Some Prejudices about the Legal Tradition of Eastern Europe

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Comparative Law in Eastern and Central Europe

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SOME PREJUDICES ABOUT THE LEGAL TRADITION OF EASTERN EUROPE

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Uncertainties about the legal tradition of Eastern Europe

Prejudices and stereotypes sometimes occur even in the best historical scholarship and, a fortiori, in legal historiography. However, a legal historian is also obliged to question and eliminate them. Let us consider in this spirit several common prejudices about the legal tradition of Eastern Europe, which are in circulation above all in the western part of the continent. Some of them are explicitly formulated, but most rather constitute a kind of background knowledge, if not background ignorance, of the western legal historian.

As a matter of fact, in respect of Eastern Europe the picture of our knowledge is all but clear. First of all we do not even know whether this region ever existed and still exists as a distinct legal area. If we may trust a stereotype of European legal historiography, from the high Middle Ages right up to the civil codifications of the 19th century\(^1\) or, according to a somewhat different formulation, until the so-called usus modernus Pandectarum, the phase of legal development immediately preceding the codification,\(^2\) the legal area of Europe formed a wholly undifferentiated unit.

Is Eastern Europe supposed to be included in this homogeneous area? And if so, precisely to what extent? Indeed, Eastern Europe could have been equally excluded, particularly if it is deemed to be identical to Byzantium, frequently considered the decadent offshoot of the Roman Empire and a natural enemy of Europe. The stereotype just cited represents evidently an innovation with respect to the well established doctrine of legal history and comparative law, according to which European legal unity has always been compromised by two divisions: civil versus common law and Western versus Eastern Europe.

Given that the majority of actual opinion makers of European legal history reside in the continental West, in the name of Western legal tradition the division between civil law and common law is usually underestimated,\(^3\) while the division between East and West is overestimated.\(^4\) Anyway, the heartland of Europe and the central stage of its legal history is, indeed, the Western part of the continent which roughly embraces the current day territories of France, Benelux, West Germany, Italy and Spain. This region was traditionally distinguished from Eastern Europe as a 'new' or 'younger' post-Carolingian Europe, born only in the 9th-10th century.\(^5\)

Regrettably, the process of nation-building was delayed in the East and less successful. Hence, up to World War I continental Europe was composed of several strong nation-states in the West and few polyethnic empires, i.e. Austria-Hungary, Russia and the Ottoman Empire, in the East. In connection with this, the question may be posed whether Eastern Europe is a truly autonomous legal area, generated by the historical longue durée, or merely a construct of western hegemonial discourse, born with the very term 'Eastern Europe' during the Enlightenment\(^6\) and strengthened by the Cold War of 1945-1989.

Eastern Europe was identical with the legal area of Byzantium

Since the Eastern Roman Empire, governed from the city of Byzantium, was historically the first rival of the Western Empire, and subsequently of the Roman Papacy, the concept of Byzantium is often used in the metonymic sense to designate the whole European East. Following the medieval religious divide between Latin and Orthodox Christendom, cherished particularly by the German legal historian Helmut Coing (1912-2000), the founder of the Max-Planck-Institute of European

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5 Henryk Samsonowicz, *From 'Barbarian Europe' to 'Younger Europe'* in Jerzy Kloczkowski & Hubert Łaszkiewicz (eds.), *East-Central Europe in European History* 87-95 (2009).
Legal History in Frankfurt am Main, there is only 'Europe', East Central Europe included, and 'Byzantium' which embraces the Balkans and Russia.7

The historical reality behind this scholarly European geopolitics seems to be, however, somewhat more complicated than the theory. The Eastern part of Europe has had, indeed, just as little homogeneity as the Western. Speaking with more precision, East and West must be distinguished also within Eastern Europe. As a matter of fact, as subject of legal history from the middle ages onwards this region has been composed of at least three distinct sub-regions: (1) South Eastern Europe; (2) East Central Europe; (3) Russia.8

(1) The borderline between the Eastern and Western Roman Empire, established in 293 AD by Emperor Diocletian, became the divide between Eastern and Western Europe only during the 6th century, as the Southern Slavs began to settle on the Balkan Peninsula.9 At the end of the 9th century, when their Christianization started,10 the Slovenes and the Croats on the western side adopted the Catholic confession and the Latin script, whereas the Serbs on the eastern side adopted the Orthodox confession and the Cyrillic script. The famous schism between both Churches, called the Great Schism, has perpetuated this division since 1054.

Thus, already in the second half of the 9th century in Eastern Europe some empires arose proselytized from Byzantium, particularly proceeding from the East to the West -- in 865 the First Bulgarian Empire, in 863 Great Moravia, and in 988 Kievan Rus. In Great Moravia, however, western and eastern influences merged. Also, the founder of the Serbian state, Grand Prince Stefan Nemanja (1167-1196), received his crown from the Catholic legate as well as from the Byzantines. Even so, Serbia remained within the Orthodox orbit, exactly as did Bulgaria.

As a matter of fact, during the 8th century, as in the East the traditional Latin-Greek bilingualism eventually disappeared to the benefit of Greek alone, the political division between East and West became a cultural one. Consequently, the key historical process of the late Middle Ages in South Eastern Europe was the decline of the Byzantine Empire which, in the second half of the 15th century, together with the neighbouring Southern Slavs, was subjugated by the Ottoman Turks who subsequently maintained their rule over the whole Balkan Peninsula up until the 19th century.

(2) East Central Europe is the Roman Catholic westward-looking part of Eastern Europe with a legal culture oriented towards the Latin European model.11 Its Gelisian doctrine of two equal ‘swords’, the spiritual and the temporal, implies a political independence of Church and State, legal and ecclesiastical culture resting upon the relationship of mutual autonomy. This structure was reproduced in the whole area of Latin Christendom whose reception in East Central Europe, accomplished through the mediation of the Roman Papacy, could be accompanied by the rejection of Roman law as the legal system of German emperors.

