

## *The Communist Public Sphere: A Sociolegal Analysis*

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Two questions anchor this chapter: the first is whether the totalitarian paradigm continues to be valuable; the second is whether and to what extent we can identify public spheres in totalitarian spaces, such as communism. The second question and the answer to it are the lever that might pry open the totalitarian box. These questions remain urgent not just because debates about the totalitarian model persist, but also because genealogies of communism and post-communism increasingly de-center Western-driven archetypes and re-center Soviet-type models.<sup>1</sup>

I use a sociolegal lens with Romania as a case study to locate semi-autonomous communist public spheres, borrowing from law and society theory.<sup>2</sup> I argue for an orientative, rather than prescriptive reliance on the totalitarian model, incorporating the concept of dual or multiple legalities in my analysis. The chapter begins with a brief overview of the totalitarian paradigm and its critiques, followed by a discussion of the communist public sphere, and lastly examples of communist legality in action that illustrate the limits of the totalitarian model and reveal some aspects of the communist public sphere. Law may not seem like an obvious candidate for such an analysis, given the usual (rightly so) emphasis on it as an instrument of the state and the regime. But part of questioning the totalitarian model—rejecting a totalitarian approach to totalitarianism, questioning the acceptance of totalitarianism’s own framework, and

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<sup>1</sup> See, for instance, Rittersporn, Rolf, and Behrends, *Sphären von Öffentlichkeit*, 2003.

<sup>2</sup> Moore, “Law and Social Change,” 1973.

examining the lived experiences of totalitarianisms—leads to unpacking the theory, institutions, practices, and temporality of communist legality itself. Sociolegal approaches emphasize the study of law and/in society, of law in action, “living law,” or how law and society shape each other.<sup>3</sup> The projects of communist public spheres, totalitarianism, and legality are thus mutually and inevitably constitutive.

The core of the argument is the following: as historians, in particular, have untangled totalitarian practices and revealed cracks in the totalitarian model (institutionally, ideologically, structurally, etc.),<sup>4</sup> the totalitarian paradigm continues to be valuable as an ideal-type with orientative value. Gaps, ruptures, weaknesses at various levels both maintain a totalitarian focus and allow for an understanding of alternative spaces that are coherent internally in terms of rules, symbols, communication, etc., but are also vulnerable to outside, i.e. totalitarian forces. Hence, they can be understood on a continuum of limited autonomy or semi-autonomy, following, *mutatis mutandis*, Moore’s analysis of law as a semi-autonomous field. Even within such spaces, there are degrees of autonomy—criminal law was significantly more restricted compared to civil law. Totalitarian ruptures open up spaces of resistance to the regimes, positing totalitarianism as a gravitational, centripetal force, with differential impact on semi-autonomous spaces, from law to religion to art, which may be in direct opposition to the regime, or simply negotiating their limited autonomy. In this understanding, the public sphere is decoupled from its democratic underpinnings, although not its democratic aspirations, and is more rooted in the characteristics of communist societies.

### **Totalitarianism and communist public spheres**

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<sup>3</sup> Șerban and Ciobanu, “Law, History, and Justice in Romania,” 2020.

<sup>4</sup> Most notably, for example, Mary Fulbrook, *The People’s State* (2005), and her contribution to this volume.

Totalitarianism is or ought to be dead, yet the term “keeps creeping out of its conceptual grave”.<sup>5</sup> Is it because it does important analytical work, helping us construct ideal types of extreme societies, from communism to pure Islamic caliphates?<sup>6</sup> Because we lack alternatives, or alternatives are absorbed into the term itself, keeping it zombie-like alive? Because we apply it empirically when it is meant as an ideal-type, which makes it rather impervious to falsification?

‘Totalitarianism’ has significant advantages, such as integrating various aspects of society (political, social, economic, etc.) without assuming total control or knowledge, and has a political edge (Edele, 2020: 151). The genealogy of totalitarianism is inextricably linked with alternatives and variations, from modernization to revisionism, post-revisionism, or neo-totalitarianism. Bedrock totalitarian theories came in two different flavors: normative and empiricist. Both tended to emphasize the evil of the regimes, their stability, the perfectibility of totalitarianism, and saw little or no possibility of endogenous change. Some versions focused on the interdependency and dynamic between fascism and Soviet communism (e.g. Nolte), others on issues such as revolutionary Messianism and apocalyptic fanaticism.<sup>7</sup> The main totalitarian theories, however, sprang from political science: empirical descriptive--Friedrich and Brzezinski, identifying six basic features that have remained salient, and political philosophy, normative--Hannah Arendt’s theory of domination and atomization.

Post-1989 neo-totalitarian theories divided totalitarianism into high totalitarianism and post-totalitarianism<sup>8</sup>, semi-totalitarianism (Havel), or simply late totalitarianism. Neo-totalitarians further distinguish within post-totalitarianism two subtypes: “mature post-

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<sup>5</sup> Edele, *Debates on Stalinism*, 2020: 150.

