Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making

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Abstract
In the past two decades, Central and Eastern European countries have experienced a rapid political, economic, social transformation. This transformation has been intertwined with the Europeanization and modernization of the law. The paper analyses the different paths of the renewal of private law in Central and Eastern Europe, with or without recodification, with a special emphasis on the Hungarian case. I discuss the conflicts between academic and political, as well as material and symbolic interests in the drafting of new civil codes. I also identify how mechanisms of legal transplantation, legal technical assistance, and regulatory competition impact on the structure and substance of national private law codifications in the region.

1 Introduction
This paper discusses the drafting of civil codes in Central and Eastern Europe (CEE) in the last two decades, as a case study on the role of legal scholarship in the process of law-making. I will especially focus on the on-going codification process of the new civil code in Hungary. As a study about civil codes and their drafting, the paper is interesting from the perspective of codification as a legislative technique, a minor but important topic in legal theory (see e.g. Canale 2009) and it is also relevant in the context of the ongoing European discussion on harmonisation and unification of private law (see e.g. Marciano – Josselin 2002) and more generally, in the debate over the changing role of national codifications in a globalised legal world (see e.g. Symposium 1998). The paper is structured as follows. In section 2 I briefly discuss the historical and theoretical background of some transitory and persistent features of CEE legal culture. Section 3 gives an overview on the status of national civil law codifications in the CEE region. Then I discuss the antecedents and the history of the drafting of a new civil code in Hungary (section 4). Section 5 draws some theoretical lessons from the comparative analysis on the functions of civil codes, the role of legal academia in law-making. Section 6 concludes.

2 Legal transition and persistent patterns in Central and Eastern Europe
After the fall of Soviet-type socialism in Central and Eastern Europe, the 1990s confronted transition countries with enormous political, legal and economic...
challenges. The process of establishing a market economy in a constitutional democracy has been a unique historical experience, with a different path for each transition country (see e.g. Bartlett 1997, Bönker – Müller – Pickel 2000, Zielonka 2001).

As far as the legal aspects are concerned, the transition of CEE countries from Soviet-type socialism to constitutional democracy and market economy has been a grand-scale exercise in legal transplantation. In other words, these countries did not merely adapt their legal system to constitutional democracy and market economy. This happened in a specific way: to a large extent, they adopted legal rules, techniques, and institutions from foreign, i.e. Western European, American and transnational models.¹

To be more precise, one should distinguish three groups among transition countries in this respect. Central Europe (Poland, Czech Republic, Slovakia, Hungary, Slovenia) and the Baltic states (Estonia, Latvia, Lithuania), to a lesser extent Balkan countries (Romania, Bulgaria, Croatia, Serbia, and Bosnia Herzegovina, Albania) opted for harmonisation with European law. The second group includes the Russian Federation, Ukraine, Moldova and Belarus that follow a different path. As far as their law reforms are concerned, besides some inspiration from European rules they have relied more on both pre-Soviet and American models and suggestions of international organizations (IMF, World Bank, EBRD), and do not make a systematic effort to harmonise their laws with the EU (Dragneva - Ferrari 2006, Hobér 1997, Maggs 2009, Simons 2009, Suchanow 2002). The third group includes ex-Soviet countries in the Caucasus and Central Asia where East and West European models are mixed with traditional law, in some cases with Islamic law, thus producing local versions of legal pluralism (Ajani 2005). This paper focuses on the first group. Somewhat imprecisely, I will refer to it as Central and Eastern Europe (CEE).

Post-socialist transformation in this region was triggered by economically and politically motivated formally voluntary convergence to the ‘West’ and reinforced by harmonisation duties deriving from EU membership: a non-negotiable, take-it-or-leave-it offer. In the last two decades, Europeanisation has been arguably the most significant practical determinant of legal changes in the new and candidate EU member states (Cafaggi et alii. 2010). Some legal changes have been also triggered by conditional credits from international financial institutions that required certain structural and institutional reforms.

Still, irrespective of the specific circumstances of transition and Europeanisation, legal rules are more easily borrowed than autonomously generated in this region. Since the second half of 19th century, Central and Eastern Europe has been a huge reservoir of Western ideas (Ajani 2005). Historically, legal transplantation has been a strong mechanism of legal changes in CEE, not the least because the region is composed of small jurisdictions (Davis 2006), with weak legal cultures (Monateri 2006). To be sure, transplantation generally provides much scope for creativity and legal engineering (Sartori 1997). In the last 20 years, though, legal development in the CEE region does not seem to reflect particular creativity: the

process was largely determined by structural constraints and necessities (Skala 2008, 270-1).

Arguably, the drafting of civil codes is a domain where European rules leave room for national idiosyncrasies and significant cross-country variety to persist. What matters for our purposes is to see whether the massive import of legal ideas, rules, doctrines, and techniques which first looks random, improvised and chaotic, then at second look proves to be increasingly determined by developments at the European level, shows some underlying patterns worth observing and analysing (Heiss 2006). To be sure, often it was a matter of pure chance which models were followed, thus confirming that in legal transplantation much depends on whether one finds ‘a particular book [...] in a particular library at a particular time’ (Watson 1996, 339) or, for that matter, whether that book was written in a language accessible to the particular reader. In sum, there is much truth in what the title of Ajani’s informative paper (1995) suggests: transplantation was largely driven ‘by chance and prestige’.

The drafting of civil codes as a technical legal project, has been driven by more specific mechanisms and characterized by somewhat less randomness than the larger process of legal transition (Harmathy 1998). In the next section, I look more specifically at the new civil codes in CEE countries in the period of transition. In section 5, I discuss the impact of foreign models on their drafting.

3 (Re)codification of private law in Central Eastern Europe: mapping the scene

3.1 Socialist civil codes

Historically, not all countries of the region had a civil code before Soviet influence (cf. Csizmadia – Kovács 1970) but all did, in some form, by the end of socialism (Eminescu – Popescu 1980, Ajani 1993a). In socialist Central and Eastern Europe Western ideas about the crisis of codification had little resonance; and when new codifications were adopted, e.g. in the Netherlands, or international (CISG) and soft law instruments (UNIDROIT, PECL) were adopted, this only increased the number of potential models.

During socialism, codification was linked to the idea of social progress. In fact, it promised to combine ‘social engineering through law’ with the idea of ‘socialist normativism’, i.e. a certain kind of formalism and the primacy of statutory law. Related to this was the ‘myth about the simplicity of the text’ (Ajani 2005, 160), reflected in the relative brevity of socialist civil codes and doctrinal simplifications. The latter led in some countries, but not in others, to ‘semantic innovations or banalisations’, most strikingly in the 1975 civil code of the GDR (ibid.).

A further characteristic of socialist civil codes was the idea that periodic recodification is preferable to the development of the law through the judiciary. To be sure, this could not hinder case law to become important in interpretation nor occasional judicial creativity to play a role. Rather, it meant that periodic recodification was not a taboo: codes were deliberately not drafted from an ahistorical perspective, their links to ‘changing social and economic relations’, and
consequently their transitory character was openly acknowledged (Grzybowski 1961). The new codes after 1990 fitted well in this trend.

As mentioned, one can observe some common features of socialist civil codes (Ajani 2005, ch. 8). The most conspicuous, brevity was in part due to the introduction of separate codes in family law, labour law, and in some cases economic law. In addition, certain institutions in property law or contract law (e.g. limited in rem rights) were simply ‘not needed’ in a planned economy, thus they were left unmentioned or regulated in a truncated form. For instance, while in Hungary the 1928 Private Law Act had more than 2000 sections, the 1959 civil code less than 700. The most notable exception from this trend was the Yugoslavian law of obligations (1978) with its 1109 sections.

Brevity was also supported by the conviction that a short code would be accessible to citizens. Related to this, in terms of style socialist civil codes probably stood closer to the French than to the German model, focusing on regulations instead of theoretical declarations. They used elastic general clauses referring to ‘socialist values’ that left scope for political intervention.