Around the turn of the millennium in East Central Europe, several Christian Kingdoms were founded. Besides Bohemia and Poland, where Christianity already became dominant during the 10th century, Hungary converted to the Roman Church at the beginning of the 11th century, as did the states of Denmark, Norway and Sweden in the North. In the wake of the Christianization of Poland and Hungary, Canon Law began to apply there, becoming the main bearer of Roman Law. The situation was therefore similar to that in the Nordic countries where Roman Law was never recognized as a subsidiary ius commune, whereas the two learned laws of the West (ius usumque) were represented exclusively by canon law.12

Another bearer of Roman law in East Central Europe was the German town law. In the 13th century the inner colonization of Germany extended towards the East. The border of the Holy Roman Empire moved from the River Elbe to Oder, eastwards from which numerous towns and villages of German law were established.13 Thus, the German-speaking world was the primary transmitter of Western ideas to the East. Magdeburg rights were granted to more than 100 cities, first of all in Poland and Lithuania, but also in Russia, Ukraine and Moldavia. As a final result of this first Europeanization of eastern borderlands, East Central Europe adopted the economic and legal models of the West.14

East Central Europe initially shared the general delay of the East towards the West. Given the scarce urbanization and the correspondingly

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weak position of the burghers, the medieval Eastern Europe did not require legal Romanization, driven in the West by the towns as the third engine of reception, next to the Holy Empire and the Latin Church. Also the feudal fief system was less developed in the East and the emancipation of towns belated. However, during the High Middle Ages the colonization, urbanization and agricultural improvement, as well as the introduction of Canon Law and German Law reduced the civilizational gap that divided East Central Europe from the West.

(3) By contrast, in respect of Russia, which participated in the process of the international circulation of Canon Law and German Law to a lesser extent, the same gap widened. Usually either identified with Eastern Europe in a narrower sense or, on the contrary, excluded from the concept as an extra-European territory, Russia remained occupied by the Mongols between 1240 and 1480. The liberation from this ‘Tatar yoke’ was accomplished only by Grand Prince of Moscow and subsequently ‘of all Russia’ Ivan III the Great (1440-1505). Due to this hegemony of Moscow over all Russian lands under Ivan III, its government took on a new autocratic form.

Both Christian Orthodox components of Eastern Europe, namely Russia and South Eastern Europe, displayed a close symbiosis between Church and State. Due to the Orthodox Church, as early as the Middle Ages, the secular Roman-Byzantine Law was always received in one package with the Canon Law of the Byzantine Empire. Because of the unsophisticated nature of the societies populating the Byzantine world, which were predominantly of Slavic origin, this legal-ecclesiastical package primarily fulfilled an elementary civilizing function.

Only since Peter the Great (1682-1725) Russia became, at the expense of Sweden and Poland-Lithuania, a European power, developing an absolutist system even stronger than the Western one. Whereas the latter was based on a progressive alliance between the monarchy and the cities, the former consisted, in a strong parallel to Brandenburg-Prussia, of a reactionary coalition between the monarchy and the gentry. In spite of the ‘enlightened’ reforms initiated by Empress Catherine the Great (1762-1796) at the turn of the 18th century, Russian society remained feudal, the economy backward, and the government autocratic.

**Eastern Europe never experienced the reception of Roman Law**

Lack of reception of Roman Law is recognized as a distinguishing feature of the Eastern European legal tradition, exactly as in the case of the English Common Law. Therefore, during the whole period preceding the European civil codifications of the 19th century, there was a general presumption of the binding force of Roman Law in the continental West and merely isolated cases of Romanist influence in the East. The Austro-German legal historian Paul Koschaker (1879-1951) even coined the reductive catchphrase ‘Europe and Roman Law’, corresponding to the title of his monograph, first published in 1947.

Koschaker’s influential book, which also appeared in Italian and Spanish translations, is an early symptom of the German post-war integration in the West. Told in one sentence, according to Koschaker, only Western Europe is the true Europe, because only that region experienced the real reception of Roman Law in the Middle Ages. However, as troubadour of the Western legal culture, Koschaker does not take into account that this defect of Eastern Europe was compensated during the 19th century, when the massive transfer of Western codes and legal doctrines to the East occurred.

Yet despite this fact, Eastern Europe retains in the eyes of Koschaker a somewhat suspect, peripheral status. At present, the idea of labeling certain regions of Europe as non-European is rarely represented in an explicit manner, but in Western Europe, books entitled ‘European legal history’ completely excluding the East, are still being written, such as the book by Randall Lesaffer, published by the Cambridge University Press in 2009. Perhaps as a remedy a more differentiated view on the reception of Roman Law in East and West should be adopted? Indeed, in the recent decades the concept of reception has been relaxed.

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According to the new concept, advocated particularly by the German legal historian Franz Wieacker (1908-1994), even the West of the continent never experienced a direct transfer of ancient legal rules, but merely a process of a scholarly intellectualization of local legal orders. Nonetheless, from the end of the 11th century onwards, Roman Law remained in Western Europe the subject of continuous study and gradual interpretive adaptation to new social needs, whereas the Byzantine world offers quite the opposite; a static picture.

However, the first reception of Roman Law occurred paradoxically in the East, due to the Byzantine emperor Justinian I the Great (527-565) who turned the old western law, written in Latin between the 1st century BC and the 3rd century AD, into a compilation. Regrettably, in the post-Justinianic age the East and the West drifted apart still further. The compilation, published in the middle of a Greek-speaking world, was an Occidentalizing reception of foreign law. But as quickly as Justinian's later years its first acculturation through the Greek works of law professors from Beirut and Constantinople took place.