<sup>6</sup> Edele, *Debates on Stalinism*, 2020: 150-1.

<sup>7</sup> Siegel, “Carl Joachim Friedrich’s Concept of Totalitarian Dictatorship,” 1998: 28; Nolte, “The Three Versions of the Theory of Totalitarianism,” 1998: 117.

<sup>8</sup> Linz, *Totalitarian and Authoritarian Regimes*, 2000; Thompson, “Neither Totalitarian nor Authoritarian,” 1998.

totalitarianism” (Poland, Hungary), where the reformists won the upper hand, and “frozen post-totalitarianism” (Romania, the GDR, Czechoslovakia), where no reform was allowed (Siegel, 1998:35). In Germany, totalitarianism made a comeback with right-leaning historians such as Nolte and the 1980s controversy of historians, while in France, Furet brought back the term in his discussions of fascism and Bolshevism and dialogue with Nolte.<sup>9</sup>

Modernization scholars shied away from normative evaluation, stressed the limits of totalitarianism, its internal dynamics and possibilities for reform, and some discerned a path of “evolution” or even “convergence” with the West. Social scientists rejected the primacy of politics and ideology favored by totalitarians, and emphasized instead advances in technology and economy (they saw the rulers’ desire for absolute control and ideological motivation and domination as merely derivative factors).<sup>10</sup> Historians and anthropologists faulted the totalitarian model for focusing too much on the center of political rule and ignoring the ruling stratum and their input, aspirations, goals, etc.,<sup>11</sup> and increasingly focused on how the Soviet system really worked on the ground: its political corruption<sup>12</sup>, ordinary life in these societies<sup>13</sup>, dynamics of power and resistance<sup>14</sup>, and the construction of communist subjectivities<sup>15</sup>. Particularly illuminating were the works of scholars writing from within various communist camps, such as the sociologist Pavel Câmpeanu in Romania (communism as a syncretic society), the philosopher Agnes Heller in Hungary (later in the US), or the economist Janos Kornai, who were more interested in the internal dynamics of “actually existing socialism,” from a perspective that was deeply critical of the regimes yet simultaneously sympathetic to their subjects.

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<sup>9</sup> Edele, *Debates on Stalinism*, 2020: 189.

<sup>10</sup> Siegel, “Carl Joachim Friedrich’s Concept of Totalitarian Dictatorship,” 1998: 20.

<sup>11</sup> Hosking, *A History of the Soviet Union*, 1985; Edele, *Debates on Stalinism*, 2020: 162-3.

<sup>12</sup> Jowitt, *The New World Disorder*, 1992.

<sup>13</sup> Fitzpatrick, *Everyday Stalinism*, 2000; Fulbrook, *The People’s State*, 2005.

<sup>14</sup> Kotkin, *Magnetic Mountain*, 1995; Verdery, *What Was Socialism*, 1996.

<sup>15</sup> See, for instance, Hellbeck, *Revolution on My Mind*, 2009.

Nevertheless, both main approaches ultimately struggled at explanatory and predictive levels. They offered only limited explanations for the legitimacy, duration and eventual collapse of the regimes, and had little space or interest for questions of resistance (at least initially)—while totalitarians ruled out resistance *ab initio*, modernizers conflated issues of legitimacy with the success of the regime and its ability to deliver on the implicit “communist social contract.” With the opening up of archives, recent studies seem to focus less on debates around totalitarianism and more on simply getting work done, quietly putting the concept to rest.

“Totalitarianism” is now everywhere, but is there a totalitarian model anymore? Are various revisionist trends just refinements of the totalitarian model, as Edele (2020) seems to imply? Was there ever a totalitarian model, or was it simply “the collective fantasy social historians had developed about the enemy for decades ... a story one told friends and doctoral students about the past to explain one’s position in the present”.<sup>16</sup>

Core insights of totalitarian approaches continue to be relevant: the initial capture of power, characterized by violence and terror, leading into the construction of institutions, systems of surveillance, record-keeping, reward, and punishment within the Party and society,<sup>17</sup> underscoring the extent of the regime’s reach directly and through various types of collaboration. The aspirations of totalitarian regimes—utopian, ideological, voluntaristic and teleological—are foregrounded, as are the multiple uses of violence. This is the orientative power of the totalitarian model, and deconstructing the totalitarian machine, breaking apart structures, practices, etc., should not foreclose basic totalitarian-driven dimensions.<sup>18</sup>

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<sup>16</sup> Edele, *Debates on Stalinism*, 2020: 169.

<sup>17</sup> For instance, Linz, *Totalitarian and Authoritarian Regimes*, 2000; Thompson, “Neither Totalitarian nor Authoritarian,” 1998; Walder, “The Decline of Communist Power,” 1994: 299-300.

