APPLIED COMPARATIVE LAW IN CENTRAL EUROPE

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Abstract: The Central European region is characterised by struggles between modernising endeavours and insisting on (legal) identity, by imposed and voluntary legal transplants — sometimes even by competing legal transplants; law reforms accelerated by rapid political, economic and social changes and European legal harmonisation. Three countries (the Czech Republic, Romania and Hungary) enacted new civil codes recently, which rely on legal transplants to a greater or lesser extent. The general rethinking of private law and the implementation of European Union law in these legal systems enhance the so-called "applied comparative law" from the perspective of both the legislature and the judiciary. This article begins with a short discussion that shows why and how comparative considerations necessarily lead to legal transplants in general. It then proceeds to analyse the three central European countries that have recently enacted new civil codes, with a special reference to legal transplants at the macro level in a historical perspective. The article concludes with a plea for more comparison.

Keywords: *legal transplants; comparative law; applied comparative law; Czech Republic; Romania; Hungary; civil law; civil code; codification; Central Europe*

> *"In our view, the scientific conclusion can be only that the acceptance and application of legal principles and legal institutions in the course of the codification of our private law cannot depend on their national origin, but on their expediency, i.e. their harmony with the present social needs, interests and conditions" Rezső Dell'Adami, 1877*[1]

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1 Dell'Adami Rezső, *Az anyagi magánjog codifikátiója [The Codification of Substantive Private Law]* (Budapest: Atheneum, 1877) pp.323–324.

I. Introduction

What is the future of comparative law is a question that frequently features in scholarly writing. For instance, in 2016, the *Maastricht Journal of European and Comparative Law* published a debate on the "End of Comparative Law" with contributions from Ralf Michaels, Matthias Siems and Stephane Reynolds. All three authors made the case for the survival of comparative law, however with different emphases and prognoses. Michaels evaluated the overhaul of the paradigm of the traditional *droit comparé* (with focus on state law and positive law and emphasis on legal-scientific approach).[2] Siems argued that the shortage of natural resources would require increased collaboration between countries and that is why the importance of trans- and supranational and international law will grow significantly.[3] He argued that the analyses of law based on country differences will become less relevant and the focus will shift to potential convergence and to interaction of multi-level legal orders, including interrelations between multiple layers of norms, the mixture of legal cultures and the increased diversity of forms of law.[4] Reynolds focused on the significance and role of comparative law from the European legal harmonisation's point of view and underpinned the need for a better understanding of inconsistencies in the implementation and application of European rules.[5] Taking the member states-related differences into account, he also considered why transposition and implementation are successful in some cases but not in others.[6]

Notwithstanding the new paradigms, methodologies and approaches on and in comparative law, it will be assumed that the traditional "applied comparative law" still has legitimacy and is still a useful tool for lawmakers and practitioners. Ever increasing self-reflection of and on comparative law, on its methodology, taxonomy, old and new horizons, etc., may result in a "self-reflection-only-approach", meaning that nobody compares anything in the end: no consequences are drawn on the merits of any legal solutions, rules, principles or legal transplants. It might be a mistake, however, to understand comparative law as an academic subject comparing only the views and thoughts on comparative law itself.[7]

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2 Ralf Michaels, "Transnationalizing Comparative Law" (2016) 23 *MJ* 352, 355.

3 Mathias M Siems, "Comparative Law in the 22nd Century" (2016) 23 *MJ* 359, 361.

4 *Ibid*., 364.

5 Stephane Reynolds, "Comparative Legal Analysis: From the Prevalent Methodology to a Necessary Prerequisite" (2016) 23 *MJ* 366, 369.

6 *Ibid*., 372.

7 In the Hungarian academic writing, Péteri refers to Radbruch in this respect who qualified those fields of sciences that focus on their own methodology as sick and performing a kind of "self-torturing self-reflection", see Zoltán Péteri, "Célok és módszerek a jogösszehasonlításban" [Aims and Methods in Comparative Law] in Balázs Fekete and András Koltay (eds.), *Péteri Zoltán — Jogösszehasonlítás, történeti, rendszertani és módszertani problémák* (Budapest: PPKE JÁK, 2010) p.154, but different interpretation Balázs Fekete, "A jogösszehasonlítás magyarországi történetének és alkalmazásának alapkérdései" [The Fundamental Questions of the History and Application of Comparative Law in Hungary] in András Jakab and Attila Menyhárd (eds.), *A jog tudománya: Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal* (Budapest: Hvgorac, 2015) pp.421, 423.

It is my belief that besides the unavoidable methodological and theoretical open-mindedness, the classical functional approach (despite its shortcomings) still plays an important role in gaining a better understanding of law and in finding better solutions within the framework of national and supranational law-making procedures.

This is even more relevant in Central Europe where two parallel processes can be observed.

