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THE WAVE OF TRANSFERS: AN EAST-EUROPEAN CHAPTER IN THE CIVIL LAW TRADITION*

Tomasz Giaro

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To the civil law tradition belong the countries in which Roman law was received or a romanistic civil codification was imitated. The latter is true for Eastern Europe, inundated at the beginning of the 19th century by a wave of legal transfers from the West. In the countries of East-Central Europe, Poland, Bohemia, Slovakia, Slovenia and Croatia, both codes of natural law, code civil and ABGB, were introduced, whereas Romania and Serbia adopted their faithful translations.

In the second half of the 19th century, this transfer was followed by the doctrinal reception of the German pandect science, sometimes called „pandectification“, experienced for the first time by the Austrian and Prussian civil law scholarship. In Eastern Europe, it was Greece, Hungary and Russian Empire which preserved their traditional law collections, limiting themselves to their modernization with the help of conceptual categories borrowed from the German pandect science.

This legislative and doctrinal-judicial transfer was additionally flanked with western continental models of legal education and administration of justice. Even Poland and Hungary, countries which represented in East-Central Europe traditional bulwarks of lay justice, quickly formed a professional court staff. The reception of these models of legal education and administration of justice proved essential for the legal „civilization“ of Eastern Europe during the long 19th century.

I. THE AGE OF TRANSFERS

It has long been a fashion among comparative lawyers to question the solidity of the divide between the English common law and the continental civil law. The old dissonance is periodically sidelined as obsolete (*überholt*) or overemphasized (*überbetont*).¹ This continues to be the case even after Brexit, an event surely auguring England’s return, at least partially, to island status. However, this state of affairs should not inhibit scholars from having reference to the time-honored divide when probing significant episodes from the past of the civil law tradition.

Let us begin with the simple observation that comparative law can be practiced either in the manner of micro- or macro comparison.² The former focuses on particular norms and institutions, whereas the latter’s concern is whole normative orders, legal systems or

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¹ James Gordley, *Common law and civil law: eine überholte Unterscheidung*, Zeitschrift für Europäisches Privatrecht 1 (1993) 498-518; Reinhard Zimmermann, *England und Deutschland: unterschiedliche Rechtskulturen?*, Göttingen 2019, 47.

² Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law*, 3 rd ed. 1995, 4-5; Tomasz Giaro, *Diritto romano attuale. Mappe mentali e strumenti concettuali*, in P.G. Monateri, T. Giaro, A. Somma, *Le radici comuni del diritto europeo*, Roma 2005, 97.

traditions.³ Serving as a basis for comparison, legal traditions are in general conceived as fixed and stable entities. However, appearances are deceptive since legal traditions change through history. This is true not only of the scattered legal transplants which are smaller legal units travelling in time and space, made popular by Alan Watson (1933–2018).⁴

Even the geographical borders of traditions can be moved hundreds of miles. I classify transplants as objects of micro comparison, whereas transfers, our present concern, are objects of macro comparison. The former consist in moving specific elements of legal systems across their borders, whereas the latter may even correspond to moving the border itself. Some legal historians, dating to the work of Paul Koschaker (1879-1951), formerly characterized this problem as one that raised the question of the territorial extent of Europe, apparently strictly connected with its metaphysical essence.⁵

However, when using the language of comparative law it seems more appropriate to speak about the enlargement of the civil law family rather than the extent of Europe. According to Ernst Rabel (1874-1955), the term civil law refers to “all the countries in which Roman law was, at one time, received or one of the romanistic codes has been imitated”.⁶ However, if in Rabel’s lifetime either a special Nordic group within the civil law family had already been widely acknowledged⁷ or Rodolfo Sacco’s (1923-2022) legal formants theory⁸ had been known, Rabel would probably have also included the independent effectiveness of the combined doctrinal-judicial transfer of legal knowledge.

As a matter of fact, the period stretching from the French Revolution to World War I, adopting the “long 19th century” conception of Eric Hobsbawm (1917-2012), had profound consequences for the legal landscape of Eastern Europe, comprising all its components: East-Central Europe, South-Eastern Europe and Russia.⁹ The regionally differentiated mosaic of customary legal traditions was suppressed during that era by western codified law. However, the inclusion of some of these countries into the civil law family happened without any reception or imitation of a civil code.

Eastern Europe consisted during the 19th century of countries which were, as a rule, well defined historical regions, but did not exist as sovereign states. As in the case of Hungary and Poland, already during the 12th and 13th centuries they came into contact with western legal institutions, transmitted in part by Roman canon law,¹⁰ and in part by the German town laws.¹¹ But only with the Enlightenment did there arrive the first movement of legal

³ Christiane Wendehorst, *Rechtssystemvergleichung*, in Zimmermann (ed.), *Zukunftsperspektiven der Rechtsvergleichung* (2016) 31 - 33, available at SSRN: <https://ssrn.com/abstract=4087258>.

⁴ Tomasz Giaro, *Alt- und Neuropa, Rezeptionen und Transfers*, in id. (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, Frankfurt a.M. 2007, 276-279.

⁵ Tomasz Giaro, *Legal Historians and the Eastern Border of Europe*, in Tommaso Beggio, Aleksander Grebieniow (eds.), *Methodenfragen der Romanistik im Wandel*, Tübingen 2020, 145-164.

⁶ Ernst Rabel, *Private Laws of Western Civilization*, Louisiana Law Review 10.1 (1949) 1.

⁷ Zweigert, Kötz, *Introduction*, 276-285.

⁸ Rodolfo Sacco, *Legal Formants*, The American Journal of Comparative Law 39 (1991) 1-34, 343-399.

⁹ Tomasz Giaro, *Modernisierung durch Transfer – Schwund osteuropäischer Rechtstraditionen*, in id. (ed.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2006, 283-284.

¹⁰ Waclaw Uruszczak, *Rola prawa kanonicznego w rozwoju prawa polskiego w XII-XV wieku*, in id., *Opera historico-iuridica selecta*, Kraków 2017, 343-357.

¹¹ Heiner Lück, *Aspects of the transfer of the Saxon-Magdeburg Law to Central and Eastern Europe*, *Rechtsgeschichte* 22 (2014) 79–89; Maciej Mikula, *Municipal Magdeburg Law (Ius municipale Magdeburgense) in Late Medieval Poland*, Leiden-Boston 2021, 1-39.

culture common to the whole of Europe. From the end of the 18th century, enlightened codification projects, including but not limited to the Polish ‘May Constitution’ of 1791, were known particularly in Poland, Hungary and Romania.¹²

At the same time, further to the East, Russia under Catherine the Great became increasingly conscious of the need to reform its law. But prior to the long 19th century, which brought an extensive transfer of civilian tradition to the East, neither learned law, nor juristic literature, nor a juristic profession were known to Russia and South-Eastern Europe. Only the veritable inundation of western law, which started at the beginning of the 19th century, occasioned the comprehensive inclusion of Eastern Europe into the continental branch of the western legal tradition.

II. PRIVATE LAW IN EAST AND WEST

At the end of the 18th century there reigned in Eastern Europe a mass of customary law, administered by lay judges and differentiated according to the social strata and geographical regions. And if the medieval reception of Roman law in the West consisted in an intellectualization of the handling of local law, in the East the same happened with a considerable delay. Up to that point, the role of Roman law in East-Central Europe had indeed been to some extent greater than in the Balkans and Russia. However, despite the medieval origins of the universities at Prague and Cracow, it was only during the 19th century that modern law schools emerged in East-Central Europe, along with law journals and associations, not to mention professional judges.

The countries of East-Central Europe were governed during the 19th century by empires: the Danubian, the Russian, and since 1871, the German. The momentous changes in legal systems were brought about voluntarily only in Russia and, with even more decisiveness and rapidity, in South-Eastern Europe.¹³ In the latter region, the gradually retreating Ottomans left behind a very archaic law: in Greece it was the byzantine *Hexabiblos*, compiled by Harmenopoulos in 1345, whilst in the Slavic countries there had persisted even older customs forming a culturally specific law of family and successions.

During Ottoman rule over the Balkans, such native domestic institutions as joint family ownership, called *kuća* or *kućna zadruga*, remained “mummified” throughout the centuries.¹⁴ Moreover, from the viewpoint of capitalist trade, in the age called by Karl Polanyi (1886-1964) the Great Transformation, this was tantamount to a legal vacuum. Hence, the new, and in some cases reborn, Balkan states decided to exchange almost

¹² Katarzyna Sójka-Zielińska, *Le mouvement de la codification du droit en Pologne au XVIIIe siècle*, in Stanislas Salmonowicz (ed.) *La codification européenne du Moyen Age au siècle des Lumières*, Warszawa 1997, 207-215.

¹³ Tomasz Giaro, *Transfers von Traditionen. Zum Rechtswechsel auf dem Balkan*, *Studia Iuridica* 58 (2014) 100-101; *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, vol. I. *Rumänien, Bulgarien, Griechenland* (ed. Michael Stolleis) Frankfurt a.M. 2015; vol. II. *Serbien, Bosnien-Herzegowina, Albanien* (ed. Thomas Simon), Frankfurt a.M. 2017.

¹⁴ Giannantonio Benacchio, *La circolazione dei modelli giuridici tra gli slavi del Sud (sloveni, croati, serbi)*, Padova 1995, 70-71.

overnight their outdated Byzantine and Slavic models for a modernized western one,¹⁵ a process which is sometimes even directly qualified as a reception of Roman law.¹⁶

The codifications of the 19th century, regarded generally as the signature of continental law, were exported throughout the world during the process of colonization. But they were also transferred to Eastern Europe within a short time of their promulgation in the West. Especially the anti-feudal Napoleonic legislation had immediately produced a great propagandistic impact and a broad levelling effect across the whole of Europe.¹⁷ In private law its consequences were first felt in the Grand Duchy of Warsaw, where the French *code civil* of 1804 was introduced not later than in 1808, and in the Illyrian Provinces where it was introduced in 1809.¹⁸

However, if the first wave of western civil codes reached Eastern Europe almost contemporaneously with the same phenomenon in the West, what would be the point of insisting upon the big transfer wave of the 19th century as a distinct landmark of the continental legal tradition? The value of singling out this experience is that the situation in the East certainly did differ greatly from that in the West, inasmuch as western legal development was far more continuous than legal historians frequently think. The civil codifications of natural law were merely a kind of organic efflorescence capping processes that had already long been in motion.