<sup>18</sup> Aligning here with Turner’s critique of totalitarian objections, in this volume, and partially with Tucker’s analysis, also in this volume.

Totalitarian power, and I include here the former communist regimes, was always uneven, fragmentary, and inconsistent.<sup>19</sup> The accrual of power itself was discontinuous and inefficient, for example reforms of the justice system in Romania that focused on some areas of the law and ignored others, or simply petered out after a while.<sup>20</sup> The passage of time both solidifies efficient inactive power<sup>21</sup>, self-censorship and collaboration,<sup>22</sup> and exerts constant pressure from a legitimacy perspective (the highs and lows of Ceaușescu’s regime a case in point here—1968 and the refusal to join the Soviet invasion of Czechoslovakia a huge high, the 1980s with their widespread shortages and repression a very low point). The key point here is that neither power, nor legitimacy, nor resistance are monolithic concepts, even during high totalitarian moments. If we understand totalitarian power as a quintessentially modern form of power, with communism a sub-type, we must also acknowledge that the exercise of power usually provides openings for resistance, and their co-dependence means that not only power is “everywhere,” but so is resistance.

Resistance is central to understanding both the role and place of law, and represents an opening into reconceptualizing the public sphere under totalitarian conditions. Resistance is enmeshed within the very exercise of power, as it draws upon the symbols, practices, statuses and privileges that have become habitual in social structures.<sup>23</sup> If resistance is a mode of power, rather than the opposite to power, wherein power relations are both endured and challenged,<sup>24</sup> then it follows not just that there is a spectrum of resistance, but also that within this spectrum there will always be a or multiple public spheres, at different levels of visibility and distance

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<sup>19</sup> Pile, “Opposition, Political Identities and Spaces of Resistance,” 1997: 2.

<sup>20</sup> Șerban, *Subverting Communism in Romania*, 2019.

<sup>21</sup> Lukes, *Power: A Radical View*, 2005: 78.

<sup>22</sup> Havel, *The Power of the Powerless*, 1990.

<sup>23</sup> Ewick and Silbey, “Narrating Social Structure,” 2003: 1330-4.

<sup>24</sup> See Pile, “Opposition, Political Identities and Spaces of Resistance,” 1997.

from/within state structures. Resistance, in other words, *presupposes* some type of communicative sphere that is somewhat autonomous from the power center. Two elements need to be clarified here: resistance, and the distinctiveness of communist public/communicative spheres.

In general, the spectrum of resistance runs from oppositional action to, arguably, a mere oppositional state of being, that may not even be recognized as oppositional by either the actors or their intended targets.<sup>25</sup> Resistance is rarely pure or stable, with individuals often simultaneously resisting, adapting to, and sustaining structures of domination, and those who resist embedded in the very system they resist.<sup>26</sup> Resistance itself draws from a variety of alternative discourse, even under extreme totalitarian conditions (e.g. nationalism, liberalism, fascism, democracy, etc.). The chronic malfunction of communist systems was grounded partially in the persistence of multiple rival discourses,<sup>27</sup> from nationalism to liberalism<sup>28</sup>, ideological breaches—symbols and practices—from prior (e.g. liberal) or alternative (e.g. capitalist) visions of modernity that underscore the official monopoly, but not hegemony of the Marxist-Leninist paradigm of modernity.<sup>29</sup> These competing imaginaries of modernity can also be seen as long-term effects of other, prior “third dimensions” of power<sup>30</sup>, and are important as resources for resistance against the regime—with human rights as natural rights only the most obvious example here.

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<sup>25</sup> See Hollander and Einwohner, “Conceptualizing Resistance,” 2004.

<sup>26</sup> Mittelman and Chin, 2005; Hollander and Einwohner, “Conceptualizing Resistance,” 2004: 549-50.

<sup>27</sup> Verdery, *What Was Socialism*, 1996.

<sup>28</sup> Davies, *Popular Opinion in Stalin's Russia*, 1997.

<sup>29</sup> Șerban, *Subverting Communism in Romania*, 2019; Markus, “Overt and Covert Modes of Legitimation,” 1982: 87.

<sup>30</sup> Lukes, *Power: A Radical View*, 2005.