First, some Central European countries conducted a comprehensive review of their private law and enacted new civil codes. For example, the Romanian *Codul civil* (Act. No. 287/2009) entered into force on 1 October 2011, the Czech *Občanský Zákoník* (Act No. 89/2012) on 1 January 2014 and the Hungarian *Polgári Törvénykönyv* (Act No. V/2013) on 15 March 2014. These recodification processes were preceded by some comparative analyses that resulted in some obvious legal transplants. However, this is not the end of applied comparative legal research: on the contrary, this is just the beginning, since the detail work on application and interpretation of rules transplanted from other legal systems starts now in the transactional and judicial practice. After the legislative comparatism, the epoch of applied and interpretive comparatism begins. In this respect, besides the state laws that served as patterns, treatises of soft and model law (Draft Common Frame of Reference, DCFR; Principles of European Contract Law, PECL, etc.) will also be taken into consideration. As a consequence, quoting Siems on this point: "Comparative law will just become part of teaching and research on law: it will be nothing special to look beyond one's own borders" and comparative law is increasingly incorporated into "normal legal research".[8]

Second, most of the Central European countries are members of the European Union (EU) and are therefore part of the European supranational legal system. As Reynolds points out,[9] the European Commission takes national perspectives into consideration in framing and drafting European legislative proposals and identifies better law making as one of its important goals. The comparative method greatly assists in finding options for reforming transnational legal initiatives and proposing new measures, in order to choose a model appropriate for a Union of 28 member states.[10]

Section II of this paper contains a short discussion that shows why and how comparative considerations necessarily lead to legal transplants in general. Section III of the article examines the Central European countries that have recently adopted a civil code with special reference to legal transplants at the macro level in a historical perspective. Section IV presents some conclusions and pleads for more comparison.

8 Siems (n.3) 364.
9 Reynolds (n.5) 370.
10 *Ibid*., 373.

II. Setting the Scene: Comparative Law and Legal Transplants in General

A. Comparative law: goals and approaches

Although all taxonomy contains simplification and artificiality in itself, the starting point here is the differentiation between self-reflective academic comparative law and applied comparative law.[11] Needless to say, academic comparative law and applied comparative law are interdependent: applied comparative law cannot exist without academic comparative law. Similarly, while academic comparative law aims to be "clear" and "abstract", it is not possible to leave out practical needs and questions altogether.[12] Applied comparative law can be divided into three subtypes: legislative, judicial and lawyerly transactional — depending on who uses the comparative tool.[13]

Comparative law can be an important method in the course of preparing and improving legislation, enabling the legislator to study other solutions and benefit from the experience of other legal systems. Comparative law can assist the lawmaker to understand new economic and social problems and to be inspired by solutions provided by other countries. Comparative analyses can serve as feasibility studies of planned law reforms in order to prevent making mistakes that were made elsewhere.[14] Comparative analysis is even more important for countries in transition, such as the Central European countries in the last three decades. As the former Minister of Justice of Estonia pointed out: "The main method used for private law in today's legislative drafting is the comparative method".[15]

Comparison can support courts in the application and interpretation of new rules and legal solutions borrowed from other legal systems and "verify the

11 The term "applied comparative law" is used in comparative literature rather as the antonym of "descriptive comparative law", and applied comparative law refers to the purpose of comparative analysis, for example, in supporting law reform or law harmonisation, *cf.* in the Hungarian scholarship (with numerous references to international comparative literature), Balázs Fekete, *A modern jogösszehasonlítás paradigmái — Kísérlet a jogösszehasonlítás történetének új értelmezésére [The Paradigms of Modern Comparative Law — An Attempt at a New Interpretation of the History of Comparative Law]* (Budapest: Gondolat, 2011) p 105.

12 See Péteri (n.7) p.156.

13 Mousourakis draws a distinction between traditional comparison *de lege lata* and *de lege ferenda*, which means search for models for the interpretation of current law or for formulation and implementation of legal policy, *cf.* George Mousourakis, "Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach" (2013) 54 *Acta Jur Hng* 219, 220. Örücü describes this phenomenon as the use of comparative law as a tool of interpretation on the one hand and as a tool of law reform on the other hand. Esin Örücü, "Comparative Law in Practice: The Courts and the Legislator" in Esin Örücü and David Nelken (eds.), *Comparative Law, a Handbook* (Oxford – Portland: Hart, 2007) p.412.

14 Markus Müller Chen, Christoph Müller and Corinne Widmer Lüchinger, *Comparative Private Law* (Zurich: Dike, 2015) paras.66, 71.

15 Paul Varul, "Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia" (2000) 5 *Juridica International* 104, 107.

appropriateness of traditional solutions in their legal system".[16] Comparison can also be used to develop new approaches, even without being induced to do so by any transplanted rules, where there is insufficient guidance on the matter in domestic law (especially with regards to new, difficult and/or controversial cases),[17] because the respective issues have already been adjudicated in other legal systems. Analysis can also focus on the aftercare or follow-up comparisons, ie, where the judge turns to comparative methodology because he or she has to apply and interpret a (newly) borrowed rule or a legal solution implemented as a result of international unification and harmonisation of law.[18] As has been pointed out in many sources, courts in the Western part of Europe no longer refrain from comparisons;[19] however, the use of comparative methodology is not always functional and substantial, but sometimes only decorative, since the judge's true intention is restricted to giving the decision more authority and legitimacy and not necessarily to learn substantially from the solutions of foreign laws.[20] Another pitfall is that the courts frequently pay attention to the results of foreign judgments only and not to their reasoning. Moreover, the selection of the patterns (countries) to be compared with is often random.[21] (Even academics sometimes cannot resist the temptation to be influenced in the selection and method to be used by the desired result.[22])