The essence of this legislative reality is brilliantly captured by Jean-Etienne-Marie Portalis (1746-1807), the main drafter of the *code civil*, who described it as a compromise (*transaction*) between the written (Roman) law and (French) customs.¹⁹ Conversely, in the East the borrowed or imposed codification came as a deep shock. Therefore, the contemporary legal culture of East-Central Europe contains barely any national elements pre-dating the 19th century. At the same time, the situation was still distinct in the Nordic countries which imported or, to use Rabel's terminology, 'imitated' no western civil code;²⁰ but this problem lies beyond the scope of our paper.

III. EXAMPLES OF LEGISLATIVE TRANSFERS

Let us start with some notable instances in which civil codes have been transferred or 'imitated', where imitation is in any case viewed by some scholars, along with reception, as a kind of legal transfer (*transferts par imitation*).²¹ This strategy constituted the dominant approach to making up the lack of any original, medieval reception of Roman law. For

¹⁵ Holm Sundhaussen, *Europa balcanica. Der Balkan als historischer Raum Europas*, Geschichte und Gesellschaft 25 (1999) 641-642.

¹⁶ Holm Sundhaussen, *Bevölkerungsentwicklung und Sozialstruktur*, in Magarditsch Hatschikjan, Stefan Troebst (eds.) *Südosteuropa. Ein Handbuch*, München 1999, 140.

¹⁷ Michel Grimaldi, *L'exportation du Code civil*, Pouvoirs 107 (2003) 80-96; Tigran Yepremyan, *Napoleonic Paradigm of European Integration. Theory and History*, *Napoleonica. La Revue* 39.1 (2021) 35-53.

¹⁸ Marko Petrak, *Code Civil and Croatian Legal Culture*, *Odsev dejstev v pravu. Liber amicorum Janez Krajnc*, Ljubljana 2019, 345-347.

¹⁹ Jean-Louis Halpérin, *L'impossible code civil*, Paris 1992, 276; Tomasz Giaro, *Some Prejudices about the Legal Tradition of Eastern Europe*, in Bronisław Sitek et al. (eds.) *Comparative Law in Eastern and Central Europe*, Cambridge 2013, 39.

²⁰ Heikki Pihlajamäki, *Private Law Codification, Modernization and Nationalism. A View from Critical Legal History*, *Critical Analysis of Law. An International and Interdisciplinary Law Review* 2.1 (2015) 142-146.

²¹ Vladimir Hanga, *Les transferts de droit. Une esquisse*, in Tomasz Giaro (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, Frankfurt a.M. 2007, 2-3.

those who, as for Koschaker, Europe is forever one and the same, the reception territory marks Europe's borders which are coincident with those of the German First Reich referred to from the 13th century onwards as the Holy Roman Empire.²²

The peripheral countries, located outside these borders, were destined to wait some centuries for their second chance. In this respect for instance, Romania emerged as an independent state only in 1859 through a personal union between the Danubian Principalities of Moldavia and Wallachia. Romania represents a characteristic example of a country with a byzantine-orthodox cultural substrate practically unaffected by the Ottoman domination. The country managed to modernize its entire legal system, in a western vein, within the space of a few years.²³

Romania achieved this effect by adopting all its normative models from France, with the exception of the Belgian style constitution, promulgated in 1866, which proclaimed a constitutional monarchy based on the separation of powers. Already in 1864, the *codul civil*, a faithful copy of the French *code civil*, had been adopted in Romania. It imposed modern western rules and institutions, first and foremost the civil marriage, upon a traditional rural society governed by orally transmitted customs of family and succession.²⁴

This reform, born out of the Napoleonic spirit, provoked in Romania the decline of the patriarchal family and the disempowerment of the Orthodox Church, regardless of its merits in preserving national identity under Ottoman rule. Equilibrium was nevertheless soon restored by the Romanian constitution of 1866, which in its art. 22 "amended" the *codul civil* by requiring a religious blessing to accompany civil marriage. The latter became in the result a mixed civil-religious act.²⁵ However, the Romanian courts acknowledged marriage as valid even without religious benediction.

As is generally known, Eugen Ehrlich (1862-1922), the founding father of legal sociology, discovered underneath the Austrian civil code (ABGB) of 1811 in the multinational district of Bukovina, which was the northwestern part of Moldavia, annexed by the Habsburg Empire in 1775, the living law of local peasants.²⁶ A similar phenomenon was the initial resistance of Romanian peasants against the *codul civil*²⁷ whose reliance upon the French *code civil* was so total that prior to the 20th century Romania lacked an original indigenous doctrine of the local civil code.²⁸

In contrast, Croatia was a Catholic land endowed with the Latin cultural substrate, which had remained traditionally in the orbit of the continental European common law (*ius commune*), and now enjoyed partial autonomy within the Hungarian half of the Habsburg

²² Giaro, *Legal Historians*, 151-153.

²³ Viorel S. Roman, *Romania / Rumänien between the European Union and Orthodox Values*, Dr. Falk Verlag Offenbach a.M. 2005.

²⁴ Radu Ghidău, *The Regulation and Legal Practice of the Institution of the Family before and after the Publication of the Romanian Civil Code*, in Zoran Pokrovac (ed.) *Rechtsprechung in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2012, 113-172.

²⁵ Marius Rotar, *On Civil and Free Marriages in Romania before 1914*, *Journal of Family History* 44.2 (2019) 200-218.

²⁶ Eugen Ehrlich, *Soziologie und Jurisprudenz*, Czernowitz 1906 (from "Österreichische Richter-Zeitung") 3-7.

²⁷ Leontin Constantinesco, *Roumanie*, in *Travaux de la Semaine Internationale de Droit. L'influence du code civil dans le monde*, Paris 1954, 677-78.

²⁸ Constantin G. Dissesco, *L'influence du code civil français en Roumanie*, in *Le code civil. Livre du centenaire*, vol. II, Paris 1904, 861-62; Constantinesco, *Roumanie*, 680-684.

Empire. In Croatia, during Bach's absolutism the Vienna government imposed in 1852, in defiance of the authority of Croatian parliament (*Sabor*), the 1811 Austrian ABGB: in the local translation *Opći građanski zakonik* (OGZ). With this the archaic Croatian-Hungarian private law codified in Istvan Werböczi's *Opus tripartitum* of 1526 was in both countries abrogated.

Although during the limited constitutionalism of the 1860s Hungary immediately abolished the ABGB, Croatia voluntarily retained it up until WW II, as did equally Bohemia and Southern Poland. And, what is more singular, under the rule of the OGZ the old peasant joint family, despite being completely disregarded by the civil code, continued to thrive in the countryside. At the same time, reinforced by judicial rulings and administrative decisions, several local norms of rural law were enacted in Croatia which in one respect served to support this institution, traditionally regarded as typically Slavic, but in the other curtailed the practical influence of this anachronistic legal fossil.²⁹

So, even if the legislative transfer of the long 19th century was here and there delayed in its effects, it ultimately led, as a rule, to the progressive disappearance of several customary institutions, witnessed at the Balkans in the gradual dissolution of the South-Slavic joint family property. The dissolution of this property type was especially rapid and irreversible in Serbia³⁰ and Montenegro,³¹ even though it was precisely in those jurisdictions that the institution obtained legal regulation in the codes adopted. The same happened elsewhere in the Balkan region, particularly in Bulgaria, where the *zadruga* remained, however, a purely customary institution.³²

IV. DOCTRINAL-JUDICIAL TRANSFERS

During the long 19th century, liberal codifications of private law, referred to as natural law codes, did not appear everywhere on the European continent. In Russia, Greece, and Hungary, a classical legislative transfer was impeded by the autocracy in the first case, the authority of the *Hexabiblos* in the second, and in the third by the strong national-conservative movement. Thus, in these countries there took place a mere doctrinal-judicial modernization of their time-honored legal collections: *Svod Zakonov* in Russia, *Hexabiblos* in Greece, and the *Opus Tripartitum* in Hungary.

We speak of doctrinal-judicial transfer, because on the continent the straightforward judge made law, typical of English legal culture, was excluded. Continental courts and scholarship always worked together, for which reason the judge needed backing from the professor when their personal union, usual only in the higher court instances, was lacking. In consequence, despite the European impact of the Napoleonic legislation the doctrinal-

²⁹ Damir Prislin-Krbavski, *Administrative and judicial practice of the peasant communal joint-family (kućna zadruga) in Croatia of the 19th century*, in Pokrovac (ed.) *Rechtsprechung in Osteuropa*, 377-454.

³⁰ Jivojin M. Péritich, *L'évolution du droit civil en Serbie*, in Les transformations du droit dans le principaux pays depuis cinquante ans 1869-1919, vol. II, Paris 1923, 307-308; Holm Sundhaussen, *Institutionen und institutioneller Wandel*, in Johannes Chr. Papalekas (ed.) *Institutionen und institutioneller Wandel in Südosteuropa*, München 1994, 43-44.

³¹ Giaro, *Modernisierung durch Transfer*, 308-309; Gábor Hamza, *Bemerkungen zur Privatrechtsentwicklung in Montenegro*, in Spomenica Valtazara Bogišića, Beograd 2011, 318.

³² Stefan Simeonoff, *Die zadruga und Ebeigüterrechtsverhältnisse Bulgariens*, Hamburg 1931, passim.

judicial transfer route, enabled first and foremost by German Pandect scholarship, was indispensable.³³

As a matter of fact, at that time in Europe, eastern Europe included, the German Pandect science was considered as the very essence of legal scholarship. So, starting from the middle of the 19th century, we register a historical process christened as the “Pandectification” of private law first in Prussia and Austria,³⁴ but soon also in western and – which is our object of interest – eastern Europe. Moreover, the countries which refused the legislative transfer of a western civil code, adopted nonetheless several pieces of foreign legislation.

This was the case particularly in Greece, which adopted the Napoleonic commercial code of 1807, while the Greek criminal code as well as the codifications of criminal and civil procedure followed other western models;³⁵ even in Hungary, a stronghold of judge-made law in eastern Europe, several Austrian, French and German legislative transplants were effected;³⁶ the Russian judicial reform, promulgated in 1864 under Tsar Alexander II, included a civil and a criminal procedure of the French type, but followed also some English and German patterns.³⁷

During the 18th and early-19th centuries prior to the reform period in the 1820s, Hungary rested – in like manner to the territories of partitioned Poland – upon a system of noble privilege which stifled the development of commerce and a modern bourgeoisie, while perpetuating the oppression of peasants.³⁸ It seems that in Hungary judge-made law, which during the 19th century followed the Pandect science, was even more respected than in pre-revolutionary Russia. Also, the ABGB, although it was in force only during the short period of Neo-absolutism from 1853 to 1861, is assumed to have influenced the subsequent development of Hungarian private law.³⁹

As far as Russia is concerned, its early modern law, including the *Sobornoe Ulozhenie* (Council Code) of 1649, the first Russian attempt at more systematic legislation, shows few traces of Roman-Byzantine influence. The legal occidentalization of Russia started only at the beginning of the 19th century and was initially limited to the doctrinal level alone.⁴⁰ Compared to western universities, the Russian institutions of higher learning were

³³ Tomasz Giaro, *Europa und das Pandektenrecht*, *Rechtshistorisches Journal* 12 (1993) 326-345.