Resistance, in other words, can be understood “as an act of negotiated autonomy”<sup>31</sup>, simultaneously legitimizing and subverting official culture (as well as engaging in East-West dialogue)<sup>32</sup>, but also encompassing diverse manifestations that fall neither in the camp of official legitimacy, nor necessarily resistance or subversion: “This includes non-canonical forms of cultural resistance, often in the grey zone between official and unofficial activity, ... established without specific subversive intent”.<sup>33</sup>

It is within this sphere of “negotiated autonomy” that one can explore the width and depth of communist public spheres. Part of the difficulty here, fully recognized, is that inquiries into the public sphere inevitably start from the Habermasian model (Habermas, 1992), where the public sphere and its value are tightly interwoven with civil society and democracy (Calhoun, 2011).<sup>34</sup> Regardless of how one defines civil society—a sphere of association, a necessary balance to state and market interests, a counterweight to chaos and the state of nature, a non-political sphere of human activity, or the voluntary sector; or whether one stresses its structures (different forms of associational life), normative dimensions (values such as co-operation, non-violence, and tolerance, following Tocqueville), or somewhat collapses it into the public sphere itself (an arena for public deliberation that is relatively autonomous from states and markets)<sup>35</sup>, the communist public sphere requires engaging with communist civil society.

Pre-1989 communist civil society can be best understood from the vantage point of the idea, the “political myth” of civil society<sup>36</sup>, its anti-totalitarian potential, its human rights dimension, and the re-emergence of a public sphere outside of and parallel to the state, which

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<sup>31</sup> Maryl et al, *East European Cultures of Dissent*, 2019: 10.

<sup>32</sup> See also David-Fox, “The Iron Curtain as Semipermeable Membrane,” 2014.

<sup>33</sup> Maryl et al, *East European Cultures of Dissent*, 2019: 17.

<sup>34</sup> This is also the sense in which Fulbrook, in this volume, discusses the lack of a genuine public sphere in the GDR.

<sup>35</sup> Milner, “Civil Society: Change and Continuity,” 2001; Edwards, *Civil Society*, 2004.

<sup>36</sup> Tismăneanu, “Civil Society, Pluralism,” 2001.

contained a clear moral aspect as well.<sup>37</sup> In other words, the ideal type public sphere. In this context, the discursive and communicative aspects of the dissident public sphere are particularly salient, from Jacek Kuron to Adam Michnik, Bronislaw Geremek, Janos Kis, and Vaclav Havel, at national and regional levels, even if limited and secretive (other alternative dissidence discourses included traditional, religious, and nationalist, e.g. Solzhenitsyn, and return to true Leninism, e.g. Roy Medvedev). Communicative spaces included the Budapest School of Humanist Marxism in Hungary, and the Praxis Group in Yugoslavia. Some structural underpinnings were there, too, from the Committee for the Defense of Workers (KOR) and Solidarity, in Poland, to SZETA (Foundation for the Support of the Poor), Duna Kor (Danube Circle), and Dialogus (a peace movement) in Hungary.<sup>38</sup>

To the extent that communist civil society is framed primarily from an oppositional perspective, at least one aspect of the communist public sphere must be understood as a space for articulating alternatives to the official regime, grounding them in alternative ideologies (such as human rights, but not only, as many ideological discourses proposed were not necessarily congruent), communicating these alternative messages, and potentially creating an institutional basis for the future. Features of the public sphere that are considered essential under democratic conditions—publicness, openness, inclusivity, access to information, transparency, public communication, engagement, and vibrancy, were present to various degrees in different national contexts.<sup>39</sup>

Lack of trust due to widespread surveillance, which is essential to open and public communication, is one of the obvious victims in a communist public sphere. Yet societies adapt,

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<sup>37</sup> Priban, "Legitimacy and Legality after the Velvet Revolution," 1999: 35-36.

<sup>38</sup> See Bernhard, "Civil Society and Democratic Transition in East Central Europe," 1993: 318.

<sup>39</sup> Calhoun, "Civil Society and the Public Sphere," 2011.

and the impact includes dual or multiple, overlapping or mutually exclusive, spheres. Rittersporn et al (2003), defining public sphere in this context as spheres of potential action outside of the state, but not necessarily opposed to it, discussed different public spheres. Oswald and Voronkov, in the same volume, identified the “official public” and the “private public” spheres.<sup>40</sup> The church is a clear alternative public sphere in countries like Poland, while communal apartments are examples of public spaces and places that are mini-public spheres. State-controlled public spheres, meanwhile, like the criticism and self-criticism rituals, are more clearly about power, resistance, and negotiation with the regime (Rittersporn et al, 2003).

The Party-controlled public sphere is both about the success of the regime in communicating its messages (Schulte, 2005), but also about the push back from alternative discourses and resistance. Public political trials with mandatory participation, propaganda and communication sessions (such as the ones dealing with the “Yugoslav problem” in Romania when Tito broke with the USSR), general propaganda sessions within various professions deemed dangerous, such as the judiciary, all documented in the Romanian archives, reveal not just resistance to the official messages, but also how individuals and communities engaged in an (uneven) dialogue with the regime. Carving out spaces of political or discursive autonomy was a matter of negotiation, adaptation, and selective resistance.