Inspired by ‘materialist’ ideas, socialist codes put an emphasis on property and the hierarchy of its ‘forms’, i.e. superiority and privileges of public over private property. This was also reflected in the relatively short period of prescription (adverse possession).

In spite of a trend towards homogenisation, some national features were present in every code, mostly determined by pre-socialist legal history. In the case of Czechoslovakia and the GDR a certain strive for originality led to doctrinal ‘innovations’ alien to the Roman law-based European tradition of civil law. In other countries, there was no radical rupture with tradition. For instance, in Poland and Hungary, liberalisation in the 1970s and 1980s was continuously reflected in amendments to the civil code and made it possible to ‘live with’ a slightly modified socialist code after socialism. After 1990, ideologically charged general clauses were reformulated and, in accord with constitutional changes, the ‘hierarchy of property forms’ was abolished.²

### 3.2 A comparative overview

In this section I give a short country to country overview of the recodification of civil law in the CEE region, moving from north to south.

In the three Baltic states, the civil code is seen as a symbolic document. After regaining their independence, these countries viewed the period between 1940 and 1991 as a period of discontinuity in many respects, including private law. Still, it was not evident whether they can or will go back to pre-1940 rules. After they regained independence in 1991, the idea of cooperation and a common effort for codification was on the agenda. Finally, however, the three states took different routes (Loeber 2001).

**Estonia** had a draft civil code from 1939 which never became valid law. It was reprinted in 1992 but it could not enter into force without change. Therefore, Estonia decided for a step-by-step codification of its socialist civil code in separate books. Thus, the 1964 Soviet Civil Code lost its validity in Estonia step by step.

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² Another reason for continuity in these countries was that the systemic locus of many characteristically socialist regulations was outside the Code.
The new law of property was adopted in 1993, the general part of the civil code in 1994, the law of obligations in 2001. The reform was accomplished in 2002. As for foreign influences, the code is very eclectic (Varul 2008); it is mainly based on the German BGB but also shows being inspired by Dutch, Quebec, Lousiana, Danish, French, Italian, Austrian, Russian and Swiss models.

**Lithuania** did not have a civil code before 1940 either. In fact, there was not even legal uniformity in the country before Soviet occupation. After its independence, the country first followed the Hungarian and Polish example of a gradual renewal of the socialist code. Later, however, they decided to adopt a new civil code in 2000, modelled on the Dutch, Italian and Quebec codes, with some German and French influence (Mikelenas 2000).

In **Latvia**, the old civil code of 1937 was re-enacted again in 1992, after a long parliamentary debate, by simply republishing the old code. This solution was exceptional in the region, only Romania opted for a similar solution. The Latvian civil code follows the German civil code to a large extent. It consists of about 2400 articles in 4 books (family, inheritance, property, obligations), starting with 25 articles of general provisions. The code leaves company law to a separate commercial code. In the 1990s and 2000s, extensive modifications were undertaken, e.g. the book on family law was renewed already in 1993 (Loeber 2001).

**Poland** was one of the few countries in the region that was able to keep its traditional civil law thinking relatively intact during the socialist era (Manko 2007, Poczobut 2008). When Poland reunited after 1918, there was a lack of legal uniformity, similar to Lithuania. This was remedied in 1933 by a Code of Obligations and next year by the Code of Commercial Law, both influenced by French law. The new socialist civil code (Kodeks Cywilny) was adopted in 1964, largely based on the 1933-34 codes. It includes a general part and three parts on property, obligations, and succession. There are separate acts on family law and guardianship. The 1964 code has been constantly amended since the late 1980s. A number of rules in the code have been abolished by the constitutional court (Kempter 2007, Maczynski 2008).

From the 1990s, there has been much discussion whether a new code is necessary under the new political and economic circumstances. In 1996 the Minister of Justice appointed a commission for drafting a new code which produced several subsequent drafts. These were discussed and modified by government and parliament but none of them became law. Among both the legal profession and academia there is resistance to a new code, as they have been satisfied with the status quo.

In 2006 the Polish Civil Law Codification Commission, presided by Prof. Zbigniew Radwanski, prepared – in cooperation with Dutch experts of the MATRA program - a Green book, an “optimal vision” on civil law in Poland (Radwanski 2006). The book considers whether there is a need for a new civil code or whether a comprehensive amendment of the existing code would suffice. It starts with general considerations on comprehensiveness. The authors suggest that commercial law and family law should be included, while labour law and intellectual property (except for basic rules on the protection of the image and
privacy) should be excluded. After discussing the contents of separate books in more detail, the authors argue that if the main goals are to make the civil code the central legal source of private law and to render the system of private law coherent then this can only be achieved through a new code. The large number of new European rules can also only be systematically dealt with in a new code. Still, it is argued that such a new code should reserve the terminology and legal institutions of the current code to the extent possible.

The opponents of a new code argue that the rules in the current code are not obsolete – they are in fact of much more recent origin than most rules of the Austrian, French or German code. Unlike Russia and other CEE states which after socialism did not have ‘proper’ civil codes fit for a market economy, Poland had (and still has) a workable one. Since the few remnants of socialist law have been deleted from it, the code does not differ in structure, language and style from western codes. Its terms are general and elastic and the guiding principles and basic concepts come from Western codes and doctrine. The defenders of the status quo are, to be sure, not against reforms: they argue that necessary reforms should follow the German and French way, i.e. modernisation within the old framework. The argument that carries much weight in their reasoning is that the longer legal practice is based on the current system (categories, divisions, even the numbering of articles) the more desirable it is to keep it, ceteris paribus. A new code could also not produce substantive coherence for long because it could not prevent that new separate acts are introduced whose provisions deviate from the Civil Code (Poczobut 2008).

Although the drafting is continuing (a proposal for the general part of the law of obligations has been published early 2011), the discussion on the necessity of a new civil code is open.

In Czechoslovakia, legal uniformity in civil law was introduced only in 1950 with a socialist civil code. Between the world wars, the Austrian civil code was used in the Czech, Hungarian (customary and judge-made) law in the Slovak part. The first Czechoslovak Civil Code was designated for the transitional period from capitalism to socialism, as a legal instrument ‘to destroy the base of bourgeois civil law’ (Jurcová 2008, 167). In 1964, the second and formally still valid Civil Code was adopted. It was meant, in then-used terms, as a legal reflexion of the fact that the transition to socialism was complete. Generally speaking, Czech and Slovak legal culture was much more deformed by socialism than the Polish and Hungarian, as there was no functioning tradition of private law thinking to rely on. Hungary and Poland did not wipe out basic institutions of private law under socialism as radically as Czechoslovakia did (Hurdík – Polcák – Smejnaková 2009, Tichy 2008). As the 1964 code was far removed from the European civil law tradition in substance, structure and terminology as well, in 1991 an extensive and hasty revision was necessary in order to fulfil basic legal needs of a market economy (Act 509/1991). In the same year, a new Commercial Code was also enacted. When the country separated, the development of civil law and the discussion on a new civil code also started on separate paths, with Slovakia still looking at Czech law and legal professional discourse as a model.
In the **Czech Republic**, the 1964 Civil Code is the general systemic basis of private law. It underwent numerous amendments, although none of them as important as the 1991 revision. Family law and labour law are still regulated in separate codes, and the relation to commercial law is heavily disputed. In the last 20 years, there were several drafts for a new civil code prepared by law professors. The discussion on the last one started in 2001 and continued at expert level for ten years. In February 2011 the center-right government approved the draft and submitted the act to Parliament. Discussion in both houses is expected to take over a year and the code could come into effect in 2013 the earliest (Hurdík 2008, HN 2011, Ronovská 2008, Slehoferová 2011).

The draft code includes over 3000 sections in 5 parts: general part; family law; absolute rights, including property law and succession law; relative rights, including contracts, tort, and unjust enrichment; transitory and closing provisions. This structure, as well as the provisions on property law, largely follows the Austrian civil code (ABGB) as a model. The draft includes rules on consumer protection but the European directives are not systematically included, as consumer protection is considered as essentially public law (Tichy 2008, Slehoferová 2011).

