Chapter I

Development of Contract Law in East Central Europe

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1. Contracts in East Central Europe: One Example of A Millenary Presence

Contracts, as instruments by which agreed upon terms for economic exchange are recorded and preserved for later reference by the parties, have a millenary presence in East Central Europe. For example, at *Alburnus Maior*,[1] 25 wax tablets were recovered from an ancient Roman mineshaft between 1786 and 1855. These constituted contractual documents, in which the text of agreements was scratched onto the darkened wax that covered the tablet. The inhabitants of *Alburnus Maior*, a rich mining town, must have hidden these agreements in the mine cavities sometime after 167 AD while fleeing from the Marcomannic-Sarmatian invasion to the south. These wax tablets are called *triptychs* and are peculiar since they contain two copies of the same contractual text. The back side (*verso*) of the first tablet and the front side (*recto*) of the second tablet are latched together and sealed, thus constituting the first copy of the contractual text. The back side of the second tablet and the front side of the third tablet again contain the contractual text, this time without a seal, in a manner that can be read by anyone. The sealed part is only opened in case of a dispute. For example, four of the twenty-five wax carvings recovered were loan contracts. One of these, the first and second panels of a loan contract signed on June 20, 162 (more than 1850 years ago)

1 *Roșia Montană* in Romanian, *Verespatak* in Hungarian, and *Goldbach* in German. The town is found in the historical region of Transylvania, where the Roman town *Alburnus Maior* was located in Antiquity. After 1920, the locality became a part of Romania.

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between the lender Anduenna Batonis and the debtor Julius Alexander, contained the following legible text in Latin:

> '(...) The principal sum of one hundred and forty denarii, together with interest thereon at the rate of 12 percent from this day for the time that the lender may be without it, is demanded by Anduenna Batonis and promised by Julius Alexander to the lender in good money, to be paid to him on the day he demands it, together with the interest described above, at the time he demands it, concluded in Deusara, this 20th day of June, in the year of the consuls Rusticus and Aquilinus (...)'

Julius Alexander, who might have been an entrepreneur of Greek origin who was granted Roman citizenship (based on his name) and is mentioned on several wax tablets, ran a brickworks and was also involved in credit transactions. He also appears on other tablets as a lender and an associate of the local *societas danistariae*, a society that provided loans to miners during the winter. Anduenna Batonis (based on the name again) may have been a settled peregrine of Illyrian origin from the Balkans. The first name Anduenna (Andueia) raises the possibility that the lender might even have been a woman.

No time limit was stipulated in the contract, meaning that the loan amount had to be returned upon request by the creditor. The interest rate of 12% *per annum* corresponded to the interest rate set by imperial law at one percent per month, which was the highest rate of interest allowed. According to Elemér Pólay (1915–1988), a respected researcher on the subject, the contract was probably not based on a loan repayment the debtor had committed to, so the document might be partly fictitious. A smaller amount may have been transferred effectively to the borrower, who contracted for the higher amount, including usurious interest. The way the contract is worded and the fact that it does not refer to the actual transfer of the loan amount support the interpretation, that the contract is 'colored' and is effectively a sham contract. It is just one example that illustrates the contractual phenomenon in its entire complexity from very early periods in the region.

Contracts were used also in the later course of history in specific contexts, but what we today would call contract law has its direct roots in the codifications which began in the early 19th century.

2. Historical background of contemporary contract law in East Central Europe: The codification of private law[2]

The geographic area which forms the subject of our analysis did not yet present the variety of states in existence today at the beginning of the 19th century. East Central Europe was ruled in 1815 by the Kingdom of Prussia, the Empire of Austria, the

2 For a much more detailed analysis, see Veress, 2022a, pp. 167–205, and Veress, 2022b.

Russian Empire, and the Ottoman Empire. The codification of contract law emerged via the adoption of civil codes, which regulated rules on general and specific contracts such as sale, lease, mandate, etc. among other important issues.

The codification process started in the present-day territories of Croatia, Slovenia, and Czechia, which formed parts of the Habsburg Empire. the Austrian Civil Code should have been in force in these territories in 1812. However, parts of Croatia and Slovenia were occupied at the time by the French, under the short-lived designation of the French Illyrian provinces (1809–1814).[3] During this period, the first French governor, Auguste de Marmont introduced the French Civil Code. Nonetheless, for all intents and purposes, the Austrian Civil Code was in force from 1812 in these territories until 1946 (in the case of Croatia and Slovenia) and 1950 (in the case of the Czech Republic).

The first adaptations of western civil codes were adopted in Walachia and Moldova[4] (which were still under Turkish rule) in the second decade of the 19th century. In Moldova in 1817, prince Calimach promulgated the eponymous code of law (*Codul Calimach* or *Codica Țivilă a Moldovei*), a civil code in Greek. The Calimach Code was translated into Romanian in 1833. The code followed Byzantine traditions, but the direct influence of the Austrian Civil Code of 1811 and the French Civil Code of 1804 was also evident. The strong Austrian influence can be explained by the fact that Christian Flechtenmacher (1785–1843), a Saxon from Brașov who had studied in Vienna, played a major role in the drafting of the code, alongside Anania Cuzanos and Andronache Donici. In his work, Flechtenmacher often referred to the works of Franz von Zeiler, a leading figure in Austrian codification. Flechtenmacher was invited to become a lawyer by Prince Calimach and remained in Moldavia for the rest of his life, later receiving the title of boyar. He departed from the Byzantine tradition and marked a rapprochement with the West. This code did not propose a universal synthesis of laws but concentrated exclusively on matters of civil law.[5] It was structured in three parts: rules on persons, rules on things, and rules on both persons and things. In 1818, a code was adopted in Walachia at the initiative of the Phanariote Greek Prince Caragea under the name *Condica lui Caragea* (the Codex of Caragea). The aim of codification was in fact to strengthen legal certainty by unifying old rules and creating new ones. The Codex of Caragea covered civil law, criminal law, and procedural law at the same time i.e. it can be considered a traditional general code without any specialization. Its drafting was mainly the work of the *logothete* (chancellor-general) Nestor and Atanasie Hristopol, who despite having produced a Greek text of literary quality, could not replicate that same quality with the Romanian translation, partly because of the immaturity of the Romanian legal language.