Face to face meetings, reading a newspaper or writing a letter to the editor, calling in to a radio show, marches, petitions, specialized journal articles, are all means of engaging in the public sphere.<sup>41</sup> They were all present, to various degrees, in the former communist regimes. Government transparency, on the other hand, was mostly missing or obfuscated, as was the

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<sup>40</sup> Oswald and Voronkov, “The “Public-Private” Sphere,” 2004: 48.

<sup>41</sup> Calhoun, “Civil Society and the Public Sphere,” 2011.

regimes' approach to facts and truth (they were post-truth and post-fact before these terms were coined).

For non-state actors, the ultimate goal was to re-create a demos under democratic conditions, following democratic norms of engagement. The communist regimes, of course, aimed for a modernity that dispensed with democracy and predetermined the common good: the public good was defined by the party, so the public sphere was *ab initio* not possible, or was entirely directed by the state. The reality was that multiple public spheres existed, from culture to religion, and multiple counter- or alt-publics (not all oppositional). Pointing out specific features of these public spheres raises the problem of continuing to rely on a Western-developed model of the public sphere and theorizing from outside of the democratic model. If we are to decolonize the communist public sphere, we might need to decouple it from democracy and democratization. Some dissidents, in particular, might have worked within this model (aiming towards democracy), but not all. The model is also too much of a straitjacket, as it minimizes alternative “ways of being” that may be best understood liminally, rather than squarely within the power-resistance paradigm.

### **Communist legality and the public sphere**

So where can we find communist legality in this multiple/alternative/counter public sphere universe? I focus here on three examples, one drawn from Poland and Czechoslovakia, two from Romania, at different times during the communist period: the human rights discourse, citizen petitions against nationalization and expropriation, and specialized civil law journal articles. Czechoslovak dissidents in the late '70s and '80s based their strategy on human rights—their universality, inviolability, and independence from any political power structure. Jan

Patočka, Vaclav Havel, and others in this movement (embodied in the Charter 77 initiative) stressed the ethical aspects of the dissident opposition, were influenced by existentialism, and based their criticism of the communist system on natural rights and natural law.<sup>42</sup>

The Polish dissident movement, like the Czechoslovak one, rejected violence as a form of resistance, emphasized human rights (externally validated and legally binding after the Helsinki Act of 1975) and truth (Michnik's "live as if you are in a free society," Havel's "living in truth"), the apolitical value of the resistance (Solidarity was a trade union, not political party), and had the explicit goal to construct parallel structures of life within the "civil society," to reconstruct, in fact, society, "to restore social bonds outside official institutions".<sup>43</sup> In practice, this amounted to "fearlessly carrying on the business of daily life" (Schell, xxxi), which included everything from the "flying universities," to protecting workers' rights and the environment (an area neglected by the state).

This human rights discourse, which was notably not bound by national borders and in time spilled over the entire region and the world, was both counter to and responsive to communist legality, as the dissidents held the regime accountable to their own international law promises, undertaken when signing international human rights treaties. 'Human rights' became the site of resistance, which allowed the opposition to cast its efforts in cultural terms while simultaneously waging a real political battle. This had a direct impact on the kind of public sphere and civil society that developed, defined in opposition to the state while being intertwined with it, and fundamentally defensive.<sup>44</sup>

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<sup>42</sup> Priban, "Legitimacy and Legality after the Velvet Revolution," 1999: 35-36.

<sup>43</sup> Michnik, *Letters from Prison*, 1985.

<sup>44</sup> Smolar, "Civil Society After Communism," 1996; Brannan, "From 'Antipolitics' to 'Anti-Politics'," 2003: 16.

The human rights discourse was grounded not just in existentialism and legal philosophy, but also in the communist legal positivist tradition nestled in the state itself. Communist legality in action, it turns out, is by no means as hermetic as the regimes themselves would have liked us to believe. Disfunction, internal resistance, multiple ideological discourses, differentiated subjectivity construction, various levels of internalization of the regime's discourse, as well as accommodation are all part of "actually existing" communist law.

Still primarily understood and contrasted with "the rule of law," communist legality's most visible features are its repressiveness, ideological character, arbitrariness, instrumentalism, dehumanization, and secrecy.<sup>45</sup> This captures one facet of communist legality, but leaves out much that was experienced in everyday life. Moreover, it implicitly endorses an understanding of communist legality exclusively from a totalitarian perspective, reinforces the communist regimes' own unitary and instrumental view of law, and ignores the complexity of law on the ground, thus the types, extent, and impact of resistance in and through law.<sup>46</sup> Focusing on the spectrum of communist legality, instead, can reveal legal continuities as well as legal resistance and mobilization at individual levels (the infrapolitics of resistance).<sup>47</sup>

Even under highly repressive conditions, law is a complex space. Writing about Nazi Germany, Ernst Fraenkel developed the dual state theory—the normative state encompassed the legal order itself, bound by legal principles, but also enacting Nazi law, while the prerogative state embodied arbitrary power and official violence with no legal protection.<sup>48</sup> The core idea of the dual state is widely applicable in all types of repressive systems, whether communist or not.