In the legal profession discussion has revolved around models and structural aspects of the new code: to what extent can old models (originating from before 1950) be used or how the adaptation of EU directives can be pursued in order to create systemic unity in civil law. The draft code strives at continuity with private law thinking before 1950 and radical discontinuity with current private law which is perceived as still reflecting socialism both in form and substance. The starting point for the new draft has been a 1937 Czechoslovak draft code which itself was a modernised version of the ABGB, taking also German and Swiss models also into account. Although the new code will in this sense ‘return to the classics’, it refers to modern foreign codes as well, thus reflecting the ambition of synchronising with legal development in both Europe (including recent changes in the Austrian and the Swiss code), and the world (e.g. the new civil code of Quebec). At some points in the discussion, even the US Constitution’s reference to ‘the pursuit of happiness’ served as an inspiration (Tichy 2008, Slehoferová 2011).

The very last point also indicates the symbolic, ideological and political character of the draft (a topic that I will discuss later in more detail). The new code aims at an explicit and radical ideological change: instead of looking at civil law as ‘an instrument to direct society’, the drafters see its function as enabling citizens to ‘arrange their affairs autonomously and, reach agreement among themselves’ (HN 2011). Giving more space to private autonomy includes changes such as reduction of formality requirements in contract law, revision of the rules on legal capacity, or the introduction of new institutions such as the trust (based on the Civil Code of Quebec).

In **Slovakia**, the drafting of a new civil code has also been constantly on the agenda since the country’s independence. The legal profession and legal academia as well consider the current situation as incoherent (e.g. the 1964 civil code and the 1991 commercial code have many overlaps) and provisional. There is a strong felt need for coherence and finality. The first draft for a new code was presented in 1998 but not adopted in Parliament. The next Parliament started anew, with a deadline in
2005 but it was again a failure. In 2007, a new drafting commission was set up, with the task to finish their work by 2010 but it has not been completed yet. In contrast to the Czech Republic, in Slovakia there is clearly no way back before 1950 (i.e. to the duality of uncodified Hungarian law and a Czechoslovak commercial code). In fact, the majority of the profession wants to abolish the duality of general civil law and commercial law altogether which they also consider as one of the biggest hurdles to European harmonisation in civil law (Jurcová 2008, Lazar 2008).

In Romania, after 1989, the 19th century Civil and Commercial codes were ‘resuscitated’. These codes were never formally abrogated under socialism but ‘several special rules were enacted in various fields of private law: family law, labour law, regarding the status of natural persons and legal entities, the statutes of limitation, and contracts’ (Toader 2010:113, footnotes omitted) and ‘commercial law rules were largely inapplicable. In any case, with rules more than a hundred years old, the codes have been difficult to adapt to the needs and practices of the 21st century. Therefore, first piecemeal reform statutes were enacted in many legal fields, relying on both European legislation and other foreign models. ‘In the absence of accurate legislative coordination and in the context of an accelerating legislative pace, the courts and legal scholars were primarily in charge of ensuring the compatibility of these transplants with each other and with the principles of Romanian private law.’ (Toader 2010: 114) The drafting of a new code was decided in 1997 and the commission submitted a first draft in 2004. After two years of political discussion, a second commission was set up in order to coordinate the code with EU law and other statutes adopted in the meantime. The code was approved by Parliament on 22 June 2009. A separate act for the application of the New Civil Code was recently adopted (Law 71 of 10 June 2011) that establishes October 1st, 2011 for the entry into force of the new Civil Code. The structure of the new code largely follows the structure and system of traditional civil law textbooks, takes into account previous Romanian code projects and the codes of other civil law countries. In this sense, it is conservative – the structure is not disrupted by the EU directives. The main inspiration is coming from French law, with some influence of the new Quebec and Dutch Civil Codes (Józon 2006, Toader 2010).

After Bulgaria regained its independence in 1879, it adopted its first civil code (inspired by the 1865 Italian Codice civile) in three separate statutes: persons, goods, inheritance; obligations; commercial and maritime law. This fragmentation continued under socialism when separate codes were adopted on persons and family law (1949), obligations and contracts (1950) and on property (1951). The socialist codes have been either revised or in part overwritten by new statutes. Currently, private law in Bulgaria is increasingly fragmented. There seems to be a concern among legal scholars that a flood of EU rules and other market-related legal instruments result in the destruction of the coherence of private law system. Still, the question of a new codification which would lead to a comprehensive civil code, similar to most European countries, is not on the agenda. The reasons why
there is no real prospect for a systemic codification are twofold: there is still a
dynamic inflow of new legislation arising from European harmonisation duties;
and the legal profession is more familiar with private law as it is now, i.e.
2008b, 2010).

The successor states of Yugoslavia started from a position similar to Bulgaria (civil
law codification in separate books), combined with the federal system which also
concerned civil law (the competence on lawmaking in civil matters was shared
between the republics and the federal level). Thus, Yugoslavia was a special case
within CEE also in terms of its civil law, as before 1991 there was neither legal
uniformity nor a uniform civil code (Benacchio 1995).

After gaining independence, Slovenia adopted separate codes on the Law of
Obligations in 2001 (with many separate statutes on contractual matters) and on
the Law of Property in 2002. The socialist codes on succession and family law, both
from 1977, are still in force. There has not been serious discussion in the Slovenian
legal profession on adopting a new complete civil code (Trstenjak 2008, 2010).

Croatia, similar to Slovenia, refrained from a uniform civil code. The Croatian
legislator opted instead for individual laws that draw upon Austrian models with
respect of property law and German and Swiss concepts in company law and
insolvency law. A new code on succession law was adopted in 2003. The new law
of obligations entered into force relatively late, in 2006. A reform was not urgent
because the 1978 code was relatively modern. Croatia adopted a separate
consumer code in 2007, as lex specialis to the obligations code. In retrospect,
Croatian scholars argue that this step by step codification was necessary because
the introduction of a market economy needed a legal infrastructure quickly,
although later the lack of systematicity and unity showed up. Similarly to Slovenia
and Bulgaria, there is no plan for a uniform code in discussion, not the least
because it seems unclear on what basic principles it would be based (Josipovic
2008, 2010).

In Serbia, the earlier Yugoslavian law of obligations from 1978 (with a major
revision in 1993) is still applicable. There have been several new partial
codifications in other legal areas between 2003 and 2005, including property law,
family law, succession, company law, and labour law (Szalma 2008, Perovic 2010).
Discussions on a new uniform civil code started in 2002. An important argument
for codification was the historical reference to the first Serbian codification from
1844 (which was itself an adaptation of the ABGB). In 2006, upon a parliamentary
decision, the government appointed a commission for the drafting a new civil code.
In 2007 they published a book on the general aims of the codification and a set of
questions and possible answers on diverse legal issues in order to generate public
debate. In 2009 a draft of book 4 on the law of obligations was published. The Code
itself is planned to follow the German model, including general rules and principles
of private law (Book 1), family law (Book 2), the law of succession (Book 3), the
law of obligations (Book 4) and property law (Book 5). The drafters rely on an
eclectic mix of foreign models, including European law and PECL (Djurovic 2011).

The status of private law in Bosnia and Herzegovina is even more fragmented
than in other ex-Yugoslavian republics. According to the 1995 Dayton Agreement,
there is no legal uniformity in the state in civil law matters: the two entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) and Brcko district have legislative competence and separate laws. While the main competence in private law is with the entities, on certain issues such as housing laws the ten cantons, i.e. the lowest level of government, have legislative competence. In both entities, previous Yugoslavian and Bosniak statutes keep to be valid unless new laws replace them. The new statutes have been often transplanted from West European or US laws, with no clear systemic unity. There is no uniformity or a general tendency towards harmonisation in the state, i.e. between entities. Up to now, the two entities have harmonised their new laws only in two particular areas (land registry, public notaries) but even this does not include the laws of the Brcko district.