Within the framework of the so-called Macedonian Renaissance, during the 9th century Byzantium experienced a second reception of Roman law. It also produced works, which contained some post-Justinianic elements. Thus to the older Ecloga legum of 741 two younger and 886, were added. However, the most important were the Basilica, a Greek periphrasis of the whole Justinianic legislation, compiled around the year 888 in 60 books.

Despite this process of Hellenization the compilation of Justinian never acquired a factual validity in the East. Although it still enjoyed a high symbolic value, from the substantial point of view it was rather a kind of black box, which remained permanently unopened, because the reception of Roman Law in Byzantium was not accompanied by the reception of the Western art of interpretation. Byzantine jurists were not even able to create for their legal science a Greek technical terminology.

The Hellenization of Roman Law in Byzantium was followed, in all of South Eastern Europe, by its Slavization as a means of Christianization of the Slavonic tribes. In contrast to the learned Latin law of the West, the use of local language secured for the Byzantine Law received in Eastern Europe a strongly marked popular character. Yet the process of abridging and simplification deprived the Roman originals almost entirely of their dogmatic subtlety. The valid law of the Balkans consisted, indeed, of short summaries completely devoid of any doctrinally elaborated casuistry. In consequence, the Eastern reception of Roman Law was purely symbolic, in contrast to its dynamic reception in the West.

Thus, despite the unsophisticated character of Byzantine Law its practical effectiveness remained problematic. Already its normative substrate differed from the Latin Corpus Iuris Civilis. Objects of reception in the Balkan area were, indeed, beside the ecclesiastic Nomocanon, 'extracts from extracts', such as the Ecloga, the Prochiron and the Epitomai of the Basilica, written in Old Church Slavonic.

The most important document of the reception of Byzantine Law in the Balkans is Dušan's Code of 1349-1354 which originated in St. Sava's Nomocanon of 1219, a compilation of Roman and Canon Law, based on the legislation of the ecumenical councils, organizing the young Serbian kingdom and its Church.

As far as Russian territories are concerned, Kievian Rus was also traditionally influenced by Byzantine Law in its usual version, which mixed religious and secular aspects as well as the elements of public and private law. It was the Russian clergy who applied this law in ecclesiastical courts where already in the second half of the 13th century the full translations of the Ecloga and the Prochiron were used. By contrast, not only the original Latin text of the Corpus Iuris Civilis, but also the Greek Basilica remained unknown in Russia until the end of the 17th century.

The nucleus of Western reception was the intellectualization of local legal orders, accomplished by the learned jurist, provided with university education in Roman Law. However, until the middle of the 19th century in the Byzantine world there were no universities except for the University of Moscow, founded relatively late, in 1755. Therefore the region had no

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26 Vladimir Gsovski, Roman Private Law in Russia, 46 Bulletino dell’Istituto di Diritto Romano 369 (1939); Gianmaria Ajani, Alcuni esempi di circolazione di modelli romano-germanici nella Russia imperiale, Studi Gino Gorla 967f. (1994).
juristic literature and no legal profession at all. In the Byzantine world
the only reception vehicle was the Orthodox Church, which, blending
statute and law as well as religion and morals, by no means contributed
to an intellectualization of legal knowledge in the East.

The early reception of Roman Law created in the West a kind of
synthesis between Roman and Germanic legal concepts. As a means of
compromise between both systems, some typically continental institutions
of private law emerged, such as the acquisition of movables in good faith
from the non-owner as well as the rule 'sale does not break hire'. Further
synthesis was achieved by the law of Reason, represented in particular by
'Introduction to Dutch Jurisprudence' of Hugo Grotius. This work,
published in 1631, for the first time organized the jurisprudence as a
homogeneous system, consisting of Roman and Germanic elements.

By contrast, the whole of Eastern Europe lacked a legal doctrine of the
Western type and level, except perhaps to some extent the Byzantine
document of Canon Law. In consequence, the Eastern reception of
Byzantine Law, cut off from its original Roman sources and therefore
purely symbolical, remained unable to induce any kind of manageable
synthesis between the written law of the Byzantine Empire and local folk
laws. The largely not collected or recorded and, as a result, not
Romanized, customary law of Slavonic origin flourished.

Eastern European law was not backward,
but simply different

The above-mentioned may certainly justify the qualification of Eastern
Europe as an economic and legal periphery of the Western centre.
However, many contemporary historians of European legal development,
in line with political correctness, refuse the concepts of delay, of
backwardness, and similar, as excessively value-laden. Regrettably, this
attitude ignores the existence of sound indicators of backwardness, such as

27 Critical Trajan Ionasco & Valentin Al. Georgesco, La réception du droit roman... 1234 (1968).
28 Valentin Al. Georgesco, Développement du droit dans le Sud-Est de l'Europe in
III.5 Helmut Coing (ed.), Handbuch der Quellen und Literatur der neueren
29 Trajan Ionasco & Valentin Al. Georgesco, La réception du droit roman... 1235
(1968); Tomasz Giaro, Europa und das Pandektenrecht... 335 (1993).
30 Janni Kirov, Prolegomena zu einer Rechtsgeschichte Südosteuropas, 18

indices of industrial and agricultural production, the level of illiteracy, the
book-printing and reading statistics etc., which together make these
criteria a hard historical fact.

Indeed, a parallel history confronting East and West shows exactly the
same things happen in both parts of Europe, viz. state building and
Christianization, feudalization, recording customary law, founding towns,
cities and universities, abolition of slavery and mitigation of serfdom,
development of capitalism and industrialization as well as constitutionalist
movement and codifications. These processes have, however, always been
accomplished earlier in the West, following in the East only after a certain
delay. As a result, European history, general as well as legal, is
asynchronous, made by pioneering societies in the West and only imitated
by Eastern latecomers.