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<sup>45</sup> See, for instance, CADCR, *Raport Final*, 2006: 397-407; Podgorecki and Olgiati, *Totalitarian and Post-Totalitarian Law*, 1996; also Krygier, "Marxism and the Rule of Law," 1990; Ionescu-Gură, *Stalinizarea României*, 2005: 283-324; Denize and Măță, *România Comunistă*, 2005: 65-89.

<sup>46</sup> Șerban, *Subverting Communism in Romania*, 2019: 31-3.

<sup>47</sup> Scott, *Domination and the Arts of Resistance*, 1990.

<sup>48</sup> Fraenkel, *The Dual State*, 1941; Morris, *Legal Sabotage*, 2020.

The duality of these systems points to the co-existence of law and terror, ordinariness and arbitrariness, normative and prerogative.<sup>49</sup> Other authors talk about “the paradox of communist legality”<sup>50</sup> as “the law of political repression and that of ordinary daily life” even at the height of repression.<sup>51</sup>

This very duality and the shifting relationship between the normative and the prerogative reveal the extent to which communist legality was simultaneously, albeit unequally, an instrument of power and a space of resistance. As alternative or submerged public spheres are tied to spaces of resistance, uncovering resistance in and through law in communist regimes helps us understand the form and shape of these public spheres. In Romania, communist legality was a quintessentially modern, hybrid type of legality drawing from multiple normative and discursive sources, primarily modernity, the civil law tradition, the Marxist-Leninist-Stalinist ideology, and the imperatives of the transition to communism.<sup>52</sup>

In certain areas of the law, such as civil law, deep structural changes were superficial enough that rationality and law’s own internal momentum conspired towards creating some “relative autonomy,” while continuities with bourgeois (civil) law reinforced habits of legality, legal positivist strands, or simply inertia. Equally importantly, these continuities also acted as a web of invisible links still rooted in the pre-communist *nomos*, with its narratives, interpretive commitments, the meanings it constituted, and the worlds it created.<sup>53</sup> Finally, the pragmatic goals of the communist regime were also caught between conflicting imperatives: suppression and incorporation of all those who were against it, ordinary management of social life, and the

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<sup>49</sup> See Hazard, *Communists and Their Law*, 1969, writing about Russia.

<sup>50</sup> Ajani, “Formalism and Anti-formalism under Communist Law,” 2002: 2.

<sup>51</sup> Markovits, “The Death of Communist Law?” 2007: 237.

<sup>52</sup> Șerban, *Subverting Communism in Romania*, 2019: 32-33.

<sup>53</sup> Cover, “Nomos and Narrative,” 1983.

transition to a still hazy communist utopia. The greatest failure of the communist regimes, from this perspective, was to mishandle the fundamental capacity of law to constitute the world we live in, consequently allowing both spaces of resistance and alternatives to persist, if not flourish.<sup>54</sup>

The example of housing nationalization and expropriation, and the resistance against these takings, is a case in point. Eliminating private property and replacing it with collective and state property was at the core of the communist project. The newly installed post-war communist regime faithfully followed the Soviet guidance, and swiftly proceeded to nationalize everything from industry, to commerce and land (1945-1950), eventually reaching the last stumbling block, housing. While approximately 30-40 percent of all housing was eventually taken through a variety of means, the landmark legislation for housing nationalization was Decree 92/1950, which nationalized approximately a quarter of all privately owned urban houses and apartments in the country.<sup>55</sup>

Decree 92 was short, effective immediately, offered no means of redress or appeal, and its appendices, which listed the owners individually, were secret. The surprising part of the story, then, is the extent to which during this period of deep repression that targeted precisely those nationalized, almost half of the nationalized owners in one large city, Timișoara (45-percent) fought back and petitioned, sometimes multiple times, to regain their home. While this was not a public, open, transparent discourse, neither was it a state-controlled public sphere. Timișoara was still a relatively tight-knit community, where entire streets and neighbors who knew each other well were nationalized. In their persistent complaints and face to face engagement with local

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<sup>54</sup> Șerban, *Subverting Communism in Romania*, 2019: 33.

<sup>55</sup> Chelcea, *State, Kinship and Urban Transformations*, 2004; Șerban, *Subverting Communism in Romania*, 2019.

officials, who complained that they were swamped by petitioners<sup>56</sup>, former owners noted the partial and arbitrary nature of the takings, and mobilized the law—the nationalization decree itself—to contest the regime’s understanding of private property, labor and exploitation, and to argue that their houses had been gained through labor, not exploitation.