16 Müller Chen, Müller and Widmer Lüchinger (n.14) para.66.

17 Örücü (n.13) pp.425, 426–427. See also Thomas Kadner Graziano and János Bóka (trs.), *Összehasonlító szerződési jog [Comparative Contract Law]* (Budapest: Complex, 2010) pp.62–63. Rehm emphasises that it does not matter whether the legal system is a civil law system or a common law system and whether private law is codified or not. The legal system develops through cases; yet, the cases help to verify, falsify or change (and/or apply differently) one or more rules. In this respect, it is more than natural to look at the judgments of courts in other countries. Gerhard Rehm, "Rechtstransplantate als Instrument der Rechtsreform und -transformation' (2008) 72 *RabelsZ* 1, 35–36.

18 See Mousourakis (n.13) 227–228 with examples from Germany and England in the footnotes. As Guy Canivet points out: "The French private law judge is no longer – if ever he really was – considered as the 'mouth that produces the words of the law' (in the famous words of Montesquieu). He is commissioned to adjust the law to the values of his society". To the contrary, the courts complete and give meaning to legislative changes through interpretation. See Guy Canivet, "The Use of Comparative Law Before the French Private Law Courts" in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds.), *Comparative Law Before the Courts* (London: BIICL, 2005) pp.182–183.

19 See, for example, the summary provided by Marta Infantino, "Making European Tort Law: The Game and its Players" (2010) 18 *Cardozo J Int'l Comp L* 45, 85–86 with reference to published judgments issued by Italian, Portuguese and Greek courts and also to the tendencies in Austria and Switzerland to look at the German judicial practice.

20 Örücü (n.13) p.429 states that if British law and the law of other common law jurisdictions are compared, a functional comparison takes place, while the references to the civilian systems are rather decorative. In the Hungarian literature, Bóka blames all ordinary national courts for using the comparative references for decorative purposes and accessorily only, ie, in order to legitimise a decision that has already been made (unlike the Court of Justice of the European Union, CJEU). János Bóka, "Az összehasonlító módszer az Európai Unió Bíróságának gyakorlatában" [The Comparative Method in the Practice of the CJEU] in László Blutman (ed.), *Ünnepi kötet Dr. Bodnár László egyetemi tanár 70. születésnapjára* (Szeged: SZTE ÁJK, 2014) pp.66–67.

21 Örücü (n.13) p.430.

22 Lóránt Csink, "Hogyan alkalmazzuk az összehasonlító módszert?" [How to Use the Comparative Method] in Nóra Chronowski, Zoltán Pozsár-Szentmiklósy, Péter Smuk and Zsolt Szabó (eds.),

As many scholars rightly note, transplanting a solution — and (we add) to perform comparative analysis at all — "requires a deep knowledge of both the language and the law of the system"[23] to be analysed, which goes far beyond the average level of knowledge of judges and other practitioners, particularly taking into account their workload and unavoidable focus and concentration on their national legal system. Therefore, it is the academics' task to present and evaluate foreign laws.[24] The academic's intervention may decrease the risk of superficiality, arbitrariness of selection and misunderstanding of the analysed foreign rules (principles and solutions).

Finally, comparative law expands the legal practitioner's interpretation toolbox with special regard to problems that have not yet been decided in domestic courts.[25] Similarly, solutions developed elsewhere can be used in transactions while drafting contractual documents. Counsel go through three phases in using foreign law: "discovering, understanding and applying".[26]

B. Legal transplants: an unavoidable station in applied comparative law analysis

Applied comparative law frequently results in evaluating solutions in other legal systems and in suggesting and/or supporting the borrowing of some of them. Systems in transition, for example, look to the pool of competing models available with the purpose of redesigning and, *inter alia*, modernising their legal systems.[27] In this way, "comparatists can assist systems in transition in structured change".[28] However, all legal systems are "compelled to constantly change and adapt themselves", and they can learn from each other:

> to ameliorate existing solutions, or find new and better ones to cope with the challenges. … One way to do this is to borrow ideas and concepts from each other and implement them — often with modifications — into their own system.[29]

A szabadságszerető embernek — Liber Amicorum István Kukorelli (Budapest: Gondolat, 2017) p.198. Müller Chen, Müller and Widmer Lüchinger (n.14) para.85.

23 Infantino (n.19) 87.

24 Jan M Smits, "Convergence of Private Law in Europe: Towards a New Ius Commune" in Örücü and Nelken (n.13) p.236. Örücü too emphasises the importance of partnership with the academic profession for the same reason, Örücü (n.13) p.417. In the same manner, also Kadner Graziano and Bóka (n.17) p.55.

25 Müller Chen, Müller and Widmer Lüchinger (n.14) para.66

26 Örücü (n.13) p.413

27 Here, we can refer back to the idea that one of the goals of comparative law is to assist in finding "the better law" or, to put it in a pathetic way, to serve the realisation of justice. On the latter approach, see George Rodrigo Bandeira Galindo, "Legal Transplants between Time and Space" in Thomas Duve (ed.), *Entanglements in Legal History – Conceptual Approaches* (Frankfurt am Main: MPI for European Legal History, 2014) p.146.