³⁴ Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001, 4-5; Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, *The Cambridge Law Journal* 64.2 (2005) 496.

³⁵ Evdoxios Doxiadis, *Resurrecting the Law. State Formation and Legal Debates in Nineteenth-Century Greece*, *European History Quarterly* 48.4 (2018) 629–657.

³⁶ István Kajtár, *Rechts- und Gerichtspraxis in Ungarn 1840-1944. Tradition und Transfer*, in Pokrovac (ed.) *Rechtssprechung in Osteuropa*, 226-27.

³⁷ Jörg Baberowski, *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgebenden Zarenreich 1864-1914*, Frankfurt a.M. 1996, 39-60, 57.

³⁸ Martyn Rady, *Judicial Organization and Decision Making in Old Hungary*, *The Slavonic and East European Review* 90.3 (2012) 450-481.

³⁹ Judith Balogh, *Österreichisches Recht in Ungarn und in Siebenbürgen*, in Martin F. Polaschek, Anita Ziegerhofer (eds.), *Recht ohne Grenzen? Grenzen des Rechts*, Frankfurt a.M. 1998, 126-132; Mária Homoki-Nagy, *Der Durchbruch des ABGB in Ungarn*, in Martin Löhnig, Stephan Wagner (eds.), *Nichtgeborene Kinder des Liberalismus? Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit*, Tübingen 2018, 71-90.

⁴⁰ Martin Avenarius, *Fremde Traditionen des römischen Rechts. Einfluss, Wahrnehmung und Argument des ‚russkoe pravo‘ im russischen Zarenreich des 19. Jahrhunderts*, Gottingen 2014.

considerably belated. Universities were first founded in 1755 in Moscow, and then at Kazan in 1804, Kharkov in 1805, Saint Petersburg in 1819, and Kiev in 1834, to mention only the earliest.

The first step in promoting Russian legal education was taken by the Tsar's Empire in 1829, when a group of young Russians was sent to Berlin to study first under the great German jurist and founder of the Historical Law School, Friedrich Carl von Savigny (1779-1861), and then somewhat later under such renown professors as Carl Adolf von Vangerow (1808-1870) in Heidelberg and Rudolf von Jhering (1818-1892) in Göttingen. With the same object in view, the Russian government ran a seminar in Roman Law at the Law Faculty in Berlin during the years 1887-1896.⁴¹

Russian translations of the German handbooks of Pandect law served in the Russian Empire as introductions to the local private law interpreted from a systematic point of view, exactly as did their original editions in Germany. In the plans for the Russian civil code, drafted at the turn of the 20th century, the impact of German legal scholarship was particularly strong. As early as 1898, a Russian translation of the German civil code BGB, despite not yet being in effect in its mother-country, appeared in print in the Tsar's Empire.⁴²

V. THE CIVIL CASSATION COURT OF THE GOVERNING SENATE

This doctrinal reception of the German Pandect law, taught at all Russian universities, supported the modernization of the *Svod Zakonov* (Collection of Laws) which in 1832 replaced the *Sobornoe Ulozhenie*. A significant impetus for these developments was the emancipation of the Russian serfs, which took place only in 1861, and burdened them with redemption payments. Following the judicial reform of 1864, the body of jurisprudence emerging from the civil cassation court of the Governing Senate in Saint Petersburg, the Empire's supreme court, gained momentum, generating space for the judicial reception of the Pandect law.

The Civil Cassation Department of the Governing Senate was composed of several qualified professors of Roman and private law, such as Konstantin P. Pobedonostsev (1827-1907), Kronid I. Malyshev (1841-1907), Semjon V. Pachman (1825-1910), Petr P. Tsitovich (Cytowicz 1843-1913), among others.⁴³ Even if they voiced misgivings about the conception of doctrine as an independent legal source and declined to adopt the entirety of the teachings of the German Pandectists, they followed them in the practice of citing directly ancient sources of Roman law to motivate their decisions.⁴⁴

The Civil Cassation Department of the Governing Senate promoted the free sale of peasant land based on the absolute law of private property as derived from the supposedly Roman idea of autonomous and apolitical private law. The cassation court facilitated free

⁴¹ Alexei S. Kartsov, *Das Russische Seminar für römisches Recht an der juristischen Fakultät der Friedrich-Wilhelms-Universität zu Berlin*, in Pokrovac (ed.) *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg*, Frankfurt a.M. 2007, 317-356.

⁴² Tomasz Giaro, *Russia and Roman Law*, *Rechtsgeschichte* 23 (2015) 312.

⁴³ Anton Rudokvas, Alexei Kartsov, *The Development of Civil Law Doctrine in Imperial Russia under the Aspect of Legal Transplants*, in Zoran Pokrovac (ed.) *Rechtswissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2010, 322.

⁴⁴ Avenarius, *Fremde Traditionen*, 461-463, 482-519.

commerce in landholdings within the framework of the freedom of contract and extended the freedom of testation.⁴⁵ In this framework there flourished also such neighboring institutions of property, all of Roman origin, as possession, easements (servitudes), prescriptive acquisition of ownership, right of pre-emption, limitation of actions, pledge and mortgage.⁴⁶

The judicial reform of 1864 inaugurated the golden age of Russian law, enriching the legal order of the Empire with several features of judge-made law.⁴⁷ The success of the Civil Cassation Department also demonstrates how feudal and collectivist oriented customary traditions could be eliminated without a legislative intervention, through the employment of western legal concepts alone. That result could be achieved by mere doctrinal reception reinforced by court decision-making oriented by the same precepts.

A similar modernizing role was played by the Russian courts in Bessarabia, a province roughly equivalent to the two thirds of today's Moldova, acquired by Tsar Alexander I in 1812.⁴⁸ In Bessarabia was in force the late byzantine *Hexabiblos*, a medieval Nutshell in "Six books".⁴⁹ As it urgently required modernization, it was interpreted according to German Pandect science to the effect that the Russian translation of Baron's "Pandekten" was considered there directly applicable law.⁵⁰ The parallel developments promoted by the pandectist German-influenced judiciary in respect of the same *Hexabiblos* in modern Greece, where it remained effective from 1828 until 1946, is already well known.

By 1884-1885 the reform of legal education had bestowed upon Roman law an exceptional level of importance; consequently, the Russian curriculum dedicated more hours per week to the study of Justinian's Pandects than several law faculties in Germany where Roman law was still in force.⁵¹ The aim of its intense study was to elevate the professional ethics of the Russian jurist and to improve his knowledge of two important pieces of foreign legislation in force within the Empire: the French *code civil* in central Poland and von Bunge's code of private law in the Baltics.⁵²

VI. FOREIGN LAWS WITHIN THE RUSSIAN EMPIRE

In the capitulations of the Swedish provinces of Estonia and Livonia, stipulated in 1710 during the Great Northern War, Emperor Peter the Great promised to respect the local rights and freedoms existing in these territories. He limited this privilege, however, to the

⁴⁵ William Butler, *The Role of Case-Law in the Russian Legal System*, in John H. Baker (ed.) *Judicial Records, Law Reports and the Growth of Case Law*, Berlin 1989, 337–352; Gareth Popkins, *Russian Peasant Wills in the Decisions of the Ruling Senate 1861–1906*, *The Journal of Legal History* 20.2 (1999) 1–23.

⁴⁶ Alexei S. Kartsov, *Transplants in the Cassation Senate's practice. The problem of the Privies' Rights of Participation*, in Pokrovac (ed.) *Rechtsprechung in Osteuropa*, 233-266; Anton Rudokvas, *'Labour-ownership' contra abstraktes Eigentum: Acquisitive Prescription*, *ibid.*, 455-473.

⁴⁷ Adriano Silvestri, *The Contrast between Modernization and Tradition. Landownership during the Last Decades of the Tsarist Empire*, *Review of Central and East European Law* 19 (1993) 8-9, 29.

⁴⁸ Analysis in Avenarius, *Fremde Traditionen*, 467-482.

⁴⁹ Kirill Maksimovič, *Byzantinische Rechtsbücher und ihre Bedeutung für die Rechtsgeschichte Osteuropas*, in Giaro (ed.) *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, 25-29.

⁵⁰ Anton D. Rudokvas, *Petrażycki's russische Übersetzung der „Pandekten“ von Julius Baron*, in Tomasz Giaro (ed.) *Leo von Petrażycki und die Rechtswissenschaft der Gegenwart*, Warszawa 2020, 324.

⁵¹ Anton D. Rudokvas, Alexei S. Kartsov, *Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland*, in Pokrovac (ed.) *Juristenausbildung*, 273-316.

⁵² T. Giaro, *Russia and Roman Law*, 311.

Baltic German burghers and nobles, excluding the Estonian and Latvian speaking population. The same model preserving old rights and freedoms had already been applied by Russia in the capitulations of Curland in 1795. In the Baltics, the autonomous character of the local legal order that emerged from the capitulations lasted a very long time.⁵³

In this way, the German-influenced private law of Livland, Estland and Curland, compiled in 1864 by a local learned jurist, Friedrich Georg von Bunge (1802–1897), could be promulgated as the Empire's provincial law. This extensive code relied to a certain extent upon German Pandect scholarship. Von Bunge, professor at the University of Dorpat, was primarily a local legal historian rather than a lawyer. However, his code was, from a technical-systematic standpoint, much more advanced than the Russian *Svod Zakonov*, even if its content embodied in greater measure local than western tradition.⁵⁴

The Baltic jurisprudence was from 1889 subject to cassation by the Governing Senate in Saint Petersburg which in principle defended the new code, promulgated by Tsar Alexander II. In such manner, the Pandect scholarship may have radiated throughout Russia via an additional pathway: the medium of Baltic law.⁵⁵ On the other hand, the direction of transmission might have been the reverse and the Baltic jurisprudence could have been influenced by the lines of decision adopted by the Russian cassation. The latter was obviously, together with the whole legal doctrine in Russia, occidentalized in the Pandectist sense.