Thus, a new uniform civil code is clearly not on the agenda in Bosnia and Herzegovina. The most urgent and most complicated reforms concern property law which is currently a rather chaotic conglomerate of the remnants of socialist property rules and transplanted Austrian, German and US laws (Povlakic 2008, 2010).

In Albania, in spite of two previous codifications (the 1928 French and Italian inspired and the 1981 Soviet and German inspired socialist civil code), there has not been a full transition from feudal relations. In consequence, at the start of the transition in 1990, very basic legal institutions were missing, such as general full legal capacity, freedom of contract and unlimited debtor's liability (Ajani 1993b, 1996). In the early 1990s, there was a comprehensive and relatively quick legal reform in the country, with massive assistance from a large number of international organizations and foreign entities, including the IMF, the World Bank, the German, Dutch, Italian governments, the Soros Foundation, the “International Development Law Institute”, the American Bar Association, and Task Force Albania set up by the Council of Europe (Ajani 1996).

The drafting process of a new civil code was long and complex, at least compared to other statutes that were adopted with much haste (Ajani 1993b). The drafters relied on both previous codes but neither could be directly used. Therefore, they mainly relied on more recent Western European models. The civil code entered into force on 1 November 1994.

4 The Hungarian Civil Code Project: a never ending story?

Hungary was a forerunner in adopting pro-market legislation from the mid-80s. The introduction of a two-tier banking system, a new tax system including sales and personal income taxes, liberalisation of foreign investment, adoption of the Companies Act and the Transformation Act (providing a legal framework for state-owned enterprises to convert into new forms of business), as well as the first reopening of the stock exchange in post-war Eastern Europe all happened before 1990, in the last years of the so-called reform-socialism (Kornai 1990, Sárközy 2007). As to the ‘extensiveness’ and ‘effectiveness’ of commercial and business law, the EBRD found in 2005 that ‘improvements are still needed in some areas crucial
to the business environment and to foreign investment, in particular in the field of insolvency and concessions.’ (EBRD 2005, 1) Although radically revised in contents, Hungary still uses its socialist civil code from 1959.

4.1 **The 1959 Civil code**

Hungary has a long tradition of unfinished projects in general and draft civil codes in particular. When in the late nineteenth century modernisation of the legal system was on the agenda, many new codes were enacted in Hungary, largely following German and Austrian models. For instance, the 1875 Commercial Code was mainly based on the German HGB. A comprehensive civil code was also planned and several drafts were prepared starting from the mid-19th century. The most serious one, written by a committee with prestigious academic and professional participants was published in 1900. After extensive Parliamentary debates and several revisions in the drafting committee, a new version was published in 1915 but in the turmoil of World War I it was not voted upon. After the war, a new initiative of the Ministry of Justice resulted in 1928 in a proposal of very high quality which was based on previous drafts, as well as some elements of the German and Swiss codes. This so-called Private Law Act found general approval among academics and professionals. It was well received in the Parliament as well, as far as its contents were concerned, but the legislator decided not to adopt it. The main reason seems to have been political: it was argued that codifying civil law in the new smaller territory of post-war Hungary would cause disparity with the law of those ‘lost territories’ in north, east and south where Hungarian customary and judge-made private law was still in force. Although never adopted formally, the Private Law Act had a huge impact on both legal practice and legal education. Similar to constitutional law, private law was not codified until socialism. In fact, up to 1960 most private legal relationships (contracts, tort, property, succession) were regulated by case law, although there have been an increasing number of statutes enacted in commercial law, company law, and parts of family law.

The first civil code of Hungary came into force in May 1960 (Act IV of 1959), in the midst of Soviet-type socialism (Léh 1960, Grybowski 1961). After more than 150 amendments and revisions, it is still in force. In the 1959 Hungarian Civil Code (CC, HCC) we find much solid doctrine originating mainly from earlier drafts (especially the 1928 Private Law Act), the German and Swiss codes, and customary law (especially in succession law). But these so-called ‘bourgeois’ and ‘feudal’ elements (the latter referred to customary law) were used tacitly or wrapped in socialist ideology, and were at any rate combined with ‘genuinely socialist’ rules. The actual effect of traditional rules and prestigious foreign models known by academics was surely more marked than the influence of the ‘official’ model, the 1958 Soviet draft civil code (Ajani 2005, 75). For instance, in contrast to the Soviet code (which was in this respect inspired by German pandectist ideas), the HCC does not have a general part and makes no use of the concept of act-in-law (Rechtsgeschäft).

As mentioned above, socialist civil law codifications were justified by arguments about the fundamental difference between bourgeois and socialist civil law. The former was considered by Marxists as an embodiment of bourgeois ideology of formal equality, covering and sanctioning the ‘exploitative production relations’ of
capitalism. As the very basis of a market economy – private property and freedom of contact – had been almost entirely abolished in the period starting from 1948, by the time the HCC was adopted, the official justification could refer to it as a code which serves to ‘consolidate socialist development’.

Indeed, the 1959 CC was a definitely ‘socialist’ civil code as it declared state property superior to private property, introduced general clauses to protect the interests of the ‘people’s economy’ and socialist values, and generally simplified language, doctrines, and the structure of the text.

To be sure, different parts of the code were different in this respect. Property law reflected socialist ideological influence much more heavily than for instance the law of succession. It declared the supremacy, unity and indivisibility of state property and provided less protection for private property than to state property (and also less in absolute terms, or compared to the 1928 Act). An example is the reduction of the time period for adverse possession of real estate from 32 to 10 years. The officially stated reasons (Reasons 1960, 95, 100) referred to less commercial activity and better means of communication, in justifying that there is no need to maintain legal uncertainty in favour of an absent owner for such a long time. Behind this prima facie reasonable argument, however, lurked a more pragmatic or even opportunistic reason: the reduction helped the state and local governments to get possession of many abandoned land in a cheap and easy way. Namely, in the early 1960s it was roughly 10 years after the coerced collectivisation of agricultural land that induced many people to leave their property, without formally granting ownership to a cooperative or the state.

Another example of the role of socialist ideas in the code is this. In the official ministerial reasons for the HCC, much more than in the text itself, there is constant reference to the moral superiority of socialist society, and the educative role of law. For instance, in the book on inheritance law, the rules on intestate succession precede the rules on testamentary succession. The justification is that the former ‘is considered the most appropriate way of inheritance; the law is trying to educate those who tend to neglect their families (in their testament)’ (Reasons 1960, 471). This reference to the educative function of socialist law (Kulcsár 1961) seems to be merely empty rhetoric.

The HCC was drafted by professors who were either trained before the WWII or still had an international outlook. For technical and professional, rather than ideological or moral reasons, they safeguarded and incorporated classical values of private law thinking and certain structural and semantic features of traditional and modern Western codifications. Thus, although Soviet civil law was markedly present in the official motives, the HCC itself was drafted more in the long shadow of previous drafts and with a watchful and critical eye on foreign models. Altogether, it is a code of outstanding technical quality. As it was formulated in abstract terms, its basic structure could survive social and technological changes, privatisation, and the (re)introduction of a market economy. After a major revision in 1977, the next round of amendments and changes, between 1987 and 1993 made the code workable in a market economy.

Still, during the last twenty years it has become generally accepted that a new code is necessary. Like the still nominally provisional Hungarian Constitution from
1989\(^3\), the genesis and pedigree of the 1959 code provide an argument for a symbolic change. This argument is rather weak though: unlike constitutions that are generally considered as closely related to national identity and sovereignty, civil law codifications are often seen as merely technical rules (Schauer 2000: 7-11). Weightier arguments for recodification are related to the structure and the incompleteness of the code and to new challenges of European harmonisation (Basa 2005, Gárdos 2007, Vékás 2001, 2006a).