28 Esin Örücü, "Law as Transposition" (2002) 51 *Int'l Comp LQ* 205, 220–221.

29 Müller Chen, Müller and Widmer Lüchinger (n.14) para.252

Obviously, the goal is to solve problems of the society in better or more efficient ways.[30] As a result, "very little is original in law. What there is, is in the selectivity in the borrowing, in the ensuing mix and the homogenisation process in the courts, that is successful 'tuning'".[31] Legal transplants are considered in the context of law reforms in search of the best possible rule.[32]

It goes far beyond the aims of this paper to present the diverse history of thoughts and analysis on legal transplants in comparative scholarship, but it is the common denominator among scholars that "what is borrowed, imposed or imported" does not remain the same.[33] (*A posteriori*) internalisation of the transplanted rules by legal professionals in the recipient system is crucial "if there are to be fruitful developments".[34] This internalisation is, however, not a mechanical process but rather a creative process that frequently involves "improvisation and experimentation".[35] The post-transposition adjustment can be more or less successful, achieving "full convergence" or going through "substantive transformation", or — in the worst case — the transplanted rules can "suffer" distortion, mutation or rejection.[36] The extrusion of a "legal intruder" happens either explicitly (the legislator makes up its mind based on discouraging experiences) or more surreptitiously by simply not applying the law, whereby the rule itself becomes virtual reality,[37] a dead letter.[38]

Comparatists thus can play an important role both in the *a priori* (compatibility) check and in the *a posteriori* adjustment phase,[39] for example, by drawing the judges' attention to the ongoing (judicial) practice of the borrowed concepts in the place of origin. Since the post-transfer adjustment is a normal, organic and natural process, like the legal transplant itself, it is unavoidable that the borrowed rule's application and interpretation in the recipient system diverges from that of the donor system, "the own life of the transplanted rule begins".[40] Therefore,

30 Esin Örücü, "Developing Comparative Law" in Örücü and Nelken (n.13) p.55.

31 Örücü (n.28) 221.

32 Alan Watson, *Legal Transplants, An Approach to Comparative Law* (Athens – London: University of Georgia Press, 2nd ed., 1993) p.18.

33 William Twining, "Diffusion of Law: A Global Perspective" (2004) 36:49 *J Leg Plur Unoff Law* 1, 24; Mousourakis (n.13) 229.

34 Örücü (n.28) 221.

35 Michele Graziadei, "Comparative Law As the Study of Transplants and Receptions" in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) pp.469–470.

36 Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom" (2010) 58 *Am J Comp L* 583, 593.

37 Örücü (n.28) 208.

38 The more rules or institutions are taken over "as a complete package", the bigger the risk that the natural connection between social reality and its legal regulation might be broken. *Cf.* András Kisfaludi, "Company Law in Hungary" in Christa Jessel-Holst, Rainer Kulms and Andreas Trunk (eds.), *Private Law in Eastern Europe* (Tübingen: Mohr Siebeck, 2010) p.442, where he prefers partial reception to overall reception.

39 See the examples provided by Twining (n.33) 10.

40 Eörsi Gyula, *Összehasonlító polgári jog [Comparative Private Law]* (Budapest: Akadémiai, 1975) p.536.

the courts in the recipient system should not necessarily follow the imported rules' application in the donor system,[41] although it is more than reasonable and sensible to keep an eye on any further developments over there, in order not to omit the chance to be continuously inspired by the developments and case law in the donor system.[42] The amendment of the transplanted rules in the donor system can be very relevant for the recipient system: why did the legislator of the donor country amend the law? What was the problem with the law? Maybe some inherent malfunctions were solved, and if so, which inherent malfunctions were imported together with the respective law? Is there a need for the intervention of the legislator of the recipient country? Can the problem, which was the reason for the amendment in the donor country, be solved by judicial interpretation? Even if there are different problems of application and interpretation, similar problems can appear any time in the recipient system as well. To our understanding, the continuous analysis and consideration of the legislative and judicial changes of law in the donor legal system is of crucial importance. Kramer reports a suggestive example from Liechtenstein, where the Supreme Court extended the so-called *Ursprungslandprinzip* (country of origin principle) beyond private international law to receptions, stating that the received rules apply in Liechtenstein as they apply in the country of origin (law in action). Kramer remarks correctly that this routine applies only if the goal of the reception was to accomplish legal unity (unification of law), but there is no reason to curtail the free discretion of the judge in interpreting the transplanted rule as he or she thinks is most appropriate, using the legal reasoning in the donor country as persuasive authority. In any event, the way it is interpreted and applied in the country of origin is a serious factor to be considered.[43]

The academics' participation and intervention is crucial to prevent and/or to avoid the pitfalls that threaten the success of the transfer and the transposition, for example: focusing on the results only but not considering the reasons behind them, randomness and arbitrariness of selection or the pool from which the transplanted rules are taken; not considering useful solutions due to language and access barriers; misunderstanding or overlooking "the relevant legal, historical, socio-economic and political background of the would-be transplant including extra-legal factors"[44] or, to make matters worse, reception of a dead letter law, i.e. a codified rule, which has long since been reinterpreted or turned upside down in case law, and/or

41 The process results in a completely different interpretation, which can create new dissonances and divergences if the reception takes place un- or semi-voluntarily, for example, as a result of legal harmonisation. See Günther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61 *Mod L Rev* 11, 20.