A similar reciprocal influence must have taken place between the courts of Russia and the central part of the old Polish territory. On this territory Napoleon Bonaparte established in 1807 a satellite state called the Grand Duchy of Warsaw (*Grand-Duché de Varsovie*). It was here that in 1808 his *code civil* was introduced and a modern law school aiming at its implementation founded.⁵⁶ The Warsaw Law School and its first Dean, Jan Wincenty Bandtkie (1783-1846), strongly supported the *code* which, on the other hand, was opposed by the gentry and the Catholic clergy of the Duchy.⁵⁷

Moreover, after the Napoleonic debacle, the Vienna Congress of 1815 assigned the former territory of the Grand Duchy of Warsaw to Tsar Alexander I who decided to leave in force there the French *code civil*. The territory, which became conjoined with the Russian Empire by a personal union, was now called the Polish Kingdom or, recalling the Vienna Congress, the Congress Kingdom. During this period several legal fields were transformed from French to Polish models, beginning in 1818 with the French law of mortgage and followed in 1825 by family law and the law of persons. Rounding out the changes, 1836 saw the introduction of Russian marriage law.⁵⁸

⁵³ Tomasz Giaro, *Transnational Law and its Historical Precedents*, *Studia Iuridica* 68 (2016) 78-79.

⁵⁴ Marju Luts, *Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert*, in Giaro (ed.) *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2006, 175-190.

⁵⁵ Tomasz Giaro, *Westen im Osten. Modernisierung osteuropäischer Rechte bis zum Zweiten Weltkrieg*, *Rechtsgeschichte* 2 (2003) 131.

⁵⁶ T. Giaro, *Legal Historians*, 160-161.

⁵⁷ Adam Lityński, *Die Geschichte des Code Napoléon in Polen*, in Reiner Schulze (ed.) *Französisches Zivilrecht in Europa während des 19. Jahrhunderts*, Berlin 1994, 258-259; Michał Gałędek, Anna Klimaszewska, *A Controversial Transplant? Debate over the Adaptation of the Napoleonic Code on the Polish Territories in the Early 19th Century*, *Journal of Civil Law Studies* 11.2 (2018) 269-298.

⁵⁸ T. Giaro, *Modernisierung durch Transfer*, 311.

This interaction by osmosis between the Polish Kingdom and Russia proper notably increased from 1876 when the Warsaw judicature administering the *code civil* was put under the control of the Saint Petersburg cassation. What resulted was a partial Pandectification of the Warsaw jurisdiction.⁵⁹ At the end of the 19th century, the *code civil* remained one of the few distinctive institutions of the Polish Kingdom with respect to the Empire. Despite the strong Russification measures following the defeat of the January uprising of 1863-64, several Polish judges and public prosecutors remained in office until World War I, whilst advocates and notaries were almost exclusively Poles.

With this, attention must turn to a final dilemma of the Russian Empire's legal pluralism: that of the lands beyond the river Bug, which during the partitions of Poland were incorporated into Russia. The third Lithuanian Statute of 1588, an impressive Renaissance codification, was there in force up until the 1840s.⁶⁰ Only at that point did these territories become subject to the Russian *Svod zakonov*.⁶¹ However, with the arrival of the age of nationalism in the late 19th century, Empire's legal pluralism, and particularly the law of the Baltic Germans, was increasingly questioned by the Russian central government which advocated imperialistic and pan-Slavic tendencies.⁶²

In particular, the *Szkoła Główna* (Main School) in Warsaw, which in the years 1862-1869 had served as a short-lived successor institution to the University of Warsaw, closed after the 1830 November insurrection. The *Szkoła Główna* was Russified and replaced in 1870 by the Russian Imperial University which was scarcely anything more than a provincial university of the Tsar's Empire.⁶³ With some delay, a similar process took place in the Baltic Provinces, where the city of Dorpat (Tartu), known in Russian as *Derpt*, together with its prestigious university founded in 1632 by Gustav Adolf of Sweden, were renamed to *Jurjev*.⁶⁴

VII. NATIONAL EMANCIPATION IN THE HABSBURG MONARCHY

The Polish territory acquired by Austria during the partitions of Poland-Lithuania, where the Austrian civil code ABGB was in effect, became Habsburg crown land under the title of the Kingdom of Galicia and Lodomeria. After this land was granted a *de facto* autonomy within the Habsburg Empire in the 1860s, both old Polish Universities of Cracow and Lwów (*Lemberg*) became training centers for Polish lawyers serving Austria-Hungary.⁶⁵

⁵⁹ Katarzyna Sójka-Zielińska, *La réception du Code Napoléon en Pologne*, in *Rapports polonais présentés au VIII^e Congrès International de Droit Comparé*, Varsovie 1970, 219-220; Lityński, *Die Geschichte des Code Napoléon*, 265-266.

⁶⁰ Juliusz Bardach, *Les Statuts Litvaniens – codifications de l'époque de la Renaissance*, in Salmonowicz (ed.) *La codification européenne*, 103-126.

⁶¹ Sławomir Godek, *III Statut Litewski w dobie poróżbiorowej*, Warszawa 2012 (793-810 an extensive summary: *The Third Lithuanian Statute in the Post-Partition Era*).

⁶² Thomas Anepaio, *Die Justizreform von 1889 in den Ostseeprovinzen*, in Jörn Eckert, Kjell A. Modéer (eds.), *Geschichte und Perspektiven des Rechts im Ostseeraum*, Frankfurt a.M. 2002, 78.

⁶³ Piotr S. Wandycz, *The Lands of the Partitioned Poland 1795-1918*, 4th ed. Seattle-London 1996, 196.

⁶⁴ T. Anepaio, *Die russische Universität in Jur'ev 1889-1918*, in Pokrovac (ed.) *Juristenausbildung*, 391-425.

⁶⁵ Andrzej Mączyński, *Das ABGB in Polen*, in *200 Jahre ABGB - Ausstrahlungen*, vol. I, Wien 2011, 180-188; Filippo Ranieri, *Zur Bedeutung nationaler Privatrechte im heutigen europäischen Zivilrecht*, *Zeitschrift für Neuere Rechtsgeschichte* 33 (2011) 142-148.

These universities were also frequented by Poles from the Russian and Prussian partitions, a fact which fostered the unification of Polish law after World War I.⁶⁶

Previously, the judges of peripheral courts had been dispatched directly from Vienna and subordinated to the *Oberste Justizstelle* which from 1850 was substituted by the *Oberstes Gerichts- und Kassationshof*. However, during the autonomy the jurisdiction of Galicia became infused with local elements. In particular, the Lemberg civilian, Ernest Till (1846-1926), followed by Fryderyk Zoll jr. (1865-1948) of Cracow,⁶⁷ both fought for acknowledgment that real property could be acquired without an accompanying entry in the land register (*intabulatio*), as was required by the ABGB.⁶⁸ Moreover, the customary law of succession of the Polish peasants remained unaffected by any of the new civil codes.⁶⁹ Within the Danubian Monarchy, outside of Southern Poland, the national linguistic emancipation of legal education was strictly intertwined with the modernizing function of legal scholarship particularly in Bohemia and Croatia. In 1882, at the culmination of the Czech National Revival, a Czech Law Faculty was founded at the Charles-Ferdinand University of Prague by a splinter group of Czech professors under the leadership of the well-known Pandect scholar Antonín Randa (1834-1914).⁷⁰ Both the German and the Czech university went by the name Charles-Ferdinand, but after World War II the German one was not reopened.

On the other hand, in Zagreb (*Agram*) a university and a law faculty following the Austrian model were established in 1874; the curriculum of the law faculty conceded a large place to education in historical subjects, but Croatian legal history was not included.⁷¹ The Zagreb law faculty's establishment followed that of its Romanian brethren, founded at Iasi (*Jassy, Jászvásár*) in 1860, at Bucharest in 1864, and at Cluj (*Clausenburg, Koložsvár*) in 1872, which had since 1867 been part of Hungary. But the University of Zagreb predated, in its turn, those founded at Sofia in 1892 and at Belgrade in 1905.

In this way, it may be generally stated that the medieval reception of Roman law, which assured the relative unity of western European countries, occurred in eastern Europe during the 19th century. It is true that this region received Roman law in its modern guise of western codifications and legal doctrines. But however this may be, it is from this time that the threefold European legal geography, with its tripartite division between the British Isles, the west and the east of the continent, collapsed to a dual system which confronted the English common law with the relatively homogeneous continental landscape of civil law.⁷²

⁶⁶ Andrzej Wrzyszczyk, *Die Juristenausbildung an polnischen akademischen Einrichtungen im 19. und zu Beginn des 20. Jahrhunderts*, in Pokrovac (ed.) *Juristenausbildung*, 238-246.

⁶⁷ Ernest Till, *Pravo prywatne austriackie*, vol. II. *Pravo rzeczowe*, Lwów 1892, 209 nt. 1; Fryderyk Zoll jr., *Petytoryjna ochrona posiadania prawnego*, *Przegląd Notarialny* 7-8 (1947) 22.

⁶⁸ Rafał Wojciechowski, *Das ABGB und die polnische Zivilistik*, in 200 Jahre ABGB, vol. I, 186-187.

⁶⁹ Adam Bobkowski et al. (eds.) *Zwyczajne spadkowe młóścian w Polsce*, parts I-IV, Warszawa 1928-29.

⁷⁰ Petra Skřejpková, *Die juristische Ausbildung in den böhmischen Ländern bis zum Ersten Weltkrieg*, in Pokrovac (ed.) *Juristenausbildung*, 172-175.

⁷¹ Dalibor Čepulo, *Legal Education in Croatia from Medieval Times to 1918: Institutions, Courses of Study and Transfers*, in Pokrovac (ed.) *Juristenausbildung*, 123-141.

⁷² Tomasz Giaro, *Legal Tradition of Eastern Europe. Its Rise and Demise*, *Comparative Law Review* 2.1 (2011) 22.

VIII. PUBLIC LAW: RECEPTION TAKEN AT A GALLOP

We have mentioned the legal vacuum in private law left behind by the Ottomans in the Balkans. The characterization “power vacuum”, can in turn aptly be applied to the situation then prevailing in public law.⁷³ Likewise, the legal occidentalization of the Tsar’s Empire during the 19th century was not restricted to private law. The Russian Empire served to export western constitutional models that were not even given a moment’s consideration for usage in Russia proper. By means of such “constitutional diplomacy”, the Tsar’s Empire supplied numerous countries subject to Russian tutelage in East-Central and South-Eastern Europe with western legal models.⁷⁴

The constitutions of the Ionian Islands, both the so-called Usakov-constitution of 1799 and its successor promulgated in 1803, were inspired by the French revolutionary models. In contrast, the two 1815 constitutions, for the Free City of Cracow and for the Congress Poland, both mainly devised by Prince Adam Jerzy Czartoryski (1770-1861),⁷⁵ followed the Bourbonic *charte octroyée* of 1814. The latter also affected the *Règlement organiques* of the Romanian Principalities of Moldavia and Wallachia, enacted by the Russians in 1831-1832, as well as the Serbian constitution of 1838, called also the “Turkish” constitution (*Turski ustav*).

Russian translations of early German authorities on the concept of “legal state” (the German *Rechtsstaat*)⁷⁶, sometimes less happily rendered into English as the “law-state”,⁷⁷ started to appear in the Tsar’s Empire as early as the 1860s, such as in the case of the classic Robert von Mohl (1799-1875).⁷⁸ However, the term *pravovoe gosudarstvo*, which seems to be the most exact translation from the German, was known to Russian constitutionalism only from the 1880s onwards. Thereafter, it was energetically, but inefficiently, popularized among others by the Polish jurist, professor of the Imperial Moscow University and member of the First Duma on behalf of the Constitutional Democrats, Gabriel Shershenevitch (Szerszeniewicz 1863-1912).⁷⁹

The Bulgarian Tarnovo Constitution, in whose preparation Russian assistance proved indispensable, already in 1879 followed the liberal model of the Belgian parliamentary monarchy of 1831. But within the Tsar’s Empire itself the first ever Russian constitution, inspired by the anachronistic Prussian *Verfassung* of 1850, famous for its plutocratic three-class franchise, was promulgated by the last Russian Tsar Nicholas II Romanov only in 1906. Nevertheless, in the succeeding period this constitution remained a dead letter. Only

⁷³ Thomas Simon, ‘Nationale Wiedergeburt’ und ‘koloniale Modernisierung’. Zwei Muster des Rechtstransfers auf dem Balkan im 19. Jahrhundert, in id. (ed.) *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, vol. II, 1-42, 31.

⁷⁴ Vladislav J. Grossul, *Der russische Konstitutionalismus außerhalb der Grenzen Russlands*, in Dietrich Beyrau et al. (eds.) *Reformen im Russland des 19. und 20. Jahrhunderts. Westliche Modelle und russische Erfahrungen*, Frankfurt a. M. 1996, 60-84.

⁷⁵ Martian Kukiel, *Czartoryski and European Unity, 1771-1861*, Princeton NY 1955.

⁷⁶ James R. Silkenat et al. (eds.) *The Legal Doctrines of the Rule of Law and the Legal State*, Springer 2014.

⁷⁷ Neil MacCormick, *Institutions of Law: an Essay in Legal Theory*, Oxford 2007, 3, 35, 49.

⁷⁸ Hiroshi Oda, *The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia*, *Review of Central and East European Law* 25 (1999) 381-382.

⁷⁹ Anita Schlüchter, *Gabriel Feliksovic Sersenevic – eine rechtspositivistische Verteidigung des Rechts und des Rechtsstaates in Russland*, *Rechtstheorie* 35.3 (2004) 563-575; Adam Bosiacki, *Koncepcje prawa Gabriela Szerszeniewicza a ich znajomość w Polsce*, *Studia Iuridica* 57 (2013) 22-24.

during the February Revolution of 1917 did there arise a short interruption of autocracy that finally allowed some space to parliamentary government.⁸⁰

Of course, South-Eastern Europe resorted to the reception not only of private law from the West, but also received western public law, particularly of the constitutional variety.⁸¹

The diffusion underwent by the Belgian constitution of 1831, itself inspired by the 1815 Dutch constitution, and by the 1830 French *charte constitutionnelle*, based in its turn on the 1814 *charte octroyée*, is particularly noteworthy.⁸² The Belgian constitution was characterized by the principle of popular sovereignty, fundamental rights and separation of powers, as well as the joint legislative competence of the king and both chambers of parliament.⁸³

The Belgian 1831 model of liberal parliamentary monarchy had an astonishing career during the 19th century throughout western Europe, but first and foremost in the Balkans.⁸⁴ It was adopted twice, in 1844 and 1864, by the Kingdom of Greece, in 1866 by Romania which produced the most faithful copy of the Belgian constitution, again twice by the Principality of Serbia, first in 1869 and then again in 1888, by Bulgaria in the above-mentioned Tarnovo Constitution of 1879, and by the Principality of Montenegro in 1905. The choice of the transfer source in South-Eastern Europe was predominantly dictated by political reasons and circumstances. For instance, Serbia followed France in the Napoleonic era of the First French Empire until 1815, but modeled its civil code of 1844 (*Gradanski zakonik za Kneževinu Srbiju*) chiefly upon the Austrian ABGB.⁸⁵ When between 1850 and 1870 the Second French Empire of Napoleon III, aspired again to the role of the leading continental power, Serbia turned again to French patterns, particularly in its commercial code of 1860 (*Trgovački zakonik*).⁸⁶

We are unable to trace in detail the rapid reception of western law in the Balkans, which was vividly described by a Romanian expert as reception “taken at a gallop”.⁸⁷ But in any case, the Principality of Serbia ultimately overcame its dependency on French models to the benefit of the German Empire, as did Greece, albeit only at the end of the 19th century. The German orientation also prevailed by the turn of the century in the Principality of Bulgaria, even if the country had previously wavered between Russian and French models.⁸⁸

IX. DISTANT OUTCOMES OF THE BIG TRANSFER WAVE

While the Tsar’s Empire had been moving ever closer to the legal world of the West, in the immediate aftermath of the October Revolution the newly emerged Soviet Russia

⁸⁰ Michał Sadłowski, *Między Mikołajem II a Leninem. Państwowość rosyjska i jej koncepcje*, Kraków 2021.

⁸¹ Dimitrije Djordjević, *Foreign Influences on Nineteenth-Century Balkan Constitutions*, in Papers for the 5th Congress of Southeast European Studies, Columbus 1984, 72–102.

⁸² Günter Frankenberg, *Constitutional transfers and experiments in the 19th century*, in id. (ed.) *Order from Transfer. Comparative Constitutional Design and Legal Culture*, Elgar 2013, 296.

⁸³ Günter Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, Elgar 2018, 173-176.

⁸⁴ Diana Mishkova, *Balkan Liberalisms*, in Roumen Daskalov, Mishkova (eds.) *Entangled Histories of the Balkans*, vol. II. Transfers of Political Ideologies and Institutions, Leiden-Boston 2014, 171-192.

⁸⁵ Sima Avramović, *Mixture of legal identities: case of the Dutch (1838) and the Serbian (1844) civil code*, *Belgrade Law Review* 66.4 (2018) 27-34.

⁸⁶ Dušan Nikolić, *Codification of Civil Law in Serbia*, in *Liber amicorum Ján Lazar*, Trnava 2014, 443-471.

⁸⁷ Valentin Al. Georgesco, *Modèles juridiques de la réception romano-byzantine*, in *Da Roma alla Terza Roma*, vol. I. Studi. Roma, Costantinopoli, Mosca, Napoli 1983, 351: „une réception galopante du droit occidental”.

⁸⁸ Giaro, *Modernisierung durch Transfer*, 302-303.

sought a retreat. After having said, in striking contrast with liberal slogans, that they did not recognize any distinction between private and public law,⁸⁹ and after having tried for a couple of years to administer justice without statutes and codes, the Soviets quickly set to work on the codification of civil law, which has been since then their main concern and the constant feature of the Soviet legal tradition.⁹⁰

However, in East-Central and South-Eastern Europe, during the integral interwar period of 1918-1939 the intense circulation of western legal models continued unabated. Only following World War II was Soviet communism able to extend throughout the whole Eastern Europe its campaign to reverse the effects of legal westernization. But all in all, the entire 20th century became for this region a century of codification. In other words, even after the fading away of the big transfer wave of the long 19th century Eastern Europe remained on the same path.

A redirection of effort occurred only so far as necessary to bring about the substitution of relatively simple receptions, typical of the previous period, with more syncretic models. It was the case of the Polish code of obligations (*kodeks zobowiązań*) promulgated in 1933. While being a distant reverberation of the transfer era, this was by no means a mere transplant. Rather, it was the product of comparative research conducted by Polish jurists in the interwar time.⁹¹ Hence, the Polish code of obligations was described by Filippo Ranieri (1944-2020) with good reason as the first truly European private law codification.⁹² After World War II the codification trend persisted. Only at the dawn of the 21st century have some countries in the region attained first codifications, while others had no more to do than undertake recodification,⁹³ for instance, Lithuania in 2000, Estonia in 2002, Ukraine in 2003, the Czech Republic in 2012, and Hungary in 2013.⁹⁴ Latvia alone opted in 1992 to simply return to its own old civil code of 1937 which, in its turn, was essentially hardly something more than a reworking of Friedrich Georg von Bunge's private law codification for the Baltic provinces of the Russian Empire, promulgated in 1864.⁹⁵

With respect to the period of communist rule, even the old civil codes could survive in Eastern Germany where the BGB of 1896 was in force until 1976. The case was the same in Romania, where the *codul civil* of 1864 was never abrogated until the fall of communism. To these legislative survivals several examples of doctrinal survivals may be added. Some of the supposedly new real-socialist civil codes, particularly those enacted by Hungary in

⁸⁹ Rafał Mańko, 'We do not Recognize Anything Private', in Bronisław Sitek et al. (eds.) *Private Interest and Public Interest in European Legal Tradition*, Olsztyn 2015, 31-65.

⁹⁰ Dmitry Poldnikov, *The Formalistic Pattern of Soviet Civil Codification as a Chapter in European Legal History*, Working Papers of National Research University Higher School of Economics 94 (2020).

⁹¹ Wojciech Dajczak, *Kodeks zobowiązań jako lekcja metody prawnoporównawczej*, *Kwartalnik Prawa Prywatnego* 23.4 (2014) 829-854; Anna Moszyńska, *Codification of the Civil Law in Interwar Poland*, in Löhnig, Wagner (eds.) *Nichtgeborene Kinder?* 167-172.

⁹² Filippo Ranieri, *Europäisches Obligationenrecht*, 3rd ed., Springer 2009, 106.

⁹³ Kamil Zaradkiewicz, *Rekodyfikacja prawa cywilnego*, *Przegląd Legislacyjny* 36 (2003) 60-96; id., *Kodyfikacja prawa cywilnego na Litwie, Łotwie i w Estonii*, *Przegląd Legislacyjny* 38 (2003) 25-74.

⁹⁴ Anna Stawarska-Rippel, *Problem kodyfikacji prawa prywatnego w państwach Europy Środkowo-Wschodniej z perspektywy stulecia*, *Miscellanea Historico-Iuridica* 18.1 (2019) 50-51.

⁹⁵ Thomas Anepaio, *Die rechtliche Entwicklung der Baltischen Staaten 1918-1940*, in Giaro (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, 19-20; Philipp Schwartz, *Das Lettländische Zivilgesetzbuch vom 28. Januar 1937*, in Löhnig, Wagner (eds.) *Nichtgeborene Kinder?*, 317-358.

1959 and Poland in 1964, substantially drew upon the good old tradition of the German Pandect science. The former could have been equally promulgated, according to a Hungarian expert, some 150 years earlier.⁹⁶

In legal history, such phenomena of hidden continuity from previous periods frequently accompany episodes of more or less extensive and conspicuous change. In reference to phenomena like these, Rafał Mańko has formulated a theory of legal survivals, first and foremost, though not only, with the real-socialist survivals in legal systems of post-communist societies in view.⁹⁷ However, even Soviet legal concepts and institutions, although lauded by many as particularly innovative, were not heaven-sent.

As a matter of fact, even though they were exported to East-Central and South-Eastern Europe from the Russian center as instruments of Sovietization, they had been previously westernized by the pre-revolutionary legal scholarship. Soviet legislation on civil law (the very term “private law” was now forbidden), in particular the first modern civil code of Russia promulgated in 1922, was drafted by pre-revolutionary jurists, such as Aleksandr Grigoryevich Goikhbarg (1883-1962), who bestowed upon it a relatively high technical-doctrinal endowment and a decidedly traditional shape.

Probably for this reason, during the Stalinism of the 1930s, Goikhbarg was condemned in official circles as “not Marxist” (which was *per se* a heavy censure) and bourgeois; in 1948–1955 he was even imprisoned. In 1962 he died in oblivion.⁹⁸ But coming back to the Russian code of 1922, in its “general part”, as well as the clauses on the social function of law and the abuse of right, it demonstrates the clear influence not only of German Pandectism, but also of such representatives of “juristic socialism” as the French legal philosopher Léon Duguit (1859-1928) and the Austrian critic of the German BGB, Anton Menger (1841-1906).⁹⁹

X. LAW OF REAL SOCIALISM AND THE CIVIL LAW TRADITION

Many features of the Soviet legal system are cited in comparative law scholarship to corroborate the theory of the radical separation between socialist law and the civil law tradition: first and foremost the ideological factors, but also some structural features, such as the dominant role of the monopoly, the absorption of private law by public law, the so-called prerogativism which means in the final analysis nothing less than legalized lawlessness.¹⁰⁰ However, if we search for legal innovations or discoveries in the field of legal dogmatics, the results are rather scarce.

⁹⁶ László Sólyom, *Zivilrecht und Bürgerrecht oder was man darf, was nicht*, Acta Juridica Academiae Scientiarum Hungaricae 28.3-4 (1986) 267.

⁹⁷ Rafał Mańko, *Is the Socialist Legal Tradition ‘Dead and Buried’?*, in Thomas Wilhelmsson et al. (eds.), *Private Law and the Many Cultures of Europe*, Wolters Kluwer 2007, 86–89; id., *Legal Survivals. A Conceptual Tool for Analysing Post-transformation Continuity of Legal Culture*, in Tiesību efektivitāte postmodernā sabiedrībā, Rīga 2015, 20-24.

⁹⁸ Adam Bosiacki, *Utopia, Władza, Prawo. Doktryna i koncepcje prawne bolszewickiej Rosji 1917-1921*, 2nd ed., Warszawa 2012, 379-395.

⁹⁹ Norbert Reich, *Sozialismus und Zivilrecht. Eine rechtstheoretisch-rechtshistorische Studie zur Zivilrechtstheorie und Kodifikationspraxis im sowjetischen Gesellschafts- und Rechtssystem*, Frankfurt a.M. 1972, 540-68; Giaro, *Westen im Osten*, 136.

¹⁰⁰ John Quigley, *Socialist Law and the Civil Law Tradition*, The American Journal of Comparative Law 37.4 (1989) 786-796.

For instance, the differentiation of property according to its object and the model of the externally controlled state enterprise were not invented by Soviet jurists. It was the continental branch of liberal capitalism that distinguished for the first time between property as an absolute unitary right of possession, on the one hand, and the mere usage or disposal thereof, on the other. So, property in the technical sense remained with the enterprise, whereas the development strategy and the choice of managers were decided externally by the majority stockholders.¹⁰¹

The question whether Soviet law constituted a system distinct from continental civil law that eventually became the “mother” of the “socialist legal family” remains unsettled among comparatists. In his seminal handbook of comparative law, René David (1906-1990) defined the emergence of the socialist law as “secession” from the civil law system or, as he used to say, from the Romano-Germanic family.¹⁰² John Henry Merryman (1920-2015) spoke about “the Soviet deviation” as a temporary phenomenon.¹⁰³ In such a case socialist law would be simply an short-lived offshoot of the civil law system.

However, the eminent American sovietologist and expert in Russian law, Harold J. Berman (1918-2007), went still further, extending the concept of western legal tradition not only to East-Central Europe, but also directly to Russia, even the communist one.¹⁰⁴ Although Berman strangely forgot to mention in this context South-Eastern Europe,¹⁰⁵ since then the belief in the European character of Soviet civil law, and in consequence of the whole system of socialist law, has been gaining still more adherents amidst the community of comparatists.

Evident elements of continuity between the pre-revolutionary and the Soviet era in the field of Soviet public law¹⁰⁶ prompt the conclusion that Soviet law retained many enduring ‘survivals’ carried over from earlier Russian law.¹⁰⁷ We should mention at the theoretical level the concept of *pravovoe gosudarstvo*, equivalent to the continental-German *Rechtsstaat*. However, we also must not overlook administrative law, which took over from tsarist times the organizational structure of the government and particular ministries, nor for that matter criminal law, which restored the traditional penalty of banishment already in 1922.¹⁰⁸

The conservatism of Soviet lawyers is also easily observable in those sectors of legal regulation which in the West fall under the heading of private law, above all in matters of the law of economy and state ownership. The Soviet “Principles of Civil Legislation of the USSR and the Union Republics”, promulgated in 1961, as well as the Russian (RSFSR)

¹⁰¹ Tomasz Giaro, *Aufstieg und Niedergang des sozialistischen Zivilrechts. Von der Ideologie zur Rechtsdogmatik der Pauschalenteignung*, in Gerd Bender, Ulrich Falk (eds.), *Recht im Sozialismus*, vol. I. Enteignung, Frankfurt a.M. 1999, 251-252.

¹⁰² René David, *Les grands systèmes de droit contemporains*, 4th ed., Dalloz 1971, 71.

¹⁰³ John H. Merryman, *The French Deviation*, *The American Journal of Comparative Law* 44.1 (1996) 109, 119.

¹⁰⁴ Harold J. Berman, *Law and Revolution*, vol. I. *The Formation of the Western Legal Tradition*, Cambridge MA, London 1983, 539.

¹⁰⁵ Tomasz Giaro, *The East of the West. Harold J. Berman and Eastern Europe*, *Rechtsgeschichte* 21 (2013) 195.

¹⁰⁶ Citations in Tomasz Giaro, *Legal Tradition of Eastern Europe*, 20-21.

¹⁰⁷ Frits Gorlé, *Le poids de la tradition juridique nationale russe dans le droit soviétique*, *Tijdschrift voor Rechtsgeschiedenis* 48.2 (1980) 99–123.

¹⁰⁸ William Partlett, *Reclassifying Russian Law: Mechanisms, Outcomes, and Solutions for an Overly Politicized Field*, *Columbia Journal of Eastern European Law* 2.1 (2008) 1-55.

civil code of 1964, embraced the principle of the unity of civil law, contradicted within the socialist camp only by Czechoslovakia and East Germany (DDR).¹⁰⁹ In consequence, only those two countries promulgated a kind of commercial code for the units of socialized economy.¹¹⁰

In accordance with its conservative function, the principle of the unity of civil law required a sharp dogmatic distinction between the public administrative and private civilian components of economic regulation.¹¹¹ In this way, the Napoleonic fiction of the younger civil law tradition equal for all the subjects could be maintained. However, the reality of socialist commercial life was that the economic plans adopted by the state administration were considered as paramount "super-sources" of economic law.¹¹²

Or take finally the famous *crux interpretum* concerning the subjective rights granted to state-owned enterprises over the portions of national property administered by them. The question of the bearer of these rights, interpreted in accordance with the German Pandect science as exclusive ownership, was formulated according to the abstract way of thinking dominant in this scholarly discipline. Little wonder that such a highly conceptual problem never came to be resolved satisfactorily and instead persisted as a paradox until the collapse of real socialism.¹¹³

Rafał Mańko would like to resolve the dilemma of the supposed autonomy of socialist law from the traditional civil law system with the help of the form/substance dichotomy. He sees the followers of formalism as focusing on the textual and conceptual similarities between the Pandect scholarship and the socialist civil codes, whereas the opposite party, the substantialists, highlight the dissimilar legal culture: collectivist ideology, omnipresent monoparty, planned economy, soviet mentality, etc.¹¹⁴

However, when directed toward legal matters, the distinction between form and substance results in a very imperfect dichotomy. Is it not the case that socialist conceptualism, which is paramount in the above-cited discussions on the proper construction of state ownership, belongs to the field of legal culture? I somewhere happened upon the view that Russia was a civil law country until 1917 and then again after 1991. And what was in between? Was real socialism something like a total blackout of the civil law tradition marked by precipitous discontinuities?¹¹⁵

Democracy, the market economy, separation of powers and human rights are not invariably present in every civil law country. If we are not entitled to enrich the definition of civil law with moral and ideological elements based upon value-laden criteria, we must

¹⁰⁹ Klaus Westen, *Das ‚sozialistische Zivilrecht‘ und die Kontinuität europäischer Zivilrechtsentwicklung*, *Juristen-Zeitung* 48 (1993) 13-14.

¹¹⁰ Gábor Hamza, *Continuity and Discontinuity of Private/Civil Law in Eastern Europe after World War II* *Fundamina* 12 (2006) 69.

¹¹¹ Giaro, *Aufstieg und Niedergang*, 273-276.

¹¹² Wenceslas J. Wagner, *General Features of Polish Contract Law*, in id. (ed.), *Polish Law Throughout the Ages*, Stanford 1970, 409-410.

¹¹³ Frederic H. Lawson, *Pour une étude comparative de la propriété*, *Revue Internationale de Droit Comparé* 19 (1967) 420; Katlijn Malfliet, *The Hungarian Quest for a Valid Theory of 'Socialist' Property. Still a Long Way to Go*, *Review of Socialist Law* 13 (1987) 261-262; Giaro, *Aufstieg und Niedergang*, 279-280.

¹¹⁴ Rafał Mańko, *Legal Taxonomy and the Political. A Central-European Perspective*, in Paulina Bieś-Srokosz et al. (eds.) *Law, Space and the Political. An East-West Perspective*, Częstochowa 2018, 17-19.

¹¹⁵ Giaro, *Some Prejudices*, 45.

resign ourselves to the impossibility of having a clear-cut answer.¹¹⁶ The real socialist state resembled in some measure – if I may say so without offence – the “dual state”, devised by Ernst Fraenkel (1898-1975) for the system of early Nazism.¹¹⁷ To speak with René David, the real socialist law was a system in train of “secession” from the civil law family or, the other way round, a civil law system modified by “socialist” elements.

XI. THE EFFECTIVENESS OF THE XIX CENTURY TRANSFERS

The concept of transfer is the victim of several misunderstandings. Generally, it seems reasonable to distinguish between the question of effectiveness broadly understood and a narrower inquiry into whether a transfer has exactly replicated its object; something akin to a mere mechanical displacement, like the transfer of passengers from the airport to the city. The transfer of western legal knowledge during the 19th century was frequently belated and even distorted. However, its general effectiveness consisted in an adoption of the whole set of continental systematic “formants” typical for the codified civil law.¹¹⁸

So, the big transfer wave of the 19th century signified, in the end, the victory of the continental juristic mindset or, to express it more traditionally, of the ‘codification idea’ which has always been central for the civil law tradition.¹¹⁹ This can be said equally of the countries hostile to codification, which during the long 19th century rejected the legislative transfer of a western civil code, limiting themselves instead to a transfer of purely doctrinal-judicial nature. Yet in the 20th century, new civil codes were promulgated by all these countries: in 1922 by Soviet Russia, in 1946 by Greece, and in 1959 by Hungary.

On the other hand, legislative transfer has never signified the total inclusion of a transferee country into the legal system of the transferor, since the East-European derivatives of the French *code civil*, adopted in Central Poland and Romania, were of course situated in jurisdictions formally independent from the French. Although we know that until the beginning of the 20th century Romania lacked, according to our scanty relations, an indigenous doctrine of the local civil code. The main concern of Romanian civil law scholarship at that time was “to explain the institutions” of Romanian civil code.¹²⁰

In Central Poland, the dogmatics of private law was seemingly more creative,¹²¹ but case law relating to the Polish implementation of the *code civil* was published to some extent systematically only since the 1840s.¹²² However, because of the destruction of the Warsaw

¹¹⁶ Cf. the discussion in Adam Bosiacki, *Andrei Yanuarevich Vyshinsky: Paragon of the Totalitarian Conception of the Law and Political Organisation*, in Jerzy Borejsza et al. (eds.) *Totalitarian and Authoritarian Regimes in Europe*, Oxford 2006, 177–187; Giaro, *Russia and Roman Law*, 316–317.

¹¹⁷ Ernst Fraenkel, *Dual State. A Contribution to the Theory of Dictatorship*, New York–London–Toronto 1941; Richard Sakwa, *The Dual State in Russia*, *Post-Soviet Affairs* 26.3 (2010) 185–206.

¹¹⁸ Rodolfo Sacco, *Einführung in die Rechtsvergleichung*, Baden-Baden 2001, 59–77; id., *Legal Formants*, *The American Journal of Comparative Law* 39 (1991) 1–34, 343–399.

¹¹⁹ Peter A.J. van den Berg, *The Politics of European Codification. A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands*, Europa Law Publishing 2007.

¹²⁰ Dan Constantin Măță, *The Development of Romanian Legal Science 1814–1940*, in Pokrovac (ed.) *Rechtswissenschaft*, 230–234.

¹²¹ Adam Słomiński, *Mysł prawnicza z dziedziny prawa cywilnego w Królestwie Kongresowym*, Warszawa 1923.

¹²² Piotr Pomianowski, *Divorce proceedings pursuant to the code civil and the code of the procedure civile of 1806 in the practice of Polish Courts*, *Vergentis* 6 (2018) 239; Adam Moniuszko, Piotr Pomianowski, *Zerwana więź. Tradycje dawnego prawa polskiego w XIX i XX w.*, in Łukasz Pisarczyk (ed.) *Między tradycją a nowoczesnością. Prawo polskie w 100-lecie odzyskania niepodległości*, Warszawa 2019, 383–398.

court archives by the German troops, which happened directly after the 1944 Warsaw Uprising, we possess only very fragmentary documentation of this judge-made law. What is known today stems rather from other courts of the Grand Duchy of Warsaw, such as Kalisz and Cracow, with only limited insights obtainable from the sparse remains of documentation in Warsaw and Bydgoszcz (Bromberg).

Generally speaking, the Polish customary law¹²³ was not directly eliminated by the partitions of Poland at the end of the 18th century.¹²⁴ Of the partitioned territories, it was in the Russian that Polish law and jurisdiction remained in force for the longest time.¹²⁵ But until the mid-19th century also the transfer of immovables in Galicia followed Polish law, and even later, despite the Austrian law on land registers (*Allgemeines Grundbuchgesetz*) of 1871, the practice of transacting in immovables without the obligatory land register entries (*Eintragungsgrundsatz, intabulatio*) prevailed among the Polish peasants.

Delayed effectiveness was frequently the case not only with the doctrinal-judicial transfers, but also with the legislative. In South-Eastern Europe during the first decades after the transfer of western law had been formally accomplished, the rural population invoked the jurisdiction of the courts either very rarely or not at all;¹²⁶ in reference to the higher social groups the public's lack of recourse to the courts could at least partially be explained by the then dominant opinion that judicial activity is purely reproductive.

Probably the greatest success of the big transfer wave, which inundated Eastern Europe during the 19th century, was the professionalization of the justice system's personnel. As a matter of fact, the organization of legal education with an emphasis on the preparation of students for the exercise of practical legal service was transformative in its significance for the professionalization of the administration of justice and legal occupations. By the end of the 19th century, Greece and Romania, countries with the highest rates of illiteracy, became countries of jurists no longer educated in Berlin and Paris, but at domestic universities.¹²⁷

This process of professionalization of the jurisdiction personnel during the 19th century resembled functionally the reception of Roman law in Germany, where already at the end of the 15th century the lay judge had been substituted by the learned one.¹²⁸ In all the countries of eastern Europe, without excepting the Balkan region and the Russian Empire, modern law faculties emerged at newly founded universities; moreover, legal associations were created, while scholarly books and journals dedicated to juristic questions appeared on the market.¹²⁹

¹²³ Waclaw Uruszczak, *La coutume et la loi dans la pensée juridique polonaise des XVIe et XVIIe siècles*, in *Recueils Jean Bodin* 53 (1992) 145-146, 156-157.

¹²⁴ Irena Malinowska-Kwiatkowska, *Customary Law in the Partitioned Poland*, in *Recueils Jean Bodin* 54 (1989) 171-178; Anna Karabowicz, *Custom and Statute*, *Krakowskie Studia z Historii Państwa i Prawa* 7.1 (2014) 128-9.

¹²⁵ Władysław Sobociński, *Sąd i prawo w Polsce pod zaborami*, *Państwo i Prawo* 2 (1967) 220-234.

¹²⁶ Giaro, *Modernisierung durch Transfer*, 309.

¹²⁷ Giaro, *Modernisierung durch Transfer*, 317.

¹²⁸ Gerald Strauss, *Law, Resistance and the State. The Opposition to Roman Law in Reformation Germany*, Princeton 1986, 80-83; Tomasz Giaro, *Vorwort*, in Pokrovac (ed.) *Juristenausbildung*, VII.

¹²⁹ Giaro, *Modernisierung durch Transfer*, 316-317.

On this ground, building upon the concept of the second reception or after-reception (*Nachrezeption*), whose merits are usually ascribed to German Pandectism,¹³⁰ we are entitled in this context to fall back on this concept to describe the above depicted spread of Pandect scholarship in Europe. As a matter of fact, the same feature was equally a part of the historical transfer process in the countries where a legislative transfer was initially rejected and subsequently substituted in functional terms by a doctrinal-judicial one.¹³¹

XII. IS “TRANSFER” A USEFUL CONCEPT?

The conceptual dyad of traditions and transfers was popularized to a certain extent by my own modest contribution as editor of two collective volumes, published in 2006 and 2007 at the Max Planck Institute of European Legal History in Frankfurt am Main. These publications appeared as the two first volumes of a new series dedicated to “Legal cultures of modern eastern Europe. Traditions and transfers” (*Rechtskulturen des modernen Osteuropa. Traditionen und Transfers*).¹³² However, the idea was not always and not by all favorably received.

The most critical voice was raised by Prof. Wilhelm Brauner of the University of Vienna. According to this legal historian of outstanding merit, “transfer” is neither a meaningful nor useful concept,¹³³ at least in reference to those countries which were constitutive parts of bigger state organisms, as for instance the Habsburg Empire. This conclusion arises from the simple reason that such subordinate countries could be at most only the passive subjects of modernizing operations decreed and guided from the imperial center.

Prof. Brauner, who assumes in this respect a position of extreme legal positivism, which is a somewhat strange approach in a legal historian, admits the transfer of law only between sovereign states. According to this “imperial” mindset, it would be incorrect to characterize the state of affairs existing after the promulgation of the German civil code BGB as one in which Hesse, one of the German lands and insofar an old component of the German *Reich*, “was influenced by German legal thinking”.¹³⁴

With all due respect to Hesse, this land seems to be hardly comparable to Poland or Hungary, countries which were already at the relevant time centuries-old state organisms and full subjects of international law. They had developed an autonomous legal culture composed of legal institutions harking from a genesis which was decidedly different from the German or Austrian one.¹³⁵ In other words, these countries acquired their legal-

¹³⁰ Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, Oxford 1995, translated by Tony Weir, 155, 349 renders *Nachrezeption* with 'post-reception'.

¹³¹ Malgorzata Materniak-Pawlowska, review of Pokrovac (ed.) *Rechtsprechung in Osteuropa*, in *Czasopismo Prawno-historyczne* 65 (2018) 530.

¹³² Giaro (ed.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*, Frankfurt a.M. 2006; id. (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, Frankfurt a.M. 2007.

¹³³ Wilhelm Brauner, review of Giaro (ed.) *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*; id. (ed.) *Modernisierung durch Transfer zwischen den Weltkriegen*, *Zeitschrift für Neuere Rechtsgeschichte* 31 (2009) 157-162, 159.

¹³⁴ Brauner, review of Giaro (ed.) *Modernisierung*, 159.

¹³⁵ Rudolf B. Schlesinger, *Polish Law Throughout the Ages*, *Cornell Law Review* 57 (1972) 850-854; Barna Mezey, *Traditions of Hungarian Legal Development*, *Annales Universitatis Scientiarum Budapestinensis. Sectio Iuridica* 41-42 (2000-2001) 7-37.

historical identity long before they were favored by the Almighty with the imposition of the Austrian civil code ABGB.