The back and forth between the petitioners and the regime, lasting for at least 15 years, travelling all the way from the local level to the Central Committee through a maze of repeat petitions, constituted a hidden, but large public sphere that was deeply engaged in clarifying the value, place, and meanings of private property in communism. The debates between the former owners and the regime over categories of labor and exploitation and who constituted a “housing exploiter,” as well as the regime’s arbitrariness in the nationalization process and lack of clarity of the criteria for the takings, resulted in quite positive initial responses to the petitions: officials tentatively approved 20-percent of the petitions for restitution. Petitions were investigated, some of them in detail, and regime officials clearly did not expect the push back. Moreover, it was not just the former owners who continued to operate largely within the pre-communist *nomos*, but also the officials themselves: their understandings of property rights, labor, and exploitation were mutually comprehensible, as the officials themselves understood homes primarily from a private property perspective.

The third example of semi-autonomy and a negotiated public sphere is the specialized law journal articles written by civil law experts in Romania. Particularly during the first decade, during the period of revolutionary totalitarianism,<sup>57</sup> the goal of the regime was to transform the bourgeois justice system into a communist one, both institutionally and at the individual level (to help create communist legal consciousness and subjectivity). Massive purges to the courts (e.g.

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<sup>56</sup> Șerban, *Subverting Communism in Romania*, 2019:147.

<sup>57</sup> See Tucker’s analysis in this volume.

20-percent of magistrates removed), bar (75-percent purged), and legal education were undertaken simultaneously with changes in legislation and the democratization of justice.<sup>58</sup> By comparison with the bar and the court system, law schools escaped relatively unscathed in terms of personnel, with the focus on changing the profile of students and the curriculum (infusing it with class character, among others). In this process, criminal law and public law became privileged fields, while civil law, less of a threat, was mainly neglected.

Legal scholarship focused on criminal law and public law (constitutional, administrative, etc.) was in the spotlight—politicized, ideological, instrumentalized, and dominated the three law journals of the time. Yet even here there were stirrings of discontent. The first issue of the *Legal Studies and Research* journal (the legal research arm of the Romanian Academy), arguably attempted to lay out a course of semi-autonomy in its opening salvo, the 1956 preface of its first issue. The author was Ion Gheorghe Maurer, the first director of the Institute for Legal Research, and a leading Party activist, former foreign minister and future prime minister, and bourgeois-trained lawyer.<sup>59</sup> Maurer declared that law was a science that had its own, objective laws of development, distinct from psychology, economy, or society in general (otherwise it could not be a science). He advanced a research program for Romanian communist legal scholarship grounded in concepts of “legal constants” and “continuity through discontinuity,” connected to the “logical structure of law” that guarantees that law would not disappear, as its core concepts persist regardless of changes in social and economic structure.<sup>60</sup> The theme of “legal constants” became embedded throughout the communist period in Romania in a legal hyper-positivism that focused on law as technique, insisted on extreme legal formalism and separation of law and

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<sup>58</sup> Ionescu-Gură, *Stalinizarea României*, 2005: 283-296.

<sup>59</sup> Maurer may or may not have been the author of the entire lengthy piece, see Vasile, “Schită de istorie,” 2019.

<sup>60</sup> Maurer, “Cuvânt înainte,” 1956.

politics, and discounted “law in action.” Post-communist legal historiography recast this as an attempt to create a professional-scientific shield for law and lawyers and preserve some level of autonomy.<sup>61</sup> While this is highly self-exculpatory and discounts the very high price paid by individual lawyers and the subordination of the justice system<sup>62</sup>, it is also indicative of a type of limited semi-autonomy gnawing at the very roots of totalitarianism.

Moreover, court decisions were not widely available (the decisions of the Supreme Tribunal only started to be published in annual collections in the 1950s), so the decisions and law review articles published in the three law reviews of the time performed important functions for practitioners throughout the country: informing them about the kinds of cases that came up more frequently before courts, troublesome legal issues, as well as signaling the Party policy and ideologically ‘correct’ and ‘incorrect’ decisions and doctrinal approaches (Șerban, 2019: 76-77). In civil law systems, communist included, treatises, commentaries, and law journal articles are key to systematizing the law and guiding both practitioners and legislators. As Inga Markovits noted for East Germany, their importance should not be dismissed, as even seemingly esoteric issues debated in these venues are “symptoms of social and political change ... highly indicative of the underlying political situation,” and reflecting “the political significance attributed to them: for the participants, these are not nice points of legal aestheticism, but essential questions regarding society’s progress towards communism”.<sup>63</sup> In other words, while highly technical, often euphemistic, and restricted to a small number of authors and readers, these articles are nonetheless fairly clearly identifiable as a negotiated, semi-autonomous public sphere.

Scholars focused on doctrinal analysis illustrate well the quiet public sphere of civilians

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<sup>61</sup> Ionașcu and Duțu, *Istoria științelor juridice în România*, 2014: 100-104.

<sup>62</sup> See Crăcană, *Dreptul în slujba puterii*, 2015.

<sup>63</sup> Markovits, “Civil Law in East Germany,” 1968: 2-3.

and the persistence of bourgeois law ideology and doctrine (“legal constants”). Authors such as Salvator Brădeanu, Traian Ionașcu, and Mihail Eliescu had been trained during the interwar period in the continental legal tradition and continued to write in that tradition. Their work can be best described as adapting the Napoleonic tradition to communist restrictions while preserving its core. The centralization of legal education, moreover, and the small number of legal treatises, textbooks, and unpublished course notes ensured a level of continuity of their thought. Critically reviewing a number of widely used treatises published between 1946 and 1948, the president of the Bucharest tribunal criticized them for indulgent over-quotation of bourgeois theorists, not discussing Soviet ones, and ignoring the class character of law.<sup>64</sup> They were guilty of “legal cosmopolitanism,” and publishing too many law articles in foreign, usually French journals, “while those written in Romanian were in a language far removed from the masses and their problems”.<sup>65</sup>

On specific issues, such as property, central to the communist regime, these authors continued to write much as they had before, noticeable in the tone and direction of civil law scholarship. Of 49 law review articles published between 1945 and 1965, only four had a “pure” ideological content—discussing the need to “staunchly defend communist property.” The rest were devoted to discussions of difficult legal issues in housing and constructions, leasing of buildings and land, personal property, etc.<sup>66</sup> As late as 1976, other legal scholars noted the intractability of civil law, compared to other areas of law.<sup>67</sup> This was not only a theoretical issue, as the concern was that the “formalism and objectivity” of law professors, scholars, judges, and

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<sup>64</sup> Nedelschi, “Împotriva cosmopolitismului în știința juridică,” 1949: 731-5.

<sup>65</sup> Nedelschi, “Împotriva cosmopolitismului în știința juridică,” 1949: 730.

<sup>66</sup> Șerban, *Subverting Communism in Romania*, 2019: 187-8.

<sup>67</sup> e.g. Vasilescu, “Dreptul în fața tranzițiilor social-economice,” 1976.

lawyers trained under the previous regime and operating in apparently technical fields (like civil law) in fact covered their “attachment to the former regime and hate for the workers”.<sup>68</sup>

## **Conclusion**

Discussing Soviet and post-Soviet society, Oswald and Voronkov distinguished between the public sphere and the public/private sphere (such as the culture of joking or folklore).<sup>69</sup> They posited that different social spaces were governed by different concepts of law: the public, official sphere was ruled by formal law and repression, while other social spaces were ruled by norms of everyday life, informal customary law, with customary norms and law expanding at the expense of formal law spaces, undermining the legitimacy of formal law, and the two legalities mutually exclusive. This is an attractive proposition, as it acknowledges the legal pluralism of communist societies (rarely studied), and captures part of the distinctive dynamic between official law and other normative orders. It does, however, expand the notion of informal customary law so much that it simply dissolves into broader social norms, continues to emphasize repression and discount other facets of legality in everyday life, and does not really engage with the spectrum and multiplicity of communist legality.

If we approach the communist public sphere from a slightly different direction, namely totalitarianism in action, both the uses and weaknesses of the totalitarian model become more visible. Totalitarian cracks, such as the ones highlighted here—discourses and practices related to human rights, property rights, and legal education—reveal multiple oppositional or alternative public spheres, spaces of semi-autonomy or negotiated autonomy. Definitional features of the public sphere may be limited or missing, but a key element is usually present: some type of

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<sup>68</sup> Mihalca, “Justiția populară,” 1949: 299.

<sup>69</sup> Oswald and Voronkov, “The “Public-Private” Sphere,” 2004.

collective engagement around the public good, with various degrees of transparency and openness, against the regime (human rights), with the regime (housing petitions), and within the regime (law professors). The precondition is not just the imperfect reach of the repressive arm of the regime, but internal inconsistencies and paradoxes as well, particularly at the level of alternative discourses and ideologies that constitute these communicative spaces.

Communist legality as a type of hybrid legality—rooted in the continental civil law tradition, ‘bourgeois’ theories of law and a pre-communist *nomos*, yet also an instrument of social engineering for the communist regime, defined by the simultaneity of arbitrariness and legality, instrumentalism and autonomy, formalism and anti-formalism—points to possibilities for law as a site of resistance.<sup>70</sup> More broadly, hybridity in the context of the communist public sphere(s) underscores their fragmentation, porous boundaries and limits, while steering away from normative assumptions and the stark delimitation of “public/regime” versus “private.” Hybridity allows us to peel totalitarian layers and understand “totalitarianism in action” without overestimating the depth of resistance or reach of alternatives, yet also without denying their existence and thus reinscribing the totalitarian logic.

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<sup>70</sup> Șerban, *Subverting Communism in Romania*, 2019.

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