42 See Camelia Toader, "Contract Law in Romania" in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe* (Tübingen: Mohr Siebeck, 2010) p.110.

43 Ernst A Kramer, "Hauptprobleme der Rechtsrezeption" (2017) 72 *JZ* 1, 11.

44 Müller Chen, Müller and Widmer Lüchinger (n.14) para.281

underestimating the differences due to relative closeness of the donor system regarding economic and other factors.[45]

III. Legal Transplants in the Three Central European Countries of Czech Republic, Romania and Hungary: a Bird's Eye View

The Central (and Eastern) European region (i.e. the post-communist countries) has always been of interest to comparatists. Before the fall of the Iron Curtain, analysis of the "socialist legal family" was part of the comparative canon. After 1989–1990, the post-communist countries, "countries in transition", wanted to switch from a planned economy to a market economy and attract foreign investments.[46] They underwent a semi-voluntary legal reception[47] in order to make good the lost time and opportunities of development and to catch up with the developed "Western countries" as much and as fast as possible. Semi-voluntary in the sense that nobody forced these countries to catch up, but they wanted to join the EU, the transition was connected with the Europeanisation and modernisation of the law. Thus, the transition was economically and politically motivated (there being no real alternative in fact), but formally voluntary.[48] What follows is a historical-comparative analysis of three Central European countries, which recently enacted new civil codes.

A. Czech Republic

The Bohemian Kingdom was part of the Holy Roman Empire and later the Austrian Empire and then the Austro-Hungarian Monarchy. The Austrian Civil Code, the *Allgemeines bürgerliches Gesetzbuch* (ABGB) (enacted in 1811), was applied there from 1 January 1812. Czech scholars and judges contributed to the development of civil law in the region; for example, the Highest Court in Brünn (today Brno) played a significant role in interpreting the ABGB.[49]

45 Örücü (n.13) p.430; Müller Chen, Müller and Widmer Lüchinger (n.14) para.281; Kramer (n.43) 8. Bandeira Galindo (n.27) p.145 adds that "sometimes the trust in a transplant is so thick that it overshadows the experience a foreign legal system had with a rule or institution; contextualization is erased or, at least, forgotten". Rehm (n.17) 37 takes the view that no legal transplant can be successful without disseminating the process in the class room and in the professional legal circles, including the publication of (foreign) judgments, inspiring academic debate and encouraging discussion with the lawyers of the donor system.

46 Rehm (n.17) 10; Kramer (n.43) 5.

47 Müller Chen, Müller and Widmer Lüchinger (n.14) para.276.

48 Péter Cserne, "The Recodification of Private Law in Central and Eastern Europe" in Pierre Larouche and Péter Cserne (eds.), *National Legal Systems and Globalization: New Role, Continuing Relevance* (Springer, 2012) pp.46, 48. He adds that the Central and Eastern Europe (CEE) region had already in the 19th century been a reservoir of Western political and legal ideas.

49 Luboš Tichý, "Stand un Entwicklung des Privatrechts in der Tschechischen Republik" in Rudolf Welser (ed.), *Privatrechtsentwicklung in Zentral- und Osteuropa* (Wien: Manz, 2008) p.23.

After the First World War, the laws of Austria remained in force in the Bohemian, Moravian and Silesian parts of the Czechoslovakian Republic, to the extent that they did not contravene the democratic laws of the new republic and its constitutional order. In 1937, a new draft civil code was prepared but was never formally enacted; this was a modernised and consolidated version of the ABGB. The ABGB was finally replaced by a new civil code enacted under the socialist regime in 1950 (which entered into force on 1 January 1951), which was replaced by a newer one in 1964, reflecting even more the socialist state order and planned economy. The socialist regime performed a quite efficient clean sweep within the realm of private law: for example, the principle of *Treu und Glauben* was abandoned (the same happened to party autonomy in general and to publicity in property law), the notion of and rules on legal persons were transposed to the concept of socialist organisations, land registers were abandoned in 1964, obligations were replaced by (socialist) services and former well-functioning principles of property law such as *aedificium solo cedit*, possession and *usucapion* were abandoned (although the latter two were restored in 1982).[50]

After the turnaround in 1989–1990, when the transformation into a democratic state under the rule of law and the shift to a market economy began, a new commercial code was enacted in 1991, and the Civil Code of 1964 was fundamentally amended.[51] Since the amendments were enacted over hastily, EU directives had to be implemented and economic and technical developments had to be provided for, in 2001 the government decided to get a new civil code drafted. The first draft was published in 2005 and was continuously updated.[52] Tichý criticised the process itself, because of the absence of appropriate public debate. According to him, it was only as a result of the initiative of the American Chamber of Commerce that legal professionals were invited to submit analysis and evaluation of the draft, after which small working groups were established to suggest amendments within two months. Critical approaches were generally neglected, and the whole process could be characterised as one with parallel monologues instead of dialogues. He added that the motifs (reasons) were rather brief, and it could not always be determined why the legislator preferred one solution to the other.[53]

The Draft Civil Code of 1937 was one of the foundations of the most recent Civil Code of 2012.[54] In the motifs (reasons) of the new code, the following codes and laws are mentioned as models: the Austrian ABGB, the Swiss *Zivilgesetzbuch,* ZGB and *Obligationenrecht,* OR the German *Bürgerliches Gesetzbuch* (BGB), the Italian *Codice civile*, the Dutch *Burgerlijk Wetboek* and the Polish Civil Code; from

50 See Luboš Tichý, "Das neue ZGB für die Tschechische Republik — Eine kritische Skizze" (2014) 22 *ZeuP* 467, 470–472.

51 For the sources of this short historical overview, see Jan Hurdík, "Das Konzept des Entwurfes zu einem neuen Tschechischen ZGB" in Welser (n.49) pp.15–17, 19.