4.2 The drafting process
The idea of a new Civil Code was first officially formulated by the minister of justice in 1989 (cf. Sárközy 2007) but it was only in 1998 that the government formally decided to set up a team in the ministry of justice with the task of drafting a new civil code. The three main goals have been (Gárdos 2007: 3) to achieve comprehensiveness; to respond to new economic and social needs; and to solve doctrinal problems. The actual drafting was in the hands of an Expert Committee (EC), set up from a handful of academic and judicial experts, headed first by Attila Harmathy, later by Lajos Vékás, both renowned professors of civil law. The drafting was conducted in separate parts (persons; family; property; general contract law; specific contracts; torts; inheritance), each in the hands of one member of the EC, assisted by working teams based in the Ministry of Justice or in legal academia.

In 2003 the EC published a detailed Conception, and in 2006 a Plan of the code, also in English translation. At the same time, the Ministry launched a consultation among legal professional groups and opened also a public debate. It was expected that based on the Plan and considering the suggestions arising from the discussion, by 2008 the EC would complete an Expert Proposal (EP) that would be approved by the Government and submitted to Parliament. Before the EC completed the proposal, however, in September 2007 the Ministry discharged the EC of its commission and started drafting the Act on its own, based on the 2006 Plan. Although the reasons for this decision are still not entirely transparent, it was seen by the majority of the legal profession as a ‘political intervention’ and an insult to the EC. It brought the issue of the civil code in a clear political context when the right-wing parliamentary opposition took sides with the legal profession and the experts.

The Ministry had two main arguments. The first related to the speed of codification: they wanted the code to enter into force before the end of the government’s mandate in early 2010 and they were increasingly worried whether the EC would complete its work in time. The second argument concerned the substance of the EC’s work. In the Ministry’s view the academic experts were irresponsible to arguments of certain well-defined and respectable stakeholder groups (disabled persons, Hungarian Patent Office, Banking Association) whose interests and suggestions they should have taken into consideration (Interview 2008). The Ministry prepared a draft within a few months and published it on their website in April 2008. Early June 2008 the Government submitted the Draft to Parliament.

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\(^3\) The 1989 Hungarian constitution is formally an amendment of the 1949 communist constitution. On 1 January 2012 it will be replaced by a new Constitution.
In the meantime, members of the EC, offended by their dismissal, nonetheless continued their work and published an EP, along with extensive explanations and comparative material with a commercial publisher in March 2008 (Vékás 2008). The book was launched, symbolically, in the premises of the Academy of Sciences, in the presence of the acting and the previous President of the Republic (both professors of civil law).

After long parliamentary debates between September and December 2008, and again in March and September 2009, which resulted in many elements of the EP getting included in the text, the new civil code was adopted in September 2009. Due to the political veto of the President, however, the proposal was sent back to Parliament. After a short and formal discussion the text was approved for a second time and on 20 November 2009 the new Civil Code was promulgated in the Hungarian Gazette (Act CXX of 2009, Promulgated Code, PC).

The timing of entry into force of PC, along with the enactment of necessary transitory rules, was left for a separate statute. This statute was adopted by the Parliament in December 2009. The President issued a political veto again, sending the statute back to Parliament. After a second parliamentary debate and some changes, this statute on the entry into force of the PC was promulgated on 3 March 2010, shortly before the end of the mandate of the left-wing majority Parliament. It provided that Books 1 (introductory provisions) and 2 (persons) of the PC shall enter into force on 1 May 2010, while Books 3 to 7 on 1 January 2011.

After the right-wing coalition won the elections in April 2010, their representatives made clear that the new Parliament will withdraw the PC. In the meantime, the introductory statute was also challenged in front of the Constitutional Court, both on substantive and procedural grounds. A few days before 1 May (when the first two books of the PC were supposed to enter into force), the Constitutional Court found the statute unconstitutional and annulled it. The main reason was that because of the short transition (preparation) period and the legal uncertainty arising from the two-stage introduction of the PC, the principle of the rule of law was violated. In July, the new Parliament formally decided that the PC shall not enter into force.

In the meantime, the new right-wing Government issued a decree on the preparations of a new Civil Code, setting up a new drafting team. This new expert group is coordinated by intellectual property scholar László Székely and includes most members of the previous groups, along with a few new members, all law professors and senior judges. The head of the previous EC, Lajos Vékás, again has a leading role in the drafting. The new EC (more precisely, there are three committees but the internal division of labour between them does not matter for our purposes) is expected to submit a new draft to the Government early 2012 (the mandate of the commissioner has been recently extended until January 2012). After a few months of open consultation the Parliament is expected to vote on the code so that it could enter into force in 2013.

In the last months, there has been scarce information published about the working of the EC. In December 2010, they launched a short note, indicating a few strategic points where the drafters are planning to deviate from the PC. These will be explained below. In July 2011 a further note was released, providing information on how particular doctrinal controversies have been solved among the experts,
mainly in property law. In sum, it is likely that the new code (NC) will mainly follow the lines of the PC, on certain points of difference favouring the EP.

4.3 Scope and structure of the code
Although in 2009 Hungary was quite close to have a new Civil Code, the drafting process started again from an early stage in 2010, with a likely but still uncertain end in sight. In spite of this uncertainty, it is worth briefly comparing the scope and structure of the current CC, the EP and the PC. As for the scope, the goal has been to make the civil code comprehensive, i.e. a general systemic background for the entire private law. Compared to the current CC, the new code will include two new books: on legal persons (with the main substantive rules of company law, as suggested in the EC’s December 2010 communication), and on family law (this re-integration is similar to other post-socialist countries). Minor additions are product liability in tort law, and the rules on commercial agency, as well as trust, leasing, factoring, franchising among specific contracts (currently regulated in separate statutes or in case law only). The inclusion of the rules on land registry is still under discussion. Similar to Poland, the code will probably not include labour law and intellectual property law. The following table shows the structure of the current code, the EP and the PC in parallel.
5 Theorising the Hungarian case in a comparative perspective

Even such a cursory overview of civil law reforms in CEE countries as in the previous sections shows that there are some common and recurrent questions to

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4 According to the 2010 communication of the EC, the rules on legal persons, mainly transposed from company law, would form a separate Book Three, thus changing the numbering of the further books.
be discussed. Some key issues repeatedly arise in the literature (cf. Jurcová 2008, 170) about the significance of national codification against the background of European harmonisation, the degree of continuity with socialist and pre-socialist codes, the political, technical, and symbolic character of the civil code, the moral and political values in the recodification, the unity or compartmentalisation of civil law and the role of foreign models. In the next subsections I touch upon some of these questions.

5.1 The need and justification of codification

From a narrowly legalistic or merely structural perspective, it can even be questioned whether the specific type of path dependence discussed in section 2 makes transition countries unique. If the problems of civil law codification are analysed from a forward-looking perspective, it can be argued that the challenges of the 21st century are similar in East and West Europe (Vékás 2006b).

The first challenge, bluntly, is whether ‘it makes sense at all to start creating a code based on national lines?’ (Vékás 2006b, 120-121). Isn’t it a highly untimely coincidence that “the movements to unify European private law are taking place at the same time that Central and Eastern European countries begin to create their national codes”? (ibid., 121) To put differently, the question can be raised whether civil codes have more than a symbolic role in law in the 21st century. Scepticism is justified not only because of the increasing speed and amount of new legislation coming from the EU. It also relates to the changing ways lawyers and laymen get access to legal material.

For traditionally trained (Continental) lawyers, to have a ‘system’ is still necessary. Such a grid of reference helps them to memorize where to find relevant legal material relating to a certain subject. At the moment it is still for civil codes to fulfil this function but this is neither logically nor technically necessary. The increasing use of software and electronic databases has already changed the routines of lawyers’ work. Furthermore, the idea, sometimes expressed in CEE countries in support of new civil codes, that they should help making the law accessible to ordinary citizens who want to organise their private relations is hardly more than a legalistic myth.

Historically, there has been much rationalistic optimism about the role of codification in large-scale social transformation (see e.g. Bentham or Napoleon with regard to the French code civil). Looking back to the last two centuries, it is not obvious how effectively civil codes can serve as instruments of social engineering. For instance, 50 years after the 1804 adoption of the Code civil, old rules of succession were still in use in some rural areas in France (Carbonnier 2004). On the other hand, some technical legal rules relating to commercial transactions are changing so quickly that it would be futile to incorporate them in a civil code which is supposed to represent coherence and stability in the legal system. Still, most European, including CEE countries do not abandon the idea of codification. In fact, in some cases they consider it an important achievement and proper object of national pride to have a new comprehensive civil code. In the legal imagination, a civil code still has a symbolic significance beyond any instrumental value of its substantive rules and any practical usefulness of the code’s systemicity.
The tasks of civil law codification in the 2010s are also different from what they had been in the early or mid-1990s. In most CEE countries, with the EU membership, the transition period when the content of the law had to be changed rapidly and in large domains, seems to be over. A general problem with the later recodifications (Poland, Czech Republic, Slovakia, Hungary, to some extent Serbia and Romania) seems to be this. As there was no radical, let alone revolutionary change in the civil law of these countries, the regime change being rather continuous, the further we get in time from the transition, the stronger the resistance against any fundamental reform in civil law. It seems increasingly hard to justify why previous piecemeal changes were not enough. Sometimes, governments try to justify this as a symbolic start of a new era after socialism. This plays a large role in the rhetoric of current debates in the Czech Republic. Resistance is especially due to the judiciary that strongly prefers the status quo with only minimal reforms. Their conservative approach to civil law is the practitioner’s view who has scarce knowledge about current international model laws and also not much professional interest in anything else than the coherence of the law applicable in their work. The biggest challenge from their perspective is to get acquainted with European law and use this in their everyday practice (cf. Bobek 2006, Cafaggi et alii. 2010, Kempter 2007).

In contrast, law professors often take pride in drafting new laws, eventually based on comparative work. This predicts that the perceived need for a new code in a country depends on the composition of the group of drafters. As I discuss below, in countries where the reform of civil law is perceived as a political matter, the outcome will be different from those where codification is looked at as a technical issue.

An overview of the CEE development in the transition period also shows different trends. Some countries chose a radical rupture with the socialist code; others reformed it slowly, leaving its structure almost untouched. Some countries take the existence of a unified civil code as crucial; in others the multitude of partial codes apparently does not pose insurmountable problems. As the main users of civil codes are professional lawyers, including judges, the main explanation for this divergence seems to be inertia and path-dependence, in other words, conservatism in sticking to well-exercised routines. This conservatism probably is also related to enduring traditions in legal education, characterised by formalism, doctrinalism, and an orientation towards national rules and problems.

Both in East and West, old codes have to be modernised and in countries with relatively new codes like the Netherlands, they have to face continuous challenges. The two most important challenges are coming from the European Union. The first concerns the systemic locus of rules on consumer protection in private law, a topic I discuss below. The second challenge concerns the future of national civil codes in the EU in general, after the adoption of the DCFR, in light of the on-going discussion on harmonisation, unification, optional instruments etc.

Still there are some obvious and undeniable differences between civil codes in East and West. The first is related to socialist theories and practice of codification. As discussed in section 2.1, CEE socialist civil codes were structurally different from their Western counterparts and recodification was theoretically accepted.
Second, in many transition countries codification occurred in the context of a struggle with the transposition of the EU acquis. Especially in the first few years, lack of time led to word by word translations of directives. Later this caused much more trouble in interpretation and in system-building than a careful translation and transposition would have meant. So Vékás is not fully right that problems of codification in East and West are the same. Europeanisation is a main driving force behind legal change in the region but it only determines the substance, i.e. what is harmonised, not how it is done. At least formally, it does not have an impact on how European rules are incorporated in national legal systems: this is the very idea behind harmonisation through directives that takes idiosyncrasies of the member states, including the systematicity of their rules, into account. A general complaint in this respect is that the transposition of EU directives often means only verbatim translation. It seems that in today’s Europe, the interaction of Union law with national private laws in general and with civil codes in particular raises special difficulties for small and less wealthy member states, concerning translation; technical incorporation and cross-referencing; subsequent interpretation; potential conflicts with national legal traditions. In short, the problem seems to be related to the available legal human capital.

5.2 Drafting and codification: technical, political or moral task?
In general, what do we mean by the political vs. technical distinction? As Duncan Kennedy (2001) famously argues, even so-called “merely technical” issues raise political stakes. The distinction also figures in the Hungarian discussion about the role of legal experts and elected politicians in civil law codification. This raises important questions about the drafting process itself. Is it conceived of as a political, legal, or academic project? Is the discussion about the new code a prominent or a marginal issue? Is the code a political document? What to do with controversial issues? Who is legitimized to decide between alternatives? Is there a specific expertise necessary for such a codification project which makes it a natural monopoly of law professors?
It is worth shortly referring to the US discourse about uniform laws in this respect (Zelst 2009, 618-623). In the American discourse the problem of private legislatures, i.e. drafting by non-political actors is considered problematic because non-representative and politically unaccountable organisations are not protected from undue influence and their product is vulnerable to the charge of being thus influenced (ibid, 619 n. 30) Thus, there is indeed a legitimate reason why the law should come from accountable politicians. In that case the influence of pressure groups is not considered undue because it is, in principle, transparent. On the other hand, private legislatures themselves ‘believe that their function is to deal with technical problems that can be solved by legal expertise and to avoid issues whose resolution requires controversial value choices’ (Zelst 2009, 620 n. 31, citing Robert Scott).

5 To be sure, the dynamics of US private legislatures is different – the drafters of uniform laws want to achieve ‘an acceptable number of adoptions’, thus they try to secure support of the interest groups through favourable drafting so that these groups promote the adoption later. In this process, adoption is a yes or no decision; interest group pressure can have an impact on the
This sounds similar to officially expressed views of Hungarian private law scholars, although in principle they acknowledge that when they are engaged in drafting, their expertise is ultimately subordinated to decisions by elected politicians. To be sure, it is extremely difficult to generalise about the dynamics of drafting and codification in CEE countries. Roughly, experts work within a framework set by the broader regulatory aims formulated by politicians, there is some feedback from legal professions and the general public and at the end the draft is discussed in Parliament in detail. In Hungary, during the Parliamentary debates on the PC, a large number of last minute and ad hoc amendments and changes were proposed by individual MPs, and many of them were adopted. Here the problems are twofold. First, these punctual changes usually serve well-defined lobby interests that are channelled into legislation in this intransparent way. Second, the punctual changes reduce the main value of a civil code, its coherence and consistence.

In the Hungarian debate on the PC in 2008-09 some politicians, especially on the right-wing, at least seemingly subjected themselves to the authority of law professors qua experts and to legal professionals (judges, attorneys, and public notaries) who all criticised the government to take drafting out of the EC’s hands. The government could rightfully respond that political decisions, especially deep moral controversies and value choices should not be delegated to academic experts. Politicians cannot hide behind professors or other experts, implicitly relying on their private value judgments. On the other hand, experts have to make the role of value judgments explicit, e.g. at a few crucial and highly controversial points by elaborating alternatives which are doctrinally equally possible and leaving the choice to the legislator or, in most cases, by stating what are the principles and values they follow when choosing between alternatives.

In general, the political and moral values underlying 21st century European civil codes are not controversial. The general principle of private autonomy and freedom of contract; the social duties attached to ownership; the role of social justice among the values of a civil code are anchored in the legal system, usually at the constitutional level, as principles and values enshrined in national and European constitutions. But there are also mid-level choices on how ‘social’ or ‘paternalist’, how ‘empowering’ or ‘business-friendly’ the code should be. These choices also figure in lawyers’ and legal scholars’ mind in CEE when deeply-rooted dirigiste and paternalistic views interact with ideals of private autonomy and freedom of contract.  

[6] Although here again it is very dangerous to generalise, by and large one can notice the persistence of anti-market views and the weakness of trust in business culture. For instance, it has been suggested that a characteristic substantive difference between Eastern and Western European law is stronger protection of debtors in East (Horn 2002, 155). The reason seems to lie in widespread pro-debtor views and popular feelings against banks; although the current economic crisis might have overcome some of these differences. On the other hand, in the last decades, libertarian ideas also found some resonance in the region, in some respects more so than in the western part of the Continent (i.e. excluding the UK).
Third, there are also particular substantive issues that are controversial for different reasons. New civil codes in CEE can hardly avoid becoming the playing field of a certain *Kulturkampf*, i.e. moral and ideological debates on issues such as the incapacity and autonomy of mentally disabled persons or the legal status of same sex partners.

The debate between the academic and political character is somewhat similar to the debates in other domains about the role of impact assessments – there also, what is at stake is the relation of experts to political actors. An important difference is that with civil codes, the experts are *legal* experts who are usually concerned with doctrinal issues, coherence, and systematicity. Even if they aim at substantive reforms, they only assess the likely extra-juridical consequences in an intuitive way, using their common sense. But the debate is similar and it is true in this context as well that the ultimate decision remains in the hands of the political actors. Not only in the sense that they take political responsibility (via their choice from a constrained set, a small number of simplified alternatives) but also in the sense that ultimately they are free to set aside the expert’s proposal, modify it at any point as it seems best to them. As mentioned, this happens to a large extent in the parliamentary debates on civil codes.

In general, it is an illusion that private law scholarship as such could solve political or moral controversies. At least in the way it is practiced now, as a value-neutral technique, obfuscating important tradeoffs, private law scholarship is unlikely to contribute to these discussions. Thus, in a wider perspective, through the drafting process also fundamental problems of democracy, expertise, legitimacy and of the functions of private law come to the surface. To be sure, similar dilemmas are also present in the ongoing debate on European private law, even if they are often shadowed by the debate on federal versus national competences.

5.3 Metaphors and foreign models: transplantation, emulation, competition

Law rarely emerges from *ex nihilo* and codifiers almost always use models: this seems to be the standard way of legal change. The interesting question is whether there is a method in such borrowing. A weak legal culture is one that is ‘widely opened to foreign “cultural intruders”’ (Monateri 2006, 39, n.8); it typically borrows from others but is not typically borrowed from. As mentioned above, for historical and cultural reasons CEE countries have such borrowing legal cultures.

To note, for small jurisdictions there are also efficiency reasons for relying on foreign models (Davis 2006, Mattei 1994, Grajzl – Dimitrova-Grajzl 2009).

One should also take into account a certain temporal dynamics. In the early years of the transition, the great variety of models almost automatically, with high probability led to incoherent, fragmented and random reception of foreign models. This chaotic reception could be later systematised in the domain of civil and commercial law through codification: most countries of the region made this experience. In Poland, Hungary, and Romania, the structure of the code maintained the classical models, embodied in either the French or the German code – therefore changes could go step by step, with a formal continuity upheld. Those who had an interest in a *tabula rasa* argued, instead, that socialist civil law is completely useless and should be abolished. This was indeed the case in Czechoslovakia that introduced a new, transitional commercial code or East Germany where the
German BGB was quickly reintroduced, with some transitory rules (Ajani 2005, 93-95).

In the following I try to interpret the story of civil law codifications in the CEE region in light of some insights gained from the theoretical discussion on legal transplants and regulatory competition.

The drafting process of a civil code provides ample space for borrowing and emulation. In these year-long processes legal academics usually have an opportunity to engage in comparative legal analysis. This opportunity, however, is not always used, and sometimes left unused for good reasons. The Hungarian case can serve as an illustration where some parts of the 2008 EP are based on extensive comparative work, others do not show any impact of it. For instance, the general contract law rules take into account recent changes in the German civil code, the Dutch civil code, and international models (CISG, UNIDROIT, PECL). The rules on personal securities take the respective European Principles and the Ottawa model law into account. The chapter on tort law is less innovative: it largely follows the current code, adding some rules crystallised in judicial practice but does not show any impact of the Principles of European Tort Law. The reason for this conservatism might have to do with the fact that the main drafter of the tort law rules was a judge. In the book on property law, the drafter was an academic who deliberately took a rather conservative stance as he perceived his task as consolidating law as it operates, instead of designing the best possible (sub)system. Thus he decided to keep the current rule if it seemed workable, especially if supported by established case law, even if a foreign code would suggest a substantively better solution. Some drafters have also been sceptical about the direct use of international model rules in drafting, for two reasons. First, these rules are often compromises, therefore, do not rely on principled justification. Second, as the models are relatively new, there is no established case law to rely on to solve practical problems in their application.

A further characteristic of the Hungarian use of foreign models is that there is virtually no reference to inspirations from other CEE countries, even though prima facie it would make sense. For instance, Polish and Hungarian civil law practice and scholarship face very similar problems. Apart from prestige, this relative isolation might also have reasons in language and patterns of cultural closeness and distance.

In analysing the use of foreign models in CEE civil codes, one has to take into account a few methodological suggestions from the theoretical literature as well (Wise 1990). First, in the analysis of legal transfers, it is more fruitful to focus on the micro level, instead of the macro level, i.e. look at the action of transplantation (Graziadei 2009). Transplantation is ‘mediated action’, where borrowed law is an instrument for an action with regard to ‘an imagined future’ (Graziadei 2009, 727). Relatedly, the institutional framework and the preferences of the drafters matter (Barak-Erez 2009). Thus, instead of discussing whether and when transplantation is desirable, research should focus on who (the institutional players) and how (through which mechanism) borrows, transplants or emulates. This is also in line with some trends in the law and economics literature that draw attention to the interests and the institutional setting of legislative drafting (Schwartz – Scott 1995,
In fact when we analyse these preferences and motives, we should keep in mind that drafters do not only take into account the substantive merits of foreign models. For instance, the huge influence of German models in the CEE region can hardly be explained by only their substantive merits (Schauer 2000).

When we read regulatory competition between jurisdictions in a broad sense, this can come about in two ways. Either individuals exert pressure on lawmakers through political mechanisms in order to achieve a desirable change in their law (‘yardstick competition’, Besley - Case 1995) or as subjects of the law they “vote by their feet”, i.e. choose either the location of their activities or the law applicable to those activities that fits them the best (cf. Tiebout 1956). In this way, their choice gives incentives for legislators who want to attract business (taxpayers, clients for legal services, etc.) to their jurisdiction, to adopt rules that are indeed seen as attractive. In this section I discuss the first mechanism in detail as this plays a significant role in the drafting of civil codes. In this case, ‘competition’ relies on the mobility of information about rules and policies, and other parameters in foreign jurisdictions (Kerber and Budzinski 2004). This encompasses several sub-types that are often mentioned under different names, such as mutual learning, yardstick competition or regulatory emulation.

In case of “yardstick competition”, individuals (voters) compare regulations (e.g. tax systems) in their own and neighbouring jurisdictions to assess their performances and to vote accordingly. Yet, as in these models voters are not mobile, competition takes place among different political candidates within separate jurisdictions (Besley – Case 1995).

In this context, the political market serves as a transmission mechanism for yardstick competition. The term ‘competition’ can thus be also used for describing politics within a (democratic) state as a ‘political market’ (Becker 1958). Voters, interest and pressure groups are on the demand side, politicians on the supply side. Suppliers want to maximize the chances of being re-elected and for that purpose offer political programme packages; demanders express their preferences in votes and/or campaign contributions.

When we focus on the mobility of information among legislators, policymakers or drafters, we can call the process a competition of ideas. This can be channelled into political processes when creative political entrepreneurs generate policy innovations which are imitated by followers if they promise to be successful and

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7 With the example of the American Law Institute and the NCCUSL in mind, the authors argue that although members of these bodies ‘are thought to be disinterested legal experts who pursue only the public good’, public choice ‘theory teaches us that the form and substance of a law is significantly endogenous to the law-creating institution. Put more simply, a legislature’s output is a function both of the preferences of the legislators, whether selfish or altruistic, and of the institutional structure in which the legislators perform.’ The outcome of their model and analysis is that a private legislature ‘(a) has a strong status quo bias that induces it to reject significant reform; (b) frequently produces highly abstract rules that delegate substantial discretion to courts; and (c) produces clear, bright-line rules that confine judicial discretion commonly when and because dominant interest groups influence the process. These bright-line rules ordinarily advance the interest group’s agenda.’ Schwartz- Scott 1995, 597. An interesting task would be to generalise this model for expert groups drafting civil codes in CEE countries. I am planning to do this in another paper.
then implemented in practice. This suggests a Hayekian evolutionary notion of competition (Hayek 2002 [1968]) in the political, or public policy, domain.

Still within the first meaning of the term, ‘competition’ sometimes refers to more subtle mechanisms at play within and between legal communities. The term ‘marketplace for legal ideas’ refers to a market-like process where legal ideas are central and the members of the legal community are the main actors. In case of scholars and policy advisors as actors on this market, competition is not primarily driven by pecuniary interests or political influence, rather by more symbolic values, related to prestige and reputation.

This version of competition has been suggested in the literature for explaining judicial uses of legal transplants (or comparative law). For instance, Slaughter (1994, 118) argues that courts refer to decisions by courts in other jurisdictions in order to enhance the persuasiveness, authority, or legitimacy of their decisions. More importantly, one can observe ‘cross-fertilisation’: inspiration taken from a foreign solution that is not always indicated by direct citation. In fact, personal and national pride might give reasons not to disclose the origin of a novel ruling. On the other hand, the pedigree and prestige of a foreign rule might be an argument for importing it explicitly, or at least referring to it as a model. To some extent this can be generalised to drafting processes that are somewhat isolated from politics and dominated by academics and experts. As we have seen, the drafting of civil codes in expert groups is indeed often driven by such considerations.

The theoretician who is interested in these phenomena faces an elementary difficulty here: how to observe and identify an instance of emulation if there is no clear trace of the ‘inspiration’. Once enacted as legal rules, there is no intellectual property in legal ideas and doctrines; and they do not come with a label of origin. On the other hand, as these ideas can be simply borrowed without attribution, when drafters indicate their sources, this fact usually has an additional function that needs to be analysed. In the CEE context, reference to foreign, especially Western models typically serves to promote a legal reform or assure the acceptance of an existing international, European obligation for harmonisation.

A relatively well-defined variant of yardstick competition is called regulatory or legal emulation. It refers to a process whereby regulators observe each other’s practice, experiment with different models, and through an essentially non-competitive iterative process of learning, they expect to discover a superior mode of regulation. This is a bottom-up mechanism for improving regulatory performance (and eventually achieving convergence) where regulators on the lower level ‘search around for better solutions by comparing and benchmarking with others’ (Larouche – Visser 2006), in a cooperative (non-competitive) way. Good examples are international networks of regulatory authorities in certain economic sectors that cooperate within an institutional framework.

In this context, it is also useful to distinguish two kinds of interaction between drafters. In one case, the adoption of foreign solutions is strategic in game-theoretical terms. The fact that a regulatory solution is ‘copied’ by B has an effect on the legal system A, the original or donor system is expected to react. In contrast, when a legal transfer is not strategic, it has no (direct) effect back on the system of origin A that would induce it to react.
Intuitively, this dichotomy correlates with certain policy areas. Strategic interaction seems typical in areas which are closely related to central economic interests of the jurisdiction, making competition intense (and potentially harmful). An obvious example is tax competition: if B sets its tax level with an eye on A’s tax rules, A has an interest to take this into account when setting its own tax rate. Non-strategic interaction is typical in contexts characterised by more ‘academic’ or ‘ideal’ interests. For instance, this might be the case when there is a transfer of a doctrine or an informal exchange of ideas between constitutional courts or legal drafters. Doctrinal constructs themselves are important enough in a doctrinal sense to induce looking beyond one’s own jurisdiction but they are not directly significant in an economic sense.

Understood in this broader sense, the term legal emulation can refer to a number of distinct phenomena which differ with regard to the motivations (preferences) and the resources (costs and benefits) of regulators: competition between them can be more or less fierce, cooperation more or less symmetrical. In specific instances of legal technical assistance it may even be difficult to categorically distinguish whether the interaction is more an instance of competition or cooperation. Some authors speak about a third variety, regulatory co-opetition in this respect (Esty – Geradin 2000, 2001).

6 (Re)codified civil law in Central and Eastern Europe: tentative conclusions

In this paper, I analysed the drafting of new civil codes in Hungary and in other Central and Eastern European countries. Based on a general regional overview (in sections 2, 3.1, 3.2) and a more detailed country-study on Hungary (section 4), in light of the theoretical concepts and tools discussed in section 5, one can make some rather tentative general observations.

While some talk about the decline of the idea of civil law codification in Continental Europe, the idea of a civil code still has some symbolic appeal. Indeed, at the turn of the Millennium, new civil codes and recodification seemed to be en vogue overall in the world (Remien 2008). Still, legal transition made the (re)codification of civil law in the CEE region historically unique. For instance, experts were often confronted with a dramatic choice between developing transitional civil codes or more permanent legal texts (Ajani 1996, 520). Additionally, they had to find a ‘workable balance between modernizing and the country’s limited ability to digest the product of avant-garde or exotic legal cultures’ (ibid.). In civil law, this balance is especially relevant because new solutions coexist with a broad set of traditional rules, often dating back to Roman law.

In some countries, the idea was that a comprehensive modern civil code is the best tool to prevent chaos and provide technical guarantees for further development of

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8 As they argue: ‘Regulatory theory must reflect the diversity and complexity of the world. Optimal governance thus requires a flexible mix of competition and cooperation between government actors as well as between governmental and non-governmental actors, along both horizontal and vertical dimensions. This enriched model of “regulatory co-opetition” recognizes that sometimes regulatory competition will prove to be advantageous but in other cases some form of collaboration will produce superior results. In a world that is pluralistic, not simplistic, a combination of regulatory competition and cooperation will almost always be optimal.’ Esty – Geradin 2000, 235.
both civil and commercial legislation (Ajani 1996, 516) which would complement the political guarantees set up in constitutions and international agreements. But a uniform comprehensive civil code is just one way to solve the problem that a market economy requires a legal framework. This task surely requires more than an ad hoc response to business needs but to provide legal rules of considerable complexity does not necessarily require a single systematic civil code. Thus the design of civil law is underdetermined by economic arguments. Systematicity is rather an internal need of the legal system.

Drafters typically think that there are national traditions that should be upheld but this is not based on symbolic or aesthetic, rather on pragmatic and prudential reasons. The arguments on national legal traditions and originality versus ‘imitating the West’ are rather marginal. The reason for this is perhaps that although civil law is probably as fundamental for a market economy and civil society as a constitution for democracy and the rule of law, business law rules are considered as more of a technical character, not related to personal or national identity.

I also analysed the interaction of academic and political interests in the process. Drafters with academic or judicial background do not primarily look upon the code in a consequentialist or instrumental manner, although at certain points policy goals and the influence of pressure groups seem quite obvious. Although there would be time and expertise available, systematic estimations on extra-legal consequences (ex ante evaluation) does not seem to be a part of the legislative process. Similarly, regulatory competition plays virtually no role among the explicit considerations of the drafters. For instance, they do not seem to be primarily concerned with designing rules such as to attract more foreign investments in the country but well-organised interest groups can draw their attention to policy issues that, in their eyes, need a doctrinal solution.

I also showed that the drafting process often relies on comparative work. Foreign national civil codes and international models, such as the Vienna Convention on the Sale of Goods (CISG), the Principles of European Contract Law (PECL), and the Draft Common Frame of Reference (DCFR) are often used as source of inspiration. These transplants are very diverse in quality and depth. Although the present analysis allows for some plausible generalisations, further systematic and eventually quantitative research is needed to quantify these conclusions and support them with solid evidence. I hope to pursue that work on another occasion.

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