties in proposing evidence[42] and providing the court with the possibility to exercise its active role arbitrarily, without the possibility of judicial review.

In addition, the 'Lesser Reform' expanded the number of preliminary procedures required for the filing of a civil application, under penalty of annulment of the application, without the dispute being tried in contradictory with the defendant. For cases of litigation having as their object an inheritance law dispute, it introduced the obligation to obtain the notarial minutes in advance, by which the notary attests that the resolution of the inheritance dispute in question did not take place by notarial procedure or the way such a debate was resolved during a non-contentious notarial procedure. Invoking the exception (objection) of lack of the preliminary procedure was reserved as a rule exclusively to the interested party; however, in the case of the procedure for obtaining the notarial minutes, the 'Lesser Reform' provided for the possibility of invoking this exception *ex officio* by the court.[43]

Also, when regulating peremptory exceptions, the 'Lesser Reform' – following the indications of the legal literature – introduced in the text of the law a distinction between exceptions of *public order* and those of *private order*. Exceptions of private order must be invoked by the defendant at the latest in his/her written response to the claim (the written statement of defence), while the exceptions of public order concerning exclusive territorial jurisdiction and jurisdiction *ratione materiae* must be invoked by the parties or by the court *ex officio*, at the latest at the beginning of the trial of the dispute before the court of first instance, according to the new rule (an institution called *preclusion*).[44]

5.3. Recodification of Civil Procedure

The 'new' Code of Civil Procedure of Romania entered into force on 15 February 2013, and it was built in part on the achievements of the 'Lesser Reform'. Its rules – in a relatively significant proportion – were transferred from the previous code, in some cases being corrected or updated. Among the important novelties introduced by the new Code of Civil Procedure, the introductory part, or preamble should be noted, which enumerates the principles of civil procedure, an absolute novelty in Romanian civil procedural law. We should also note the division of the structure of the civil proceedings by the introduction of a written preparatory phase, which also allows the court to order the applicant to complete or correct the application, under penalty of its annulment without trial in case of non-compliance. Finally, during the exercise of the second appeal (on points of

42 Briciu–Ciobanu–Dinu 2010. 47.
43 Briciu–Ciobanu–Dinu 2010. 43.
44 Briciu–Ciobanu–Dinu 2010. 27–31; Tabacu 2010. 183.

law), the 'new' Code of Civil Procedure reinstituted compulsory representation by an attorney. This institution was, however, later declared unconstitutional[45] by the Constitutional Court on the grounds that the expenses presupposed by this rule impede access to justice due to defects in the law pertaining to free legal aid (which, in turn, was not deemed to be contrary to the Constitution).

6. Conclusions

We have attempted in this study to demonstrate the various ways in which the unification of civil procedural norms was achieved by the Romanian legislator subsequent to the unification of the country in 1918. We have seen that at first the legislator aimed to achieve unification by drafting entirely new legislation but was forced to abandon this path, mainly due to the circumstances generated by the Second World War and the need to unify legislation. Civil procedure during the Soviet-type totalitarian regime evolved predictably according to the necessities of such a form of state organization, being characterized by court packing in the form of the presence of assessors and by the increased state supervision of court activity, owing to the wider role of public prosecutors in the civil trial and to the suppression of the first appeal on points of fact and of law. After the 1989 regime change, the development of Romanian civil procedure would take three different directions. In the beginning, the legislator aimed to restore the pre-existing procedural order while later to affect reform in order to reduce the duration of trials, in the end opting for recodifying civil procedure altogether. Finally, we should observe that the Romanian legislator, throughout some of the reforms enacted at times – perhaps inadvertently –, followed the templates of the Hungarian Code of Civil Procedure in force in Transylvania in 1918 by imposing on the parties the clarification of their claims and statements of defence in writing, the presentation of evidence in these written statements, and providing for compulsory legal representation (albeit this institution has repeatedly proven to be short-lived).

45 Decision of the Constitutional Court no 462/2014.

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Acta Universitatis Sapientiae
Legal Studies

Sapientia University

ISSN 2285-6293
http://www.acta.sapientia.ro

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