52 Tichý (n.50) 472–473.

53 *Ibid*., 476–477.

54 Hurdík (n.51) p.19; Tichý (n.49) p.27.

the worldwide pool of the most recent codifications, the Civil Codes of Russia and Québec are highlighted. There is also a general reference to the tendencies of civil law legislation and to the French, Belgian, Spanish, Portuguese and Liechtenstein civil law.[55] Scholars rather welcome the return to Austrian traditions (regarding property law and succession law in particular or with reference to the structure of the code), because the Czech terminology, way of thinking and legal structures were so intensively and deeply influenced and shaped by Austrian legal culture that not even decades of socialism and the law's forced detachment from these roots could totally eradicate this embeddedness.[56]

As far as the post-transplantation adjustment is concerned, some Czech scholars have considered the origins in order to understand the interpretation of the transplanted rules. For example, since the new Czech Civil Code adopted some concepts and rules from the (Czech) Commercial Code of 1991, which had borrowed some of them from the the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention or CISG), it is reasonable to check the interpretation and application of the respective articles of the CISG itself. A good example is the profound and convincing analysis regarding the passing of risk as regulated in the new Czech Civil Code and in the source, ie, in the CISG. Pipkova has compared art.66 CISG with s.2125 para.1 of the Czech Civil Code (the general rule on the passing of risk) and found a difference of wording between the two on the exception to the rule, ie:

> situations when this effect of passing of the risk does not apply. The CISG states that the buyer is discharged of his obligation to pay if the loss or damage is due to an act or omission of the seller, while the Czech Civil Code discharges the buyer if the seller caused the materialisation of the risk through a breach of his obligation.[57]

Although the exemption under CISG seems to be broader than the exemption under the Czech Civil Code, Pipkova nevertheless concludes that the content of the regulation itself does not differ and therefore s.2125 para.1 should be interpreted in line with art.66 of the CISG. She refers in her analysis to the drafting history of CISG and to the cases when "the exemption is narrowed down by further requirements",[58] as elaborated on in the CISG case law and commentaries, and suggests following those filters. She performs a similar comparative analysis of the situation when goods are handed over to a carrier and compares art.67 para.1 of the

55 Hurdík (n.51) p.19; Tichý (n.49) p.27 refers additionally to the PECL and to the achievements of the Gandolfi group. In another paper, he adds that despite emphasis of some model laws in the motifs, their factual impact on the content of the new code is rather low. Tichý (n.50) 480.

56 Tichý (n.49) p.29. On the return to the structure of the ABGB, see Tichý (n.50) 485–486.

57 Petra Joanna Pipková, "Risk of Loss and Its Passing to the Buyer under the New Civil Code in Comparison with CISG" (2014) 2 *ELTE Law Journal* 131, 133.

58 *Ibid*., 134.

CISG and s.2123 para.1 of the Czech Civil Code. The latter omits that particular rule, according to which it does not affect the passing of risk, if the seller retains or is authorised to retain documents controlling the disposition of the goods. Pipkova emphasises that since in both the CISG and the Czech Civil Code, the passing of risk is connected to the "actual physical authority" over the goods and not to the acquisition of ownership, one should draw the same conclusion, despite the lack of an explicit indication of this principle in the Czech Civil Code: retaining the documents by the buyer does not have an effect on the passing of risk. The inspiration for interpretation by the source ends where the legislator deviated from the model intentionally (*cf.* the passing of risk related to goods in transit).[59]

B. Romania

(i) Developments of civil law before the first Romanian Civil Code

Romania is of crucial importance from the comparatists' point of view, since — as one of the most active Romanian scholars in this field emphasises — "the [modern Romanian] legal system has been built through massive legal transplants from the Western-European legal models, mainly French and Belgian, undertaken at mid-19th century".[60]

Although the content of the above statement seems to align with modern comparative legal knowledge, it is far less obvious that the model of French law was not the first choice. The region, which became later the territory of modern Romania, was divided between two principalities: Wallachia and Moldavia (they united in 1859 and from 1866 called themselves Romania and the country became the Kingdom of Romania in 1881). In Wallachia, Prince Ioan Gheorghe Caragea promulgated a code in 1817, which was printed in 1818 in Bucharest (in the Romanian language), the so-called "*Legiurea Caragea*". The code of 1817 drew upon the byzantine heritage (the *Basilika*), local customary law, some local statutes and the Napoleonic code.[61] In Moldavia, in contrast, the *"Codul Calimach"* (*Code Callimaque* or *Codex civilis Moldaviae*), promulgated in the same year, was an overall reflection of the Austrian ABGB. Romanian scholars have attributed this to the "coincidence" that the author of the code, Christian Flechtenmacher, a legal scholar of Saxon origin from Kronstadt (Brașov), was a student of Franz von Zeiller, the father of the ABGB, in Vienna.[62]

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59 *Ibid*., 133–135.