Also, Serbia provided an early example of civil law codification and gained its independence and statehood gradually from under Ottoman rule. After the first (1804–1813) and the second revolution (1815–1830), the Ottoman Empire was obliged

3 Škrubej, 2013, p. 1067. For details, see Petrak, 2019, pp. 344–349.
4 Historical principalities, which now form part of Romania.
5 Demeter, 1985, p. 209.

to recognize the autonomy of Serbia and Miloš Obrenović as the prince. Serbia even adopted a constitution in 1835. Miloš Obrenović commissioned a civil code in 1837 from the lawyer (and poet) Jovan Hadžić. Hadžić studied law in Pest and Vienna, obtaining his doctorate in law in Pest in 1826.[6] He presented the text of the code, which was influenced mainly by the Austrian Civil Code[7] adopted in 1844 under the rule of Aleksandar and was practically an abbreviated version of the Austrian Civil Code.[8] The 1844 Civil Code remained in force until a socialist government emerged in the state, by then part of Yugoslavia.

At the end of the 18th century, Poland was partitioned between Prussia, Russia, and Austria and lost its independence, which resulted in the gradual loss of the Polish legal system and traditions.[9] Several legal systems came to coexist in Polish territory. German, Austrian, French, Russian, and Hungarian laws came to be applied, depending on the given location.

During the 19th century, Hungary possessed a vibrant legal culture deeply rooted in medieval customary law.[10] In 1840, company law and bills of exchange were regulated in a modern manner. Act XV, adopted in the context of the revolution in 1848–1849, provisioned the drafting of a civil code based on abolishing the *aviticitas* (the bound succession and circulation regime of the noble estate) and the submission of the proposal during the next parliamentary session. The codification would have been led by a truly competent jurist, László Szalay. Unfortunately, this could not take place because of the fall of the Revolution; therefore, old customary private laws remained in force until 1853, when the Austrian Civil Code was introduced by octroy (and partly with punitive intent) for a short period between 1853 and 1861.

The codification process continued in the territory of present-day Romania. In 1859, Walachia and Moldova were integrated under the name of the United Principalities and took the name Romania in 1862. It gained independence from the Ottoman Empire only in 1877. A process of modernization was set in motion, characterized by a move away from Byzantine traditions and Turkish influences and the adoption of Western models. Soon after the unification, a new, common civil code was adopted: the *Codul civil*, which also repealed the Calimach and Caragea codes of the two principalities. The Civil Code entered into force on May 1, 1865. This code is essentially a transposition (or a translation) of the French Civil Code of 1804.

In Hungary, the last decades of the 19th century were characterized by an intellectual struggle between the defenders of customary law and the adepts of codification. A Commercial Code (Act XXXVII of 1875) was adopted, which modernized company

6 Hadžić is also the founder of the Matica Srpska, an important cultural-scientific institution still active today.

7 Horváth, 1979, pp. 254–255.

8 It is stated to be the 'fourth' modern codification in Europe (see Stanković, 2014, p. 881). This doesn't seem to be precise. For example, the Austrian Civil Code was implemented in Liechtenstein in 1811 or Moldova in 1817 (a special version of it).

9 Zoll, 2014, p. 126.

10 Van Caenegem, 2004, p. 178.

law and commercial obligations. The source of inspiration was the Common Commercial Code of the German states (*Allgemeine Deutsche Handelsgesetzbuch, ADHGB,* 1861). Several partial projects of a civil code were also presented starting in 1871.[11] By 1900 a complete version was also ready, but the intense intellectual work continued well into the early decades of the 20th century to finalize the text of the code.[12]

The codification process gained a new impetus after the First World War, against the backdrop of the ruling empires of the region disintegrating.

Poland regained its independence in 1918 when it inherited a fragmented legal system. For the unification of the legislation, a Codification Commission was set up which operated until 1939 (and even under German occupation in an underground manner).[13] In the context of civil law, the major achievement of this Commission was the adoption of a new Law on Obligations in 1933 which also regulates contracts. Every rule in it was formulated based on the results of a broad comparative analysis, merging different European traditions to create the best rules.[14] In 1934, a Commercial Code was adopted.[15] In general, the codification efforts were indeed substantial and the work carried out was thorough and of outstanding quality.

For Hungary, which lost the greater part of its territory, the interwar period was a fervent era of codifications, at least with regard to the creation of high quality official projects. The main result was a perfected version of the 1900 project: the 1928 Private Law Bill. It was a complete, complex, high quality civil code[16] That failed to get adopted. There are several reasons why this is, but the Great Depression (1929–1933) is considered the most significant one. Secondly, the strength of the defenders of old customary law should not be underestimated either. Nevertheless, the draft text of this code, including contract law, has been taken up by judicial practice and applied in many cases as a text fixing the content of customary law.

After the First World War, Czechoslovakia was created, incorporating historical Czech territories (Bohemia, Moravia) and territories obtained from Hungary (Slovakia, Subcarpathian Ruthenia). With regards to private law, the ABGB was in force in the Czech parts of the new country while Hungarian law was the law of the land in the Slovakian parts,[17] mostly having a customary character. The proposed unification of private law in the interwar period did not succeed despite the sustained effort to prepare a civil code. That effort started already in 1919 under the supervision of Jan Krčmář (1877–1950) and Emil Svoboda (1878–1948). The first draft was published in 1923 and was also translated into German. The discussions continued in revision committees and the final draft was submitted to the government in 1936, which initiated

11 Nizsalovszky, 1984, p. 111.
12 For details on this specific Hungarian struggle, lasting a century, see Veress, 2022b.
13 Zoll, 2014, p. 127.
14 Zoll, 2014, p. 128.
15 Izdebski, 1996, p. 5.
16 Veress, 2019a, pp. 17–32.
17 Hungarian private law was applicable until 1950, when the Czechoslovak Civil Code entered into force.

legislative procedures in the parliament in 1937.[18] The main model was not the modern German code, but the old Austrian Civil Code because of political reasons. After the Munich Agreement (1938) was signed, Czechoslovakia was forced to cede territories to Germany and the state was dismembered. In 1939, the Protectorate of Bohemia and Moravia became part of the German Reich,[19] while Slovakia formally gained independence albeit as a puppet state of Nazi Germany in reality. Codification was impossible under these circumstances.[20] After 1945, when Czechoslovakia was re-established, codification was only possible in the context of a Soviet-type dictatorship.

The Kingdom of Serbia, Croatia, and Slovenia (from the 1929 Kingdom of Yugoslavia) was a new state created after the First World War. It was formed by the merger of Serbia, which had been independent since 1878, with the territories formerly belonging to the Austro-Hungarian Monarchy (Croatia, Slovenia, Bosnia and Herzegovina, and southern parts of Hungary called Vojvodina) and of Montenegro. This period was characterized by legal particularism, with several parallel legal regimes. In the former Kingdom of Serbia, the Civil Code of 1844, in Slovenia and Croatia, the Austrian Civil Code, in Montenegro, the General Property Code of 1888 and local customary laws were in force at the same time. In Bosnia and Herzegovina, the Austrian Civil Code was also in force, while Hungarian customary law remained in force in the territories gained from the former Kingdom of Hungary.[21] The political aim was to eliminate legal particularism. In the field of civil law, a Codification Committee was set up in 1930, which by 1934 had drawn up a preliminary draft based on the Austrian Civil Code (ABGB). The reason for this was that Austrian law was the closest to existing law and that made organic development possible, creating a common basis for it. Critics, however, argued that there were more modern codes (Germany, Switzerland) and that the choice of model is therefore not correct. The political situation did not allow this codification work to be continued and developed.[22]

In this stage came the Second World War and the establishment of Soviet-type dictatorships shortly after. The role of civil law in general, and contract law in special, changed fundamentally. The works of A. V. Venediktov had a great influence on civil law codification in the region.[23] The civil law of this period was characterized by the following. A break with legal tradition because the new political, economic, and legal order in which civil law had to perform was imposed from the outside: the Soviet Union as a great power and the local servants of Soviet policy reshaped the states of the region as much as possible in the image of the USSR.

18 Falada, 2009, p. 54.
19 In the territories ceded to Germany under the Munich Agreement, the BGB was applicable. During the Protectorate, the ABGB remained in force, but for ethnic Germans living there and who became German citizens, the BGB was applicable. See Falada, 2009, p. 57.
20 Glos, 1985, p. 223.
21 For a detailed analysis on Hungarian private law applicable in the Kingdom of Yugoslavia, see Šarkić, 2020, pp. 176–205.
22 Dudás, 2013, p. 12.
23 Kuklík and Skřejpková, 2019, p. 13.

In some states, new civil codes were adopted while old codes remained in force in others. Nonetheless, the role of classical civil law was greatly reduced and private property was primarily replaced by state and cooperative property, which reduced personal and private property to a secondary, limited role. The legislation of this period was referred to by one author as 'private law without private property.'[24] Special rules on state-owned enterprises formed the core of the legislation. Separate legislation dealt with their role in the planned economy, their control, the contracts concluded by them, their investments, dispute resolution through state arbitration, the public agricultural enterprises, or the cooperatives. Contracts became a tool for fulfilling the requirements of a planned economy. The drastic limitation of private property also reduced the role of contracts between private persons. The individual will of parties was subordinated to the needs of society. Therefore, civil codes and civil legislation declined albeit lingering on in a limited capacity. This limited survival of the civil codes also facilitated the possibility of the subsequent regime change: the main corpus (on state property disguised as socialist property which was controlled by the *nomenklatura*) had to be abolished and the existing subsidiary corpus (on private property) had to be made dominant again.

The high quality of legal science and the totalitarian regime were not necessarily mutually exclusive. After all, we can draw a parallel with classical Roman jurists as well as the excellent jurists of Justinian who also worked in autocratic empires.[25]

In Czechoslovakia, a radical change of legislation came to the fore right after the seizure of power by the Communist Party. In 1948, a two-year plan of legal codification was adopted, and work on a new civil code started immediately. It was conceived that the new code had to express the will of the working class and would be fundamental for social transformation, especially by the liquidation of bourgeois property relations, the creation of socialist ownership, and the subservience of contract law to the requirements of the planned economy. Besides being a tool for promoting Soviet-type ideologies, the code was intended also to unify the legislations of Czechia and Slovakia. The Codification Commission was subordinated to a political commission and also to the Central Committee of the Communist Party, which assured that the code was in line with Party expectations. As a principle for interpreting the entire legal text, a clause establishing the predominance of social interest over individual interests was included.[26] The code, adopted in 1950 (Act 141 of 1950) was far shorter (570 articles) than its Austrian predecessor (1502 articles).[27] That was also because family law was included in the separate act previously enacted in 1949. Moreover, some parts of ABGB were applicable even later after 1950, e.g. contract on work till the adoption of the Labor Code in 1965. The Civil Code had a provisional character because it also regulated social relationships that the Communist Party could not immediately

24 Vékás, 2013, p. 226.
25 Földi, 2020, p. 27.
26 Article 3 of the code stated that 'Nobody may abuse his civil rights to the detriment of the entire society.'
27 Falada, 2009, p. 59; Kuklík and Skřejpková, 2019, p. 16.

abolish, but that became rapidly obsolete as Czechoslovak society slowly transformed into the Soviet model.[28] In Czechoslovakia, a new Civil Code was adopted in 1964 (Act 40 of 1964). This was also a civil code that declared that civil law must be applied in the context of the socialist social order. The development and protection of socialist ownership were the duty of everyone. In civil law relationships, the code declared, there are obligations not only between the participants (e.g., contracting parties) but toward society as well. This piece of legislation was in force during the Soviet-type dictatorship. Besides the Civil Code, an Economic Code was also enacted in 1964 (Act 109 of 1964)[29], which can be interpreted as a rejection of the Soviet principle of unity of civil law.[30] The Czechoslovak civil codes of 1950 and 1964 implemented important changes, constituting the first socialist codes in East Central Europe. Another two codes adopted in this period, the Hungarian and Polish codes, took a more moderate approach compared to the Czechoslovak codes as if some of the drafters of the codes were attempting to partially rescue the bourgeois past.[31]

In Hungary, codification works commenced in 1953 amidst a relaxation of the dictatorship under prime-minister Imre Nagy, which was interrupted by the 1956 revolution.[32] The very first Hungarian Civil Code, therefore, was adopted during the Soviet-type dictatorship (Act IV of 1959), The principal authors of the draft were Miklós Világhy, Gyula Eörsi, Endre Nizsalovszky, Elemér Pólay, and Béla Kemenes. This code, as mentioned before, did not radically break with the past and also served to preserve the traditional values of civil law, unlike the Czechoslovak code. The presence of the non-communist Nizsalovszky is remarkable.[33] The code was criticized for using concepts and solutions that were linked to a stage of legal development the official line labeled as bygone: the code was described as a late-blooming of civil law following the liberal-capitalist small commodity model. Thus, the legal solutions included in the code would have strengthened the position of economic interest groups considered, or more precisely, desired to be obsolete. However, convinced communists at that time such as Eörsi and Világhy who were also exceptionally talented and highly qualified lawyers possessed strong political influence. They 'could successfully insist that several classical traditions of private law be preserved.'[34] The code represented a radical break for lawyers, as compared to the past: Hungarian private law, based on customary law, was replaced by a much narrower form of written law. Judges had to

28 Glos, 1985, pp. 238–239.
29 Also adopted was the Labor Code in 1965 (Act 65 of 1965) and Code on International Business in 1963 (Act 101 of 1963).
30 Izdebski, 1996, p. 5.
31 'In a crass contradiction to the Czechoslovak code, a strong effort is evident (...) to preserve and maintain the integrity and unity of civil law inside its new confines (after family law has been left out), not merely in the purely scholarly sense, as an academic teaching subject or in juridical textbooks, but as a branch of legislation as well.' Rudzinski, 1965, p. 48.
32 Nizsalovszky, 1984, p. 114.
33 Földi, 2020, p. 27.
34 Földi, 2020, p. 27.

switch from an inductive to a deductive method of interpretation.[35] Ultimately, it was only the Soviet-style dictatorship that was able to finally overcome customary private law. The text of the code entered into force on May 1, 1960, which was later amended in 1967 and 1977.

In Poland, the Soviet-type dictatorship practically inherited all the different pieces of civil law legislation prepared by the interwar Codification Commission, which were adopted before the Second World War (the Law of Obligations in 1933) or after the war. They all reflected a past ideology of freedom and private property. First, the General Provisions of Civil Law were adopted separately; a piece of legislation reflecting Marxist views that formed the ideological base for the interpretation of all other civil law legislation. But this was not enough, the Party wanted a new Civil Code reflecting the ideology of the new times. An ideologically burdened draft was hastily prepared but was never adopted. 'It was so strongly criticized by the legal literature, which despite the lack of academic freedom, limiting the possibility of running the necessary discussions, managed to present the flaws of this draft in such a very clear way, that even the communist government has not decided to adopt this draft.'[36] After the death of Stalin (1953), the stress to adopt a legal text which could erase the previous achievements in codification was eased and a new Codification Committee was set up. From a political point of view, this period was a severe epoch of the political system: following a limited relaxation just after 1956, the regime reverted to a stricter version of itself. Still, when compared to the Stalinist form of politics, even a very small degree of easing made the work of the Codification Committee possible[37], which joined together the distinct pieces of civil law legislation to form a unitary code. The Civil Code was finally adopted in 1964 and had 1088 articles.[38] 'This code could be regarded as the culmination of the work of the pre-war Codification Commission. Almost all essential legal concepts and institutions were taken over from the Law of Obligations from the year 1933 and the post-war decrees.'[39] The result was a more abstract piece of legislation since the political regime of the time preferred looser notions within which they could fill with their desired ideological content. As it was stated, 'this more abstract technical approach was not ideologically neutral. It is easier to fill the rules with contents harvested from the intrusive political ideology if they are more abstract and by this way more flexible and can be easier bent by the means of interpretation.'[40]

In Yugoslavia, during the first phase of the socialist-type government, the Act on the Invalidity of Regulations Adopted before April 6, 1941 and during the Occupation (1946) was adopted. This act practically repealed all previous legislation, such as the Serbian Civil Code from 1844 and the Austrian Civil Code in force in Croatia since

35 Eörsi, 1960, p. 312.
36 Zoll, 2014, p. 129.
37 Zoll, 2014, p. 126.
38 Rudzinski, 1965, p. 48.
39 Zoll, 2014, p. 130.
40 Zoll, 2014, p. 130.

1812, as a manifestation of legal nihilism. A new legal system was to be introduced. However, the old legislation (*stara pravna pravila*) practically remained applicable in all fields where the envisaged new set of rules was not yet introduced, and where the old norms were coherent with new social realities.[41] Civil law was a prominent domain where former legislation survived. For example, in the Socialist Republic of Croatia, the Austrian Civil Code was still applied to segments of family law, inheritance law, real property, and obligations not as positive law but as simple rules theoretically meant to fill any lacunae in the new legislation.[42] Similar was the case of Serbia with the 1844 Civil Code.[43] This continuation of the old law was considered a temporary solution to be adopted only until the new law was enacted. This is why different segments of private law were regulated progressively through new pieces of legislation. The need to abolish the old law resulted in new partial regulations of particular social relations. Creating fragmented norms within different acts was significantly faster than the time-consuming process of drafting a unitary civil code. Therefore, instead of a new and unitary code, the subdivisions of civil law were regulated through different acts in Yugoslavia and the Law on Obligations was adopted in 1978.[44] The results of this legislation were outstanding in terms of quality. The Law on Obligations, having mainly followed the Swiss model, was said to be 'one of the most outstanding products of the liberal socialist legislation of the time, which has shown its merits in the course of its almost forty years of application.'[45] But these new rules did not cover all the fields of a civil code, so it was stated in Croatia that the provisions of the Austrian Civil Code would continue to be applied to donation contracts, neighborhood law, and private easements.[46] We can observe that despite the tradition of a unitary code in Serbia and Croatia, a regulation on separate pieces of legislation was chosen. However, the final but unrealized goal was to create a unitary code at the end of this decades-long period of transition. During the creation of the new legislation, professor Mihailo Konstantinović, who completed his university and doctoral studies in France, played a leading role. The Law on Obligations was even compatible with the capitalist order, being kept in force in former Yugoslav states after the regime change as well (for example, in Croatia until December 31, 2005; in Serbia it is still in force).

In Romania, the Civil Code from 1864 remained in force throughout this period albeit mostly in a secondary role, given the serious limitations on private property. Some efforts were made to create a socialist civil code, but these processes faltered and never came to fruition.

After the collapse of the Soviet-type dictatorships, some of the states abided by civil codes dating from before the Second World War, which were maintained naturally after the departure of communist regimes. The civil codes adopted under the

41 Dudás, 2013, p. 13.
42 Josipović, 2014, p. 111.
43 Dudás, 2013, p. 13.
44 Josipović, 2014, p. 112.
45 Dudás, 2015, p. 79.
46 Josipović, 2014, p. 112.

Soviet-type dictatorship were maintained even after the collapse of these political regimes. The reasons are explained in relation to Poland as follows:

> 'the core of the civil code was however not strongly affected by the time of its origin. (...) After the events of 1989 and the great political and economic transition the code could be maintained without too far-reaching economic legislative intervention. The code was drafted in a way that the parts clearly affected by the communist ideology or adjusted to the communist economic legal system were very easy to delete from the text without infringing the structure of the code. They have formed simply the alien component in the body of the code."[47]

The change was informal: the civil codes rose from under the relative shadow of the Soviet-type dictatorships via the separate regulations of the planned economy, which were now disappearing. Besides the democratic constitutions, civil codes took back their well-deserved place as basic laws of private property and contractual freedom. During the transition period the reform of the civil codes was not of utmost importance; after the regime change, 'civil codes are not the first pieces of legislation to be amended or drafted."[48]

The explanation is simple: a civil code expresses a state of normality. Instead, it was necessary to first create a transition from the Soviet-type property regime to a system based on private property. This required a special set of norms to enact this shift from a planned economy to a market economy. Once this change was achieved, the question of reforming the existing civil code or the implementation of a new one could be raised.

Croatia and Slovenia, having gained their independence, adopted new acts to regulate the traditional domains of civil law. The Czech Republic, Hungary, and Romania adopted new civil codes. Some other states such as Poland, Serbia, and Slovakia also started working on new codes.

In the Czech Republic, after the regime change, a set of modifications were introduced into the 1964 Civil Code in 1990 and 1991. These were necessary for the code to remain functional under the new conditions. The most fundamental reform was achieved by Act 509 of 1991, which changed or amended approximately 80% of the original text.[49] The reform of private law was completed by the adoption of a Commercial Code (Act 513 of 1991). Both above mentioned acts were adopted before the dissolution of Czechoslovakia. This modernization was perceived as being insufficient to since the code's socialist origins and structure rendered it inconsistent and insufficient in the changing environment.[50] Therefore an effort to prepare a new code started right after the regime change (Viktor Knapp) and in 1996, another draft was

47 Zoll, 2014, p. 132.
48 Izdebski, 1996, p. 4. In general, minor changes were sufficient to make those codes, especially the texts from before the Second World War, fully applicable under the new conditions.
49 Dulaková Jakúbeková, 2021, pp. 84–85.
50 Falada, 2009, pp. 63–64.

prepared (František Zoulík). However, these projects were abandoned until the year 2000, when the Ministry of Justice commenced a new project, which was led by Karel Eliáš. Integral drafts were presented in 2007 and 2008 for public discussion. The Czech Republic finally adopted the new Civil Code in 2012, which was officially in force in 2014.[51] For commercial law, a dualist approach was initially continued by the adoption of the 1991 Commercial Code, repealing the 1964 Economic code.[52] However, the Commercial Code of 1991 was replaced by the Civil Code of 2012 too, which introduced a monist approach toward private law.

Hungary adopted a new Civil Code decades after the regime change. Instead of the 1959 Code, Hungary adopted Act V of 2013, which entered into force on March 15, 2014. An original piece of legislation that was built on previous interwar drafts, it preserved the proven elements and also aimed to ensure continuity. It may be said to be 'supermonist' in its nature, as it often regulates legal relations between private individuals (consumers) in a business-like spirit and also includes company law.

Regime change left Romania with two 19th-century codes of substantive law still in force: the Civil Code and the Commercial Code (the latter in a dormant state during the Soviet-type dictatorship).[53] Romania was perceived, thanks to its tradition of formally preserving these pieces of legislation, as having 'at its disposal a civil law infrastructure better adapted to market conditions than that of many states which attempted to completely modernize their law under real socialism.'[54] Paradoxically, civil codes were the norms of normality, as stated above, Romania thus missed its opportunity for faster conversion to a market economy. Having a regulation for normality was useless if the return to the market economy from the Soviet-type system could not be achieved at the right pace because of ideological barriers. The arguments in favor of adopting the French model were their masterful techniques of drafting, their clear, simple, and comprehensible provisions, as well as the avoidance of unnecessary theoretical generalizations and abstractions. the development of society and law in the 20th century has in many respects surpassed the original French code, so the Romanian adaptation (translation) has also somewhat lost its relevance. The modernization of the French Code in its source state was still being carried out together with amendments, judicial practice, and legal literature in continuity with the original Napoleonic Code. Subsequently, Romania, having abandoned its historical traditions, opted to adopt a new code. A new civil code had already been drafted

51 For some elements of the new code see Tichý, 2014, pp. 9–29; Balarin, 2014, pp. 31–39; Hrádek, 2014, pp. 223–232.

52 Izdebski, 1996, p. 12.

53 The code has lost the object of its regulation by the abolition of private property. See Sipos, 2003, pp. 41–43. 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 the Second World War, the Italian private law – used as the initial model – making the transition to a monist regulation of civil law through the Civil Code of 1942). The Romanian Commercial Code survived totalitarianism and revived itself after 1989 along with its natural environment, capitalism.

54 Izdebski, 1996, p. 5.

before the Second World War, but its entry into force was prevented by the outbreak of the conflict, the territorial losses suffered by the country, and the establishment of a Soviet-type dictatorship. The issue of codification came back into focus after the regime change, which led to the adoption of Act 287 in 2009 (the new Romanian Civil Code). The code entered into force on October 1, 2011. The sources upon which the new Romanian Civil Code is based are complex: although the legislator partly departed from the classical French model, they also relied heavily on the modern French-language civil code of the Canadian province of Québec (*Code civil du Québec*), which was adopted in 1991 and entered into force on January 1, 1994. Thus, it can be interpreted as a strong modernization of the original French code. Yet, it also referred to the Italian Civil Code and the Draft Common Frame of Reference (DCFR), especially in the book on obligations. The extent to which this new legislation is a product of Romanian legal culture, compared to the previous Civil Code translated from French, remains a matter of debate. One change is that the single-model code has been replaced by a multi-model code. The reform put an end to the dualism between civil and commercial law, achieving thus, at least in principle, the transition from a dualistic system of civil law regulation to a monistic model. Still, to some measure, the differentiation of business law within the Civil Code was preserved because both this new code and other special rules continued to provide for derogations from the general norms in the matter of relations between professionals.[55]

Croatia and Slovenia, after gaining their independence, inherited most of their civil law legislation from the federal legislation of the former Yugoslavia. New civil legislation, based on a modernized concept of the former Yugoslav legislation, was adopted: in the case of Croatia, the Law on Obligations was adopted in 2005; in the case of Slovenia, it was adopted in 2001. We can observe that both states followed the model of separate acts for different civil law segments instead of adopting a unitary civil code.

In Slovakia, which gained its independence in 1993, the 1964 Civil Code of former Czechoslovakia and the 1991 Commercial Code remained in force until this very day. The Civil Code inherited in this way was modified frequently in independent Slovakia and has partially drifted apart from the Czech version (in force until 2014). Recodification efforts are ongoing.

In Poland, the Civil Code from 1964 remains in force albeit with some adjustments. The 1964 text, based on the work of the Codification Commission established before the Second World War, was of high quality and proved fit to serve as a basis for the transition to the market economy. There was no need for its immediate replacement. In 1990, the code was amended but was still 'much closer to the continental tradition of civil codes…'[56] compared to the Czechoslovak code and therefore could be maintained in force. Adopting a new civil code was sometimes also on the agenda. However, Poland modernized its company law, adopting a new Commercial Companies Code

55 Veress, 2017, pp. 27–34; Fegyveresi, 2017, pp. 35–42.
56 Izdebski, 1996, p. 9.

(*Kodeks spółek handlowych*) in 2000. This regulation does not break the monistic nature of civil law, as it regulates companies as civil law entities, but does not create a separate commercial law. As it was stated, the name 'code' was given to it only to ease the resistance from supporters of the old Commercial Code of 1934.[57]

In Serbia, the former Yugoslav Law on Obligations from 1978 is still in force as the basis of contract law. Codification in the form of a unitary civil code is also an issue here.

In short, this is how the legal basis of contract law, analyzed in this present book, was formed.

3. Some remarks on contracts in general

In one of his novels (titled Casanova in Bolzano), the Hungarian writer Sándor Márai wrote: '(...) I contract with you. I am speaking with your mind and your heart at the same time when I offer you a contract, a contract that will be no more vile or noble than the usual bonds and agreements between man and man.' The driving force of contracts is usually reason and economic rationality, but sometimes also the heart (for example, in the case of a contract of gift).

A contract is an agreement between two or more persons to create, modify, or terminate a legal relationship. From a theoretical point of view, we can distinguish contracts in a narrower sense (establishing a legal relationship) and a broader one (modifying and terminating such a legal relationship). A contract is an arrangement to provide services of a specified or definable nature, usually of pecuniary value, which is recognized by the state and the performance of which is facilitated by sanctions.[58] A contract is a bilateral juridical act since it requires the consent of at least two persons (we also have plurilateral contracts as well).

Furthermore, a contract is usually made up of conflicting declarations of intent by parties with 'clashing interests.' However, this is not true for all contracts, as there are contracts where no such poles, and no interests at odds exist. These are contracts of the cooperative type, such as a company contract.

The formation of a contract presupposes the concurrent legal undertaking of at least two persons; it is the meeting of opposing parties with separate interests that creates the legal effect known as a bond.[59]

The contracting parties are, at least in legal terms, free, in a state of legal equality and, at least before the conclusion of the contract, none of them is subjected to the other. Behind the contractual wills, there is interest, or the desire to satisfy needs, but there is also an economic necessity, which means that in a given order of production and exchange, certain contracts cannot be avoided. In a market economy, based

57 Radwański, 2009a, p. 137.
58 Vékás, 2016, 18.
59 Kelemen, 1941, p. 18.

essentially on commodity-money relations, the contract plays a key role in the organization of economic relations and even in the securing and shaping of social order.[60]

The contract is the most common source of an obligation taken as a legal relationship: most obligations arise from a contract. The contract must be per the mandatory rules of law, public policy, and good morals.

The theory of contracts is based on the principle of freedom of contract: parties are free to conclude contracts. It is the intent of the contracting parties that creates the contract (their free will, private autonomy, and individual self-determination). Since the contract expresses the intent of the parties, it is in line with the interests of the contracting parties, which indicates that individual interest is the main driving force of the economy. Individual interests, asserted through contracts, lead to the overall development of society and the economy.

The principle of contractual freedom expresses that a person can decide whether to enter into a contract (freedom to choose a contract, freedom to contract) and, if so, with whom (freedom to choose a contracting partner) and with what contractual content (freedom to shape the content of the contract, freedom of content).[61] The freedom of the parties to amend or terminate a contract already concluded by mutual agreement is also freedom of the parties. In the case of freedom to choose the content, the legislators start from the premise that 'the participants of the legal relationships are generally capable of asserting and defending their interests in their contractual relations and that private law should therefore intervene only to the less extent possible.'[62] In general, contract law uses default rules that allow freedom of content to flourish. Mandatory rules are used when the legislator wants to direct social relations in a certain direction.

As stated,

> 'substantive law, by recognizing the capacity of persons to contract and by endowing their contracts with the legally essential property of enforceability, enables the human faculty of contracting to legislate. This is private autonomy, individual self-government, so widespread in private law, whereby the subjects of the law themselves create the law applicable to the relations of life which are not compulsorily regulated by law, or to the details of those relations which are not so delimited by the law.'[63]

In this conception, the contract is itself law and the conclusion of the contract is legislation, yet based on this right 'only' a private norm, i.e., a specific legal rule applicable only between the parties, is created. 'The legal order, when it confers law-making power on the private power by authorizing and institutionalizing individual autonomy, divides the power to legislate between the public sovereign and the

60 Vékás, 2016, p. 23.
61 Vékás, 2016, pp. 38–39.
62 Vékás, 2016, p. 39.
63 Kelemen, 1941, p. 8.

private.'[64] A contrary view was adopted by Gusztáv Szászy-Schwarz, who clarified that 'the contract does not constitute the law itself, but makes definite the content of the law left undecided by the legislature.'[65]

Civil law in a market economy is the law of private autonomy, which rests on three pillars. First, the full recognition and protection of private property; second, the principle of freedom of contract; and third, the freedom of association. In the socialist system of economic governance experienced by the states which form the object of research in this book, state-owned enterprises pursued the objectives of state economic governance and planning through their contracts. In that context, freedom of contract could not be applied, because the contract was a tool to direct the economy and subject state property into conformity with economic planning.[66]

The principle of freedom of contract is formulated by the civil codes in the region as the general possibility to conclude any contract and to determine its content within the limits set forth by law, public order, and good morals. It is clear that freedom of contract has not been and can never be unlimited. The state would cease to exist as a lawgiver if it granted its subjects unlimited freedom of contract, for the consequence would be that all private rules of law would be made by the parties through contracts, in which case there would no longer be any generally binding rules of conduct. That such a situation would obviously be contrary to the concept of law and would ultimately mean the disintegration of the legal order itself is beyond doubt. It is a conceptual characteristic of law to set limits to the arbitrariness of individuals, and it is therefore logically impossible to turn private engagements into wild tyrants of legal life with unlimited freedom of contract. Law is postulative in its essence and content; it determines what must be, and private will can only be the source of law as long as it is itself at its service.[67]

Obligations which arise from the exercise of private autonomy cannot be contrary to the spirit and principles of the legal order, either as to their object, content, purpose, or nature. This prohibition may be expressed by the legal order in two ways: 1. general value judgments that also set limits to individual autonomy, 2. the establishment of mandatory rules. The limits to contractual freedom are both general value judgments: public morality on the one hand (in some states also a general public order), and the mandatory rule on the other hand. In this context, public morality is a general rule which provides a solution for exceptional cases 'in which one of the parties takes advantage of the possibility offered by a dispositive rule in an unacceptable manner,' and therefore 'the court may remedy the resulting flagrant disturbance of the desirable balance between the parties.'[68]

A significant part of private law rules on contracts is constituted by default rules (permitting derogation, i.e., the parties can lay down the rules; only in the absence

64 Kelemen, 1941, p. 21.
65 Szászy-Schwarz, 1912, p. 21.
66 Vékás, 2016, p. 38.
67 Kelemen, 1941, pp. 21–22.
68 Vékás, 2016, p. 47.

of a decision by the parties is the law applied). Freedom of contract is limited only by mandatory law, public policy, and morality. The valid conclusion of a contract generally requires the expression of an identical will; special formal requirements are exceptional (this is referred to as the principle of consensualism).

4. Alterations in the world of contracts

However, contracts have undergone a fundamental transformation from the classical liberal principles correctly maintained in civil law. The economic and social role of the state and the economy itself has changed fundamentally, which has affected the area of contracts. New contracting principles have emerged (adhesion contracts, compulsory contracting) such that the state increasingly regulates certain contracts by means of a series of mandatory rules, constantly restricting private autonomy to protect the weaker party by invoking this principle.

New contractual phenomena include contracts of adhesion. The content of some contracts is predetermined by one contracting party, and the other party's rights are limited to their decision on whether to accept or reject the contract. The content of such a contract is not negotiated. For example, the contract may take a blank form. Examples include insurance contracts, banking contracts, or even simple mobile phone subscriptions. The emergence and proliferation of adhesion contracts facilitate and speed up the contracting process, yet since the content of the contract is always determined by the economically stronger party, the potential for abuse is obvious. This gave rise to a new set of rules trying to balance the use of adhesion contracts.

Another example of a new contracting type is the forced contract (compulsory contracting), i.e., cases where there is an obligation to conclude a contract. In these contracts, not only is the content of the contract predetermined, but the obligor lacks even the 'yes' or 'no' option: the contract is mandatory and the obligation to conclude it is imposed under some form of penalty by law. A typical example is compulsory insurance (compulsory car insurance or compulsory insurance for attorneys and auditors).

A third phenomenon that cannot be disregarded is the increasing role of mandatory rules and formal requirements in contract law. The classical liberal view is that in contract law, mandatory rules are exceptional because they restrict freedom of contract. However, the share of mandatory rules has also increased in civil law codes or in other rules that also regulate contracts, and the field of private autonomy has shrunk as a result of their expansion. Some contracts (such as flat tenancies for living purposes) have been regulated in great detail by means of mandatory rules (mainly to protect the tenant). This special legal protection is necessary because the tenant is perceived as being in a weaker contractual position than the landlord, both in terms of his or her financial situation and options. Thus, the parties' will at the time of the conclusion of the contract cannot extend to those issues which the law has decided in advance employing mandatory rules, and the possibility of negotiation

and agreement can only concern the design of some contractual elements like rental, duration of the lease, etc.

Finally, consumer protection law grew in importance after the collapse of Soviet-type dictatorships in East Central Europe. In the second half of the 20th century, a set of rules protecting consumers in the context of contracts was outlined and continuously developed until today. The East Central European states adopted such rules mainly in the framework of harmonizing their legal systems according to European Union norms.[69] Consumer contracts are also governed by a set of specific rules, the rationale of which is to protect the consumer as a weaker participant in contractual relations. In such cases, the mandatory rules may be 'claudicatory' – allowing no derogation to the detriment of the consumer – yet allowing the parties to agree freely on clauses that are more restrictive for the business.

The proliferation of mandatory rules in the field of contract law 'undoubtedly reflects the social recognition that the legal relations between parties who are economically unequal are not suited to being settled by individual self-government, because the weaker party, as a result of the economic pressure which the stronger party can exert, usually lacks the unconditional freedom of choice' which is an indispensable condition for dispositive regulation.[70]

Contract law is significantly affected by restrictions introduced by legislation in other fields. Thus, competition law restricts contractual freedom by penalizing agreements (cartels) to the detriment of competition.

Administrative contracts constitute a controversial category, but their existence has been recognized. Those who recognize the existence of administrative contracts consider, for example, that concession contracts or public contracts constitute a specific type of contract. The characteristics of administrative contracts are as follows: these contracts are governed at least partially by public (constitutional, administrative, financial, fiscal) law rules; at least one of the parties is a public authority; the contract is intended to achieve a public interest, a public objective, or a public service; unlike the classical contractual model, the parties are not necessarily in a purely equal relationship, and the contract may also contain an element of power or subordination, such as normative (regulatory) clauses which may be unilaterally modified by the contracting public authority; the contracting public authority may impose public law penalties (e.g., fines for infringement) on the other party for breaching of the contract; disputes relating to the contract must be resolved according to the special rules of administrative adjudication. The grey area between public and private law where administrative contracts are formed poses a challenge for legal science, but mandatory rules certainly play a dominant role in the regulation of these contracts.

69 From the states analyzed in the present book, Serbia in not a member of the European Union, but its legislation is greatly influenced by EU law because Serbia is a candidate state since 2012 and the accession negotiations, which started in 2014, are ongoing in a complicated political context.

70 Kelemen, 1941, p. 18.

As a consequence of the analyzed phenomenon, the principle of contractual freedom remains important, even with a significant increase in the number of exceptions and limitations. Exceptions, such as adhesion contracts, need to be properly regulated (obviously without unduly hindering economic circulation) to protect genuine contractual freedom.

These developments also affect contract law in the region. However, it is undeniable that, from a legal point of view, contracts continue to be an important aspect of social interaction. It is through contracts that the various dynamic aspects of society are realized: the circulation of goods and services, and the realization of private and business interests.

5. Comparative law of contracts in East Central Europe

The research project upon which the present book expounds aims to compare the contract laws in force in 8 different states, according to 14 selected topics. The states and their legal systems to be analyzed are the Czech Republic, Hungary, Poland, Romania, Serbia, Croatia, Slovenia, and Slovakia. The laws of Serbia, Croatia, and Slovenia are analyzed together. Such an approach is justifiable by the fact that these three jurisdictions share a common legal heritage, stemming from the former Yugoslav Law on Obligations from 1978 as shown before. In Serbia, the former federal law is still in force with slight adjustments. In Croatia and Slovenia, new laws were adopted in 2005 and 2001 respectively, but for the most part, they follow the structure, logic, and content of the former Federal Law on Obligations. Therefore, the particular legal solutions in Serbia, Croatia, and Slovenia show a great deal of similarity and are even verbatim identical in many parts.

The topics reflect selected problems, but also provide an overview of applicable contract law: negotiation and formation of contracts, pre-contracts, interpretation of contracts, faults of will (mistake, deceit, duress, *laesio enormis*), illegal and immoral contracts, gratuitous contracts, forms of contracts, unfair contract terms, contracts for the benefit of third parties, frustrated contracts, legislative or judiciary modification of contracts, claims of performance, damages, unilateral termination and, finally, assignment.

We see this book as the first attempt at a comparative effort. The scientific work must continue to deepen and further refine the present research and extend it to new topics. We plan to keep this book up to date through new editions when the status of our research, legislative developments, or important court decisions requires it. Our intention is to provide a useful tool to practitioners, researchers, or Ph.D. students that helps them understand the generalities and specificities of the contract law phenomenon in East Central Europe. In a parallel project, the usefulness of which is underlined by the present endeavor, we will try to strengthen the quality of English as a common legal language in this region which facilitates communication between scientists and legal practitioners. There is an urgent need to standardize mutual

English terminology because the accuracy of legal communications requires it. Such a terminological project is in preparation under the auspices of the University of Miskolc (Hungary).

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