And what about semi-sovereign states, such as the Duchy of Warsaw and, to some extent, Congress Poland before the 1830 November insurrection? Croatia after its 1868 settlement with Hungary could be considered in like manner. Is it forbidden to compare the half forced reception of the *code civil* in Poland to its completely autonomous reception in the wholly sovereign Romania? Thus, in reference to European empires it seems advisable to apply a center-periphery model where eastern Europe is to be considered as a peripheral part of the whole.¹³⁶

Moreover, Prof. Braunerder has contested not only the concept of transfer, but also that of the western legal tradition which seems to him likely to be too comprehensive (*umfassend*).¹³⁷ He rejects my own modest methodological orientation as unilaterally dictated by Roman law (*einseitig-romanistisch*), and as being premised on the disjunction ‘either Roman law or common law’; he summarizes this orientation as constricted and narrowing (*verengt und verengend*), if not blocking insights into complex processes.¹³⁸

Alright, history is usually complex! But sometimes it is also ironic. Only a decade after Prof. Braunerder attacked the dyad ‘traditions and transfers’ as pretentious (*pompöser Titel*),¹³⁹ a view perhaps in part triggered by the use of both concepts in the discourse on ‘modernization’, the very same scholar became the celebrated subject of an international *Festschrift*. The volume, which boomeranged on the honored professor with unnerving precision, was entitled simply “The Legal Transfer in History”.¹⁴⁰ Live by the sword, die by the sword.

XIII. NEITHER TRANSFERS NOR TRADITIONS?

In like manner to Prof. Braunerder, Marju Luts-Sootak, Professor for Legal History at the University of Tartu, admits almost no space for the conceptual dyad of tradition and transfer in the process by which Baltic Private Law was codified by Friedrich Georg von Bunge, nor for that matter in its further judicial application. In 2012, when her conclusion ran “neither transfers, nor traditions”, she emphasized that the code was pre-modern (*vormodern*), since its regulations were bound to the social estates (*ständisch gebunden*).¹⁴¹

As far as the application of von Bunge’s private law code in the Russian Empire was concerned, the Saint Petersburg judges of the second half of the 19th century were inspired not by such general concepts as tradition and transfer, but simply by the intention to reach practicable solutions. According to Luts-Sootak courts are always busy with decisions in individual cases, and so the approach of the Saint Petersburg Governing Senate showed,

¹³⁶ Giaro, *Legal Tradition*, 5-6, 12-13, 21-23; Rafal Mańko et al., *Carving out Central Europe as a Space of Legal Culture: a Way out of Peripherality?*, *Wroclaw Review of Law, Administration & Economics* 6.2 (2016) 4-28.

¹³⁷ Braunerder, review of Giaro (ed.) *Modernisierung*, 160.

¹³⁸ Braunerder, review of Giaro (ed.) *Modernisierung*, 161.

¹³⁹ Braunerder, review of Giaro (ed.) *Modernisierung*, 158.

¹⁴⁰ Gábor Hamza et al. (eds.) *Rechtstransfer in der Geschichte. Internationale Festschrift für Wilhelm Braunerder zum 75. Geburtstag*, Berlin 2019.

¹⁴¹ Marju Luts-Sootak, *Die baltischen Privatrechte in den Händen der russischen Reichsjustiz*, in Pokrovac (ed.) *Rechtsprechung in Osteuropa*, 290-291, 311-313; cf. also id., *Das Baltische Privatrecht von 1864/1865 – Triumphbogen oder Grabmal für das römische Recht im Baltikum?*, *Zeitschrift für Ostmitteleuropa-Forschung* 58.3 (2009) 378-379.

in this framework, simply a healthy conservative respect for the wording of Baltic Private Law.¹⁴²

Such a conclusion is surprising, since the subjective intentions of legal personnel, situated as actors within the transfer process, surely must not be permitted to determine the appreciation of its social consequences by legal historians. In this case, Baltic Private Law, even if considered less progressive and modernizing than the Austrian ABGB,¹⁴³ was evidently to some extent an autonomous outcome of the Central-European reception of Roman law,¹⁴⁴ which functioned in Russia as a byword for liberal and modern legislation. In her subsequent paper of 2019, which appeared in the above-mentioned *Festschrift Rechtstransfer in der Geschichte* dedicated to Prof. Wilhelm Brauner, a well-known enemy of both opposing concepts “traditions and transfers”, Luts-Sootak re-examines von Bunge’s Code of Baltic Private Law. On this occasion, she locates it again with those instruments brought forth completely under the spell of tradition stemming from the pre-modern social and legal order (*Tradition der vormodernen Gesellschafts- und Rechtsordnung*) dominant at that time throughout the Russian Empire.¹⁴⁵

As a result, we must necessarily accept that the Baltic Provinces of the Romanov Empire knew no (modernizing) transfer at all, because von Bunge’s private law code was quite to the contrary – according to Luts-Sootak – not a modern codification, but a pre-modern backward legislative consolidation.¹⁴⁶ However, at the same time, we do recognize nevertheless the presence of two competing legal traditions; of which one, the long-lived tradition of Russian autocracy, victoriously prevailed over the other, namely the German-Baltic.

In this way, on grounds of the careful reflection of Prof. Luts-Sootak, we can dispense with the concept of transfer, although its opposite, namely tradition, does reveal some utility for the comparative legal history of the Baltics. On the other side, in this context even Prof. Brauner has overcome his repugnance towards the transfer concept, admitting that the Russification of the Baltics in the last decades of the 19th century represented a comprehensive (*umfassend*) cultural transfer but, evidently, no modernization at all.¹⁴⁷ The choice is yours.

XIV. FINAL REFLECTIONS

Other legal historians too have made contributions worth examining, particularly Prof. Rafał Mańko who is not only an expert in the law of East-Central Europe but also himself resident there, and consequently, like Marju Luts-Sootak, a natural representative for the

¹⁴² Luts-Sootak, *Die baltischen Privatrechte*, 366-369.

¹⁴³ Luts-Sootak, *Die baltischen Privatrechte*, 306-308.

¹⁴⁴ Hesi Siimets-Gross, *Das Liv-, Est- und Curlaendische Privatrecht (1864/65) und das römische Recht im Baltikum*, Tartu 2011, 48-55, 65-82; Avenarius, *Fremde Traditionen*, 464-467.

¹⁴⁵ Marju Luts-Sootak, *Zur Verortung des Baltischen Privatrechts (1864/65) unter den europäischen Privatrechtskodifikationen*, in Hamza et al. (eds.) *Internationale Festschrift für Wilhelm Brauner zum 75. Geburtstag*, 243.

¹⁴⁶ Marju Luts-Sootak et al., *Estlands Zivilrechtskodifikation – ein fast geborenes Kind des Konservatismus*, in Löhnig, Wagner (eds.) *Nichtgeborene Kinder des Liberalismus?*, 278-279.

¹⁴⁷ Brauner, review of Giaro (ed.) *Modernisierung*, 159.

region.¹⁴⁸ For Mańko the concept of transfer in substance correctly reflects the facts and vicissitudes of the civil law tradition, in particular its eastward enlargement during the long 19th century. He finds this concept useful especially in the cases not marked by voluntariness of legal change, but which can rather be more accurately characterized as forced transfers.¹⁴⁹

Mańko stresses also that transfers, which as a rule are undertaken with the intention to modernize, or which objectively result in the modernization of backward legal systems, imply a positive value judgment.¹⁵⁰ However, Mańko has not joined, thank goodness, the community of the well-intentioned and politically correct who never stops questioning the concept of modernization as such. Indeed, the scholarly usage of modernization is frequently criticized, in particular by Dr. Jani Kirov, as symptomatic of the cardinal sin of euro centrism.¹⁵¹

This sin consists in lauding the West as the incarnation of modernity, progress, and civilization, which in reality turns out to be merely a form of self-thematization and self-celebration performed by successful exemplary societies. So, Western Europe presents itself, and is celebrated, as the center, depicting in turn the East of the continent as the periphery, and accordingly: the West must be the pattern and the East mere imitation, the West the original and the East nothing more than a copy, the West the rule and the East mere deviation.

However, the related conviction that there is no ‘center’ at all, from which evaluations could be projected,¹⁵² must be consigned to the realm of wishful thinking. In the first volume of South-European papers „Konflikt und Koexistenz“¹⁵³ there is frequently talk of modernization of all the countries discussed: Greece, Romania, and Bulgaria,¹⁵⁴ but not always of private law codification. The latter is not inseparable indeed – as the Nordic experience teaches – from the civil law tradition.¹⁵⁵ There are other modernization forces, particularly legal scholarship and adjudication, which drove eastern law to this end.

In summary, the concern with modernization seems somewhat anachronistic at a time when the concept is relied on even in the legislation of highly developed countries, as in the “Act on modernizing the German law of obligations” (*Schuldrechtsmodernisierungsgesetz*) of 2001. If such countries can admit to the improvability of law over time, let us not then confound the lead and bit parts at the stage of History. The Duchy of Warsaw marked “the beginning of modernity in Poland”,¹⁵⁶ yet the *code civil* was carried not from Warsaw

¹⁴⁸ Mańko at al., *Carving out Central Europe*, 4-28.

¹⁴⁹ Hanga, *Les transferts de droit*, 3-4: „transfert forcé“.

¹⁵⁰ Rafał Mańko, *Legal Transfers in Europe Today: Still “Modernisation Through Transfer”?*, in Paulina Bieć-Srokosz et al. (eds.) *Mutual interaction between contemporary systems and branches of law in European countries*, Częstochowa 2017, 140-141.

¹⁵¹ Jani Kirov, *Prolegomena zu einer Rechtsgeschichte Südosteuropas*, *Rechtsgeschichte* 18 (2011) 140-141.

¹⁵² Kirov, *Prolegomena*, 142-144.

¹⁵³ Michael Stolleis (ed.) *Konflikt und Koexistenz: Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, vol. I, Frankfurt a.M. 2015.

¹⁵⁴ Styliani-Eirini Vetsika, *Die Modernisierung Griechenlands im 20. Jahrhundert*; Bogdan Iancu, *Constitutionalism between Transplant and Irritation: The Case of 19th-Century Romanian Modernization*; Ivo Hristov, *Das Recht im Regime der Modernisierung. Der Fall Bulgarien 1878–1944*.

¹⁵⁵ Pihlajamäki, *Private Law Codification*, 150-151.

¹⁵⁶ Jarosław Czuby, *The Duchy of Warsaw 1807-1815. A Napoleonic Outpost in Central Europe*, Bloomsbury 2016, 215.

or Bucharest to Paris, but in the opposite direction. The real scholarship does not vainly expend itself in striving to abolish simple truths.