60 Manuel Gutan, "The Legal Transplant and the Building of the Romanian Legal Identity in the Second Half of the 19th Century and the Beginning of the 20th Century" (2017) 8 *Rom J Comp Law* 62, 64.

61 Christian Alunaru, "Das ABGB in Rumänien (frühere Geltung und heutige Ausstrahlung)" in Constanze Fischer-Czermak, Gerhard Hopf, Georg Kathrein and Martin Schauer (eds.), *Festschrift 200 Jahre ABGB* (Wien: Manz, 2011) p.103.

62 Alunaru (n.61) pp.104–109. Although he gives a summary on the opposite views as well, i.e. many scholars did and do not agree that the Codul Calimach was a replica of the ABGB. Some of them stated that the reason of similarities lies with the fact that the Moldavian and the Austrian legislators used the same sources. Others emphasise the differences in wording and on the merits related to some rules. Finally, he repeats his conclusion and conviction that the Codul Calimach is in many respects the copy of the ABGB.

(ii) Development of modern civil law in Romania, the first civil code and its aftermath

Modernisation was the driving force behind the "massive transplantation of legal ideas, concepts, norms or codes" between the 1830s and 1860s. This process was often characterised by Romanian scholars as "text to text" translations of norms, usually from French to Romanian. They also pointed to "poor critical selection of the institutions and norms to be transplanted". The reason might have been the "unparalleled prestige" of the French and Belgian models, based on the fact that young Romanian aristocrats who studied at French universities in the 19th century — many of them law — later took part in the modernisation efforts.[63] Another factor is the activity and influence of French diplomacy in the Romanian principalities.[64] Romanian legal literature points out that the first Romanian Civil Code was "manufactured in a relatively short period of time (1862–1864) by a group of Romanian lawyers with legal degrees from Paris, through direct translation from the French language in a heavily Frenchised Romanian legal language".[65] A more guarded evaluation can be found elsewhere: there was a comparative approach, but it was restricted to obtaining the "best variant" of the French Civil Code, ie, the drafters did consider French doctrine with special reference to the commentaries on the Civil Code (intra-French comparison instead of an overall or extra-French comparison, ie, no other possible alternatives were taken into consideration).[66] Only those articles of the French Civil Code were filtered out or modified, which were "manifestly incompatible" with the country's religions and customs.[67]

Besides the main source, some articles on obligations were borrowed from the Italian draft Civil Code. In order to have a modern mortgage regime, the Belgian law from 1851 on privileges and mortgages was imported. Some traditional Romanian institutions were maintained in family law[68] and also some other local customs, for instance various traditional local rights of neighbours over land.[69]

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63 Gutan (n.60) 71, 76–78, to the devotion of the Romanian elite to the French culture, including legal culture, see especially n.22, 78.

64 Manuel Gutan, "The French Legal Model in Modern Romania. An Ambition, a Rejection" (2015) 6 *Rom J Comp Law* 120, 134.

65 Gutan (n.60) 79; Manuel Gutan, "Building the Romanian Modern Law — Why Is It Based on Legal Transplant?" (2005) 5 *Acta Universitatis Lucian Blaga* 130, 136.

66 Gutan (n.64) 136; Gutan (n.65) 136. Especially, the commentary by Marcadé was recapitulated; see in this respect, Toader (n.42) p.112 footnote 10: for example, art.1589 of the French Code Civil was not incorporated into the Romanian code (para.1: "A promise of sale is the equivalent of a sale when there is reciprocal consent of both parties as to the thing and the price".); this intentional omission can be traced back to the Marcadé commentary and resulted in a different development on pre-agreements in the Romanian civil law. The Romanian doctrine suggested not to follow the French model in this respect.

67 Gutan (n.65) 135.

68 Gutan (n.65) 136 and Christian Alunaru, "Privatrechtsentwicklung in Rumänien" in Welser (n.49) p.77. For a detailed enumeration of the ingredients and their location in the civil code, see Toader (n.42) p.112, and for the rules imported from the Pisanelli draft civil code, see n.8.

69 Christian Alunaru and Lucian Bojin, "XXII. Romania" in Helmut Koziol and Barbara C Steininger (eds.), *European Tort law 2009* (Vienna – New-York: De Gruyter, 2010) p.525.

When the Romanian Civil Code entered into force on 1 December 1865, the Romanian civil law came under the overall French influence, meaning that in their academic writings, Romanian scholars refer mostly to French case law and doctrine. This orientation is still apparent and dominant.[70] Thus, a continuous monitoring of the law of the donor system emerged in which the transplanted rules and concepts were not detached from their roots and origins.