This advance of the West may be explained through elements of
Roman continuity, represented by the culture of the universal Church and
the Roman infrastructure, such as brick-built towns, hardened roads and
navigable rivers, all of which were completely absent from the East.
Outside the gates of Constantinople, the Byzantine Empire presented an
entirely rural landscape. Only King Casimir the Great (1333-1370) is
said to have found Poland built in wood and to have left it built in stone.
Warlords with political ambitions, such as the first Frankish King Clovis
(466-511), appear in the West 400 years earlier than the comparable
eastern figure of the Bulgarian Khan Boris I (852-889).

The economic and social backwardness of Eastern Europe was attested
by its early political decline. At the end of the 15th century, South
Eastern Europe fell under Ottoman rule, for half a millennium remaining
cut off from the European circulation of legal models. Conversely, in East
Central Europe the territory eastwards of the Rivers Elbe and Leitha was
re-feudalized in the 16th century and, together with the recently discovered
America, turned to the agrarian periphery of western capitalism. Eastern
European neo-serfdom became a reservoir of cheap manpower and raw
materials for the English-Dutch centre.

In contrast to South Eastern Europe and Russia, in East Central Europe
there were universities founded at a relatively early date, namely in
Prague in 1348, in Cracow in 1364 and in Pecs in 1367. However, during
their somewhat phantasmal existence they did not fully participate in the
western world of learning. As a matter of fact, they functioned with

31 Michael G. Müller, Where and When Was (East)... 116 (2010).
32 Witold Kula, An Economic Theory of the Feudal System. Towards a Model of the
considerable intermissions, leaving their chairs of Roman law vacant for long periods. Their modest level is confirmed by continuous peregrinations of Czechs, Poles and Hungarians to Western universities, which continued up to the 19th century.34

In South Eastern Europe the lack of political autonomy within the Turkish Empire excluded horizontal relations between its provinces. Therefore, their local law was preserved throughout the centuries exactly as it was at the moment of their subjugation. This 'mummification' of Slavic legal systems35 embraced also the Byzantine Law of Greece and Rumanian Principalities. As far as Russia is concerned, it was less urbanized and less agriculturally advanced than East Central Europe. Consequently, prior to the 19th century, no learned law, no juristic literature, and no legal profession were known throughout Russia and South Eastern Europe.36

In the East of Central Europe the re-feudalization of the 16th century was still stronger than in East Germany. In the West the alliance of monarchy with the bourgeoisie, legally disadvantaged but economically ascending and protected by the dominant ideology of mercantilism, opened the road to absolutism. By contrast, in Poland and Hungary the gentry suppressed the royal power almost entirely. The system of noble democracy was in both countries strictly connected with the rejection of Roman Law; regarded as an instrument of absolutism. The watershed of the 'second serfdom' at the turn of the 18th century also brought serious political consequences. All the countries of East Central Europe initially retained their political independence, but the early modern division of labour made them in to suppliers of cheap agricultural goods to the West. This process of re-feudalization in the East, obviously accompanied by de-urbanization, reopened the civilizational gap. As the final consequence, all the states of East Central Europe sooner or later became victims of the transfer of their sovereignty to foreign imperial powers.37

36 Valentin AI, Georgescu, Développement du droit... 32f. (1998).
37 Michael G. Müller, Where and When Was (East)... 115f. (2010).

The political decline of East Central Europe took place in stages.38 In Hungary and Bohemia the political domination of the Habsburg dynasty ended with their almost complete disappearance as independent states. In 1687 the Hungarian Parliament conferred the crown heritably to the Habsburgs. Within the dual monarchy, Hungary remained an autonomous legal area, since its noblemen managed to preserve the Tripartium, a feudal collection of customary laws recorded in 1514. However, the position of Hungary was strengthened only in 1867 by the Compromise (Ausgleich) concluded with Austria.

In Bohemia the same expansion of the Habsburg dynasty, guided by Archduke Ferdinand I (1556-1564), who in 1526, immediately after the battle of Mohacs, was elected also to the Bohemian crown, and inaugurated the almost total loss of independence of the country. Only one century later, in 1627, following the defeat suffered by Bohemian Protestants during the Thirty Years War in the battle of the White Mountain, the Holy Roman Emperor Ferdinand II (1619-1637) made Bohemia a hereditary land of the Habsburgs.

The Polish-Lithuanian Commonwealth (1572-1795) enjoyed the longest political existence. It developed to the extreme the western constitutional model of estate monarchy, dominated by the gentry, proud of the old Polish liberum veto, the legal right of each deputy to nullify all acts of the parliament passed at its session.39 After the political reforms introduced by the Constitution of May 1791, the first written constitution in Europe and the second in the world, Polish statehood was destroyed by Prussia, Russia and Austria, which in 1795 wiped Poland off the map of Europe.

In view of a close interrelation between the presence of Roman Law and the strength of state power in a given country, the partitions of Poland-Lithuania were frequently ascribed inter alia to the failed reception of Roman law.40 It was the gentry that rejected this law as an agency of over-strong government, even if it would have probably constrained anarchy and modernized the country. Its legal order was characterized by a

38 On the following see Tomasz Giaro, Legal Tradition of Eastern Europe... 13f. (2011).
39 The erroneous information on the liberum veto in Tomasz Giaro, Poland, IV The Oxford International Encyclopedia of Legal History 330 (2009), is due to an unhappy intervention of the editors.
40 Romuald Hube, O znaczeniu prawa rzymskiego i rzymsko-bizantyńskiego w narodów słowiańskich 387 (1668); Ignaz v. Kossensh-Lyskowaki, Zur Stellung des römischen Rechts im ABGB, Festschrift zur Jahrhundertfeier des ABGB 293 (1911).
considerably longer persistence of the traditional customary law, uncodified and strongly differentiated according to local conditions and to particular social ‘estates’. On the eve of the partitions, the Polish-Lithuanian legal system still remained largely medieval in character.41

Prior to the codifications of the 19th century, in the whole of Eastern Europe the learned judge of commoner origin, typical for Germany, remained completely unknown. In East Central Europe, justice was administered by the noble lay judges and in Russia, as in South Eastern Europe, by the orthodox clerics.42 Due to its town law as well as Canon Law and public law, East Central Europe was better integrated into the western legal culture than the South East and Russia.43 Nonetheless, the knowledge of Roman Law ascertainable in East Central Europe prior to the codifications was scarce. Such a modest legal scholarship was unable to reshape the local private law to its modern western form, equal for the whole society.

The civil codes destroyed a unitary legal culture of Western Europe

Some Western legal historians mourn the 19th century as the time of decay of the pan-European ius commune or at least of the unitary legal culture.44 In reality rather the opposite is true. The unity of the old ius commune never existed, because neither in the Byzantine world nor in Western Europe were the Pandects of Justinian directly applied. Moreover, the controversial law of European jurists implied even more uncertainty than the ancient Roman Law did. Only the pre-revolutionary France knew some hundreds of local customary laws, whereas for successful models of civil codes in the 19th century there were exclusively two: the French code civil and the Austrian ABGB.45

Consequently, it should be remembered that these few codes, which suppressed the variety of local laws (ius proprium), effected a standardisation on a national scale. Hence, the codes of the 19th century are justly regarded as the signature of the continental legal tradition.


Nonetheless, their most important outcome, easily forgotten when deploiring the demise of the pan-European ius commune, is undoubtedly a relative uniformity of private law reaching far beyond national borders: in the East and the West of the continent. A similar harmonizing role was played somewhat later by the German Pandect science, which also embraced, in the second half of the 19th century, Eastern Europe, from Greece to Russia.

All this consolidated the civilian tradition on a basis significantly enlarged to the East. The Prussian ALR of 1794 and the Austrian ABGB of 1811 were evidently imposed on the recently partitioned Polish territories simultaneously with their entry into force in their respective fatherlands, whereas the civil code was introduced in the Napoleonic Duchy of Warsaw only with a slight delay of three years. Also in the Balkan Peninsula the galloping reception of Western civil codifications swept away the old feudal mosaic of customary laws only a few decades later than in Central Europe.

Obviously, in Eastern Europe the imposed or borrowed codification could not be considered – at variance with the famous saying of Jean-Etienne-Marie Portalis (1746-1807), the chief architect of the civil code – a ‘compromise’ (transaction) between the old and the new law or between French custom and Roman law books.46 On the contrary, in the East the change was much more radical: the indigenous law was replaced by a foreign one, the consuetudinary law was replaced by a statute, the law proper to a given social ‘order’ was replaced by the unitary code and the lay judge was replaced by a professional one.

At the same time, the modernizing professionalization of legal education in Eastern Europe occurred. The university of Moscow, established in 1755, was flanked by the new ones in Kiev (1834) and St. Petersburg (1819), whereas in South Eastern Europe the law faculties emerged somewhat later: in 1837 in Athens, in 1860 in Jassy, in 1864 in Bucharest, in 1874 in Zagreb, in 1892 in Sofia, and in 1904 in Belgrade.47 Contemporarily the old universities of East Central Europe were revitalised. In Poland and Hungary, the traditional strongholds of lay justice, already during the second quarter of the 19th century legal reviews, 'Themis Polska' (1828-1830) and the Hungarian 'Themis' (1837-1839), as well as lawyers' associations were founded.

However, the legal development of Hungary and the Russian Baltic provinces displayed decisively more continuity than the development of Bohemia and Poland. The latter were, indeed, subject to the general legal order of the Danube Monarchy and, in the case of Poland, also to the legal order of Prussia, and subsequently of the Second German Reich, as well as of the Russian Empire. The modernization of these systems obviously also embraced their peripheries, where the imposition of western statutes was accompanied by the reception of the corresponding legal doctrine.

Similarly to Hungary, the legal Westernization of the Russian Empire, which started only at the beginning of the 19th century, was in constitutional and private law limited to the doctrinal level, as well as to the civil cassation judicature of the Ruling Senate in St. Petersburg, which stood under the influence of the German Pandect science. The further influence of the Pandect science culminated in the Russian drafts of the civil code, published in 1905 and 1913, which took into consideration also the French code civil and the Baltic Code of private law, compiled in 1864 by Friedrich Georg von Bunge.

A general difference between the modernization of private law in East and West should be noted. Whereas the Western process of gradual amalgamation of local Germanic laws with the learned Roman Law, inaugurated by the medieval Gloss and crowned in the 19th century by the codes, was a process of extremely long duration, in Eastern Europe the same 19th century brought an abrupt breach of local traditions. Western legal imports clashed here with pre-industrial societies. Even the legal historians willing to condemn the codifications in the West as destructive of the good old ins commune, must recognize that their shock effect in the East was incomparably greater.

In South Eastern Europe the retreating Ottomans left a legal vacuum behind, because the old local customary law mixed with some Byzantine accretion was absolutely unsuitable for the needs of a capitalist economy. Hence, most new Balkan states exchanged overnight their outdated Byzantine model against the well-modernized western one. To the codifications, which ensured a legal unity of the territory, a western constitution was added, completing the fashionable pattern of the nation-state. The new modes of legislation and government as well as the state monopoly on legal training and adjudication disempowered the Orthodox Church.

However, legal modernisation through imported codifications could not induce an effective social change. The traditional Balkan societies remained incomplete. Unlike Prussia and Bohemia, they had no middle class nor, as in Russia, Hungary and Poland, an aristocracy. Their social structure was a duality, counterposing the mass of peasants on one side and the bureaucratic-military elite on the other. In the absence of a middle class the legal reforms undertaken 'from above' did not lead to an efficient social transformation. The Balkan as well as the Russian modernization of the 19th century recalls the medieval reception of Byzantine Law, which remained purely symbolic in character.

In comparison, the modernization of East Central Europe, which traditionally stood in a narrow exchange with the West, was more successful. Nonetheless, the 19th century brought to all the countries of Eastern Europe a decisively stronger inclusion into the continental system. Not only the eastern periphery was penetrated through the capitalist market economy of the West, which replaced the traditional rural ways of social and economic life, such as the Balkan zadruga and the village community. Also in the legal respect this radical change of model eliminated from contemporary law of Eastern Europe, both private and public, all national elements pre-dating the 19th century.

The East made no contribution to the European legal tradition

The long list of Eastern European borrowings and legal transfers from the West, which occurred between the Middle Ages and the present day, may possibly justify a completely passive receptive image of the private law in the East. In this sense, the East would have made no substantial contribution to the European legal tradition. Yet this is not the whole truth.

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49 William Butler, supra 333; Anatolij A. Tille, Die Kodifikation des russischen Zivilrechts und die praktische Rechtsvergleichung, 35 Osteuroparecht 8 (1989); Tomasz Giaro, Legal Tradition of Eastern Europe... 16 (2011).
53 Tomasz Giaro, Alt- und Neuneuropa, Rezeptionen und Transfer in Id. (ed.), Modernisierung... 305 (2006).
Of course, during the inter war period 1918-1939 the intense circulation of western legal models continued throughout Eastern Europe, except Soviet Russia. Almost everywhere, new legislation was needed, because further states emerged or the borders of the old ones changed.

During the inter war period, Eastern Europe definitely dismissed its old law stemming from the period of ancien regime. In the Balkan countries, already in the 19th century liberated from the secular “Turkish yoke”, a return to their indigenous law, mummified in its medieval conditions, proved to be virtually impossible. However, the rapidity of legal development excluded a return to the old law also in Poland, reborn after the partitions of 1795-1918 which definitely interrupted the Polish legal tradition. The same holds for Czechoslovakia where already in 1811 the Austrian ABGB abrogated the old ius bohemicum.55

The new western codes of private law, besides the German BGB, the Swiss civil code (ZGB) of 1907 and the Swiss code of obligations of 1911, determined the preparatory works for codifications in Eastern Europe. Regrettably, the achievements were not particularly great: Yugoslav with its six legal areas produced only drafts of the civil code in 1934 and of commercial code in 1937; Romania with its four areas published both drafts in 1938, and Czechoslovakia with its Austro-Hungarian dual system in 1937. The simple receptions, typical of the 19th century, were now sometimes substituted by syntheses of western models. Such an objective was targeted in the law of obligations for the Slavonic states, discussed in 1933 at the congress of the Slavonic Jurists in Pressburg.57

The congress refused, however, to adopt the Polish code of obligations which in 1933 by means of a modern synthesis unified the disparate legal systems inherited in Poland from the partition era. Yet this code must be considered the greatest achievement of the European doctrine of private law between the wars. Indeed, the Poles acknowledged the necessity to codify in the first place the law of obligations, whose unity was essential for the economy and trade, whereas they excluded the possibility of extending one of the foreign codes to the whole country. The comparative approach made the Polish code of obligations a work of compromise, recently defined as the first truly European codification.58

As a matter of fact, the main drafters of the code came from all the Polish partitions whose legal systems varied between themselves to a great extent: Ernest Till (1846-1926) and Roman Longchamps de Bérier (1883-1941) from the Austrian area, Ludwik Domadski (1877-1952) and Henryk Konie (1860-1934) from Central Poland, where the French Code civil was effective, and finally the Roman lawyer Ignacy Koschenbahr-Lyskowski (1864-1945) from the German partition. However, Longchamps, who in 1907-1908 spent one year in Berlin studying with Josef Koller and Theodor Kipp, was an expert in German and in French civil law too.

The Polish code of obligations gathered inspirations from all the continental legal families of the time.59 Nonetheless, it is a widespread opinion among Polish civil lawyers that Romanic inspirations found their place in several provisions of the general part of the law of obligations, whereas the Germanic ones did so rather in the special part. The code contained, indeed, a kind of general part which consisted of its first five titles: I. Sources, nature and types of obligations (art. 1-28), II. Formation of obligations (art. 29-167), III. Passing of obligatory rights and duties (art. 168-188), IV. Extinction of obligations (art. 189-287) and V. Debtor’s acts damaging the creditor (art. 288-293).

However, in opposition to the Swiss code of obligations, but following rather the model of the German BGB, the above-mentioned parts of the Polish code of 1933 are not gathered under a single heading. By contrast, as far as the method of regulation is concerned, the drafters of the Polish code were guided rather by the French, Austrian and Italian method of legislating through principles than by the German method of providing for every possible case.60 Also the chief reporter, Roman Longchamps de Bérier, stressed the paramount role of the Swiss law of obligations, perfectly reconciling French and German elements, as the principal source of the Polish code.61

The code adopted the clausula rebus sic stantibus, which still had been present in some older Eastern codes: the Prussian ALR (I. 5 § 380) and,

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55 Tomasz Giaro, Westen im Osten... 133f. (2003); Id., Modernisierung... 326f. (2006).
56 Tomasz Giaro, supra 136; Id., supra 318f.
61 Roman Longchamps de Bérier, Le nouveau code polonais des obligations, 64 Bulletin de la Société de Législation Comparée 329f. (1933).
limited to preliminary contracts, the Austrian ABGB (§ 936). However, the clause was omitted by the French code civil, according to which (art. 1134) contracts bind the parties exactly like the statute, as well as by the German BGB and in principle by the Swiss code of obligations. Nonetheless, having considered the experience of German judicature, which during the 1920s in reference to the 'basis of the transaction' (Geschäftszweck) was forced to resort to the general clause of good faith (§ 242 BGB), the Polish lawmaker preferred to formulate a special provision on supervening events.

Pursuant to this provision (art. 269) of the Polish code of obligations if 'the performance has become excessively difficult or threatens one of the parties with a crippling loss, which could not have been foreseen at the time of the formation of contract, the judge can, if he considers that it conforms to the principle of good faith and fair dealing, after having considered the interests of both parties, prescribe a manner of performance, fix the amount of damages or even terminate the contract'. To the discretion of the judge are also left numerous questions of fact relative to the institutions of unjustified enrichment (art. 125-127) and of undue performance (art. 128-133).

The tort law of the Polish code of obligations relies on the principle of fault (art. 134-167). An exception is stated only for the liability of the possessor of a building or other structure (art. 151 § 1), responsible 'for the damage caused by the crumbling of the building or the detachment of a part thereof, unless he can prove that the accident happened not because the building had been neglected or because its construction was faulty, but for some other reason out of his control'. Moreover, a presumption of liability rested with owners of businesses run by natural power and with owners of plants, where explosives were used (art. 152), as well as with owners and users of mechanical vehicles (art. 153-154).

The Polish code of obligations was well received in the majority of European countries. In his preface to its French translation, Henri Capitant (1865-1937) evaluated it decisively higher than the somewhat earlier Franco-Italian draft law of obligations, published in 1927. Whereas this draft aimed only at 'rejuvenating the French and Italian codes' by means of a new judicature, the Poles were in a position similar to the draughtsmen of the code civil, and eventually they managed to produce equally a 'work

of compromise'. There were also some positive echoes from Germany. Without obviously touching the English Common Law, the Polish code of obligations of 1933 seems to have achieved the greatest synthesis possible within the continental system.

'The real socialism' was a blackout of European legal history

The continuity of private law in Eastern Europe under the socialist regime still remains controversial. However, according to a stereotype of legal historiography in East and West, 'the real socialism' was a historical regression; indeed a kind of blackout of European legal history. As such, the law of real socialism aligns neither with the preceding nor with the following system and should be forgotten straight away. On the other hand, according to some experts, in the Polish legal order 'there are still numerous offspring of 'the real socialism'. Regrettably, from the European perspective, things do not seem that simple.

As a matter of fact, after the communist revolution of 1917 in the Soviet Russia tried again to step out of the Western legal world. However, in the realm of private law the Russian jurists relied on the above-mentioned projects of the tsarist time, influenced by the Pandect science. The civil code of the Russian Republic (RSFSR), published in 1922, with its general part as well as with its general clauses on the social function of law and on the abuse of rights, bears the imprint not only of the Pandect science, but also of the 'juristic socialism' of Léon Duguit (1859-1928) and Anton Menger (1841-1906).

After World War II the whole of Eastern Europe fell under communist rule: the periphery of western capitalism became a periphery of the Soviet Empire. At its centre an upheaval of economic and social structures occurred. At the periphery prevailed a moderate climate of an 'as-if

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64 Henri Capitant, Préface to: Code des obligations de la République de Pologne V-XX (1933); cf. Henri Mazeaud, Les dispositions du code polonais des obligations relatives à la responsabilité délictuelle, 63 Bulletin de la Société de Législation Comparée 193-223 (1934).

65 See citations in Helmut Slapnicka, Österricherisches Recht... 20f. (1973); Tomasz Giaro, Europäische... 17f. (1994); Claudia Kraft, Europa im Blick der polnischen Juristen 113 (2002).

thinking' of imported ideology. Nonetheless, the communists expropriated large landholdings and nationalized industry and commerce, thereby repeating the failure of Balkan modernization in the 19th century, to attempt an industrial revolution before a rationalization of agriculture. Even if the Soviet-style constitutions were based on the principle of unity of state power, in the ordinary legislation, particularly in the Hungarian and the Polish civil codes, of 1959 and 1964 respectively, many traditional institutions survived.

At the beginning the old law was being adjusted with the help of general clauses and vague concepts. They made it possible to substitute the traditional free exercise of subjective rights with their exercise 'according to their social scope' and the traditional equal protection of private and public property with the 'special protection' of the latter. The method of general clauses became dominant as well in East Germany until 1975, when the BGB, a 'late born child of the Pandect science and of the national-democratic liberalism', was abrogated. Due to its abstraction, the code could be applied by the communists as well as by the Nazis.

The general clauses preserved their role also after the socialist codifications of civil law, which were completed in Czechoslovakia in 1950, in Hungary in 1959, in Russia and Poland in 1964 and in East Germany in 1975. For instance in the Polish code of 1964 the 'social-economic scope of a right' and the 'principles of social life' formed criteria for the exercise of rights and the fulfilment of duties (art. 5 KC). However, as far as the new civil law is concerned, the legalist way of thinking became in principle the obligatory doctrine.

Contrary to the prejudice that the real socialism was strictly unitary in character, the new legal family covered an inhomogeneous territory, which previously belonged partly to the border area of the reception of Roman Law (East Germany and Bohemia), partly to the Byzantine world (Bulgaria and Romania), and finally to the area occupied only during the 19th century by the natural law codes and the Pandect science (Poland and Hungary). This lack of homogeneity was stressed by the followers both of the autonomy of socialist law and of its affinity to the Romanist family.

Moreover, some legal historians drew a line between the socialist countries of Latin background, including the legal culture of the *ius commune* on one side, and those of Greek Orthodox background, cut off from the rest of Europe by Ottoman occupation, on the other; thus the medieval religious divide between Europe and the Byzantine world, dear particularly to Helmut Coing, was revaluated. Some other scholars distinguished the market-oriented countries, such as Yugoslavia, Hungary and Poland, from those preferring the administrative control of economy, such as Russia, Czechoslovakia and East Germany.

Poland and Hungary proved most faithful to the civilist tradition. They justified the cultivation of the Pandect science with the hermeneutic distinction between the traditional form and the socialist content. Also the Soviet civil law, in particular the Russian code of the NEP-period, was drafted by pre-revolutionary jurists in a traditional manner. For this reason, despite the political leadership of the Soviet Union, other countries sometimes overtook the piloting doctrinal role. Even if the fundamental doctrine on types and forms of property emerged during the 1930s in Russia, after World War II truly socialist civil codes were promulgated only in 1964 by Czechoslovakia and in 1975 by East Germany.

The second Czechoslovak civil code of 1964 was accompanied by the code of economy, which regulated the socialist property. The civil code contained some ideological innovations. In particular art. V imposed 'mutual rights and duties' not only between the parties, but also 'with respect to society'. The maxim remained, however, merely an interpretation tool, because the society may hardly be considered a subject of civil law. Moreover, the code abandoned the category of right *in rem*, understood as a direct legal power over things and therefore proscribed because of the Marxist aversion to the capitalist commodity fetishism. The categories of the code followed not the structure of legal institutions, but their social function and scope.

Also the East German code of 1975 was structured according to the states of affairs, lacking a sharp distinction between property and obligations. There was neither a clear distinction between ownership and possession nor between ownership and *ius in re alieno*. Hence, only 'lawful possession' was protected (§ 33.3) and a general notion of property

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and interests therein (§ 295). A special law on the contract system in the socialist economy of 1965 and 1982, explained sometimes with the Weimar tradition of a distinct business law (Wirtschaftsrecht),74 created a mixed regulation, which reflected the dual nature of the state as industry owner and holder of power as well as the consequent intertwining of economy and politics.

Communism intended to reverse the Westernization of Eastern Europe, but the pre-revolutionary continental influence on Russian civilians was very profound. Facing the question of subjective rights, vested in state enterprises with reference to the fractions of national property entrusted to their care, they tested without a definitive success all the conceptual tools of legal history and comparative law: the state as the sole holder of a one-man company, agency, divided property, peculium, trust, limited interests in property, possession and finally the mostly diffused specific right of operative administration. The reason for this failure was, however, the very formulation of the question according to the simplistic nature of property in the civil law countries, based on the Pandect science, rather than in the flexible case-law style.75

There is still a distinct legal tradition of Eastern Europe

A final question concerning the legal tradition of Eastern Europe should be obviously posed, namely how deep the traces left by the experience of 'real socialism' are in the legal systems of particular Eastern European countries which had previously been members of the so-called Eastern Bloc.76 Some scholars of this region argue to the positive,77 insisting that these infamous traces are to be eradicated as soon as possible. However, in my opinion, today the socialist tradition can only be considered as effectively dead and buried.

As a typical representative of private law systems of East Central Europe, the Polish civil law currently does not differ essentially from its western counterparts, which provided its building materials in the 19th century and the interwar period. The Polish civil code of 1964 was amended several times, particularly in 2003, in order to remove the remnants of 'the real socialism'.78 Lawyers in Eastern Europe are now kept busy primarily by the same task as in the old Member States of the European Union: the implementation of directives on consumer protection. The on-going differences between legal life in East and West are a matter of legal culture and juristic style rather than of substance of the law.79

To sum up, after the fall of communism, the independent states of the East are back again at the European legal stage, but their traditions prior to the 19th century, which disappeared long ago, seem impossible to resuscitate. After Harold J. Berman had extended the concept of western legal tradition not only to East Central Europe, but also to communist Russia, unfortunately forgetting to mention South Eastern Europe as well, the European character of Soviet law became widely recognized.80 Given its Romanist, or better Pandectist, constitutive elements, Soviet civil law was undoubtedly part and parcel of the continental legal family81 and remains today a chapter of western legal history.82

In keeping with the general experience of social history the centre-periphery structure tends always to consolidate, because the centre is used to become more and more central, whereas the periphery becomes necessarily still more peripheral. This insight reveals itself, however, not to be entirely exact with respect to legal families. Contrary to Koschaker’s slogan ‘Europe and Roman law’, which proclaimed the restriction of the continent to its western part, the failed reception of Roman law had been supplied in the East already during the 19th century.

Evidently, this law was received in its modern shape of western codifications and legal doctrines. Since then the old threefold legal map of Europe, consisting of the British Isles as well as the western and the eastern part of the continent,83 was replaced by a simpler dual system, confronting the English Common Law with the homogeneous continental

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74 Hubert Izdebski, La tradition et le changement... 862, 877 (1987).
77 Rafał Małko, Is the Socialist Legal Tradition... 83 (2007).
78 Dorota Kempter, Der Einfluss des europäischen Rechts auf das polnische ZGB 53ff. (2007).
80 Ludwig Burgmann, Das byzantinische Recht... 539 (1996); Christopher Osakwe, Rethinking the Nature of Soviet Law, 19 Comparative Law Review 110 (1985).
area. It is exclusively this duality of the Western legal tradition and not its alleged, but anyway obsolete, opposition to Eastern Europe which remains the chief obstacle to the present harmonization of private law of the Member States, pursued by the European Union.