Many scholars share the view that this rigid modernisation and legal imitation (or even "intellectual self-colonisation"[71]) resulted in a "considerable gap between the transplanted legal institutions and the great part of Romanian society's (legal) culture".[72] This is because the Civil Code was liberal and capitalist, inspired by the French concepts of freedom, equality and fraternity but transplanted to an underdeveloped and agrarian Romania, where society was still classified into boyars and peasants,[73] which meant that the code was ineffective in the countryside for more than 40 years because the old traditions survived and continued to apply.[74] Moreover, since the legislator ignored the Romanian "national spirit, cultural particularities and (legal) traditions", the transplanted concepts were incapable of functioning properly due to their foreignness, and therefore, the initial point of the whole transplantation, modernising Romanian society failed.[75]

However, gradually, the transplanted rules started to reshape social relationships and the legal institutions started to form the ways of thinking and habits, and in this way contributed to turning the half-medieval agrarian society into a bourgeois society.[76] At the same time, legal professionals and academics produced collective mental "best practices" to internalise, to recreate or even to retransplant the legal transplants at the meta level.[77]

The first Civil Code survived the communist regime without major modifications, which is a remarkable achievement, because it meant that legal professionals had still a tool that contained the main principles of a normal, workable and unpoliticised civil law.[78] As a result, the civil law in force back then was suitable to accompany and to support the transformation from the communist dictatorship to a democratic civil law[79] and from a centralised planned economy to a market economy.

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70 Alunaru (n.61) pp.117–118; with reference to tort law, see Alunaru and Bojin (n.69) p.533.
71 Gutan (n.64) 134.
72 Gutan (n.60) 78.
73 Emőd Veress, "The New Romanian Civil Code — Difficulties in the Transition towards a Monist Private Law" in Emőd Veress and Attila Menyhárd (eds.), *New Civil Codes in Hungary and Romania* (Springer, 2017) p.28.
74 Gutan (n.60) 79–80.
75 *Ibid*., 85, 87, 88: the author refers to Eminescu, the poet and philosopher who described this process as *maimuţăreală* (monkey-like imitation). Gutan concludes that the French influence is underestimated by a constant struggle for legal identity and originality. See Gutan (n.64) 137–140.
76 Veress (n.73) p.28.
77 See Gutan (n.64) 137–140.
78 Alunaru (n.68) p.77.
79 *Ibid*., p.79.

(iii) The present Romanian Civil Code

In 1997, it was decided to enact a new Civil Code, and in 2004, a commission composed of scholars and legal practitioners completed the first draft. The Legislative Council and the Senate adopted the draft and the Legal Affairs Commission of the Chamber of Deputies began deliberations on the draft, which were later suspended. In 2006, the Ministry of Justice set up another commission tasked with extending the scope of the code, for example, with new types of contracts, with the trust and private international law to check which other acts could be incorporated into the code and to ensure compatibility with the implementation of European law. The draft Civil Code was significantly amended by the second codification commission in 2008, and the new Civil Code was enacted in 2009 and came into force on 1 October 2011.[80]

Romanian legal literature does not deny that the new Civil Code is also based to a great extent on legal transplants, although the views vary regarding the level of sophistication and intensity of comparative analysis during the codification process.

Some authors are of the view that the new Civil Code "tries to offer practical solutions based on a thorough comparative law analysis, among other elements" and that the new code does not follow one particular model. They point out that the codification commission analysed the legislation of "large civil law countries" (France, Switzerland, Italy, Spain, Germany) and recent or contemplated reforms, such as the recent civil codes of Brazil and Quebec and also some model laws such as the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts, PECL and DCFR.[81]

Other authors identify the Quebec Civil Code (1991) as the primary source of inspiration if not the provider of the overall pattern of the new Romanian Civil Code, although the Quebec Civil Code is mentioned in the reasons (motifs) only as one of the inspiring sources or models. They attribute this Canadian influence to the Canadian International Development Agency (CIDA), which supported the codification process in many ways, for example, through a group of experts, regular consultation, working commissions and the provision of relevant documentary and comparative legal materials.[82] It may be argued that there was good reason for using the Quebec model, such as its suitability to meet modern regulatory needs of Romania and its dogmatic accuracy, including precision of concepts and definitions (and not its novelty in regulatory concepts, except the trust).[83] Józon observes that

80 Toader (n.42) pp.114–115.

81 Toader (n.42) p.115; see also Veress (n.73) p.34 who confirms this evaluation and highlights the appropriate application of the various models as a result of independent intellectual work.

82 Alunaru (n.61) p.119 and Christian Alunaru and Lucian Bojin, "The Tort Law Provisions of the New Romanian Civil Code" (2011) 2 *JETL* 103, 103.

83 Mónika Józon, "Unification of Private Law in Europe and 'Mixed Jurisdictions': a Model for Civil Codes in the Central Europe" (2011) 6 *J Comp L* 127, 137, 143.

although there could be some sound policy reasons for reliance on Quebec law — for example, that this is the only mixed legal system with French roots that accommodates many common law solutions and could therefore assist in opening the civilian door to the integration of some desirable common law influences — there is no such reason indicated in the Reasons of the Civil Code.[84]

Other scholars emphasise that the new Civil Code is not the result of systemic reform and revision of the previous existing law (statutes, case law and doctrine) but rather a "new body of law which resulted mostly from borrowings from foreign legal corpuses".[85] It is estimated that more than 60 per cent of the new provisions were inspired by the Quebec Civil Code,[86] but the *travaux préparatoires* were restricted to the textual level, ie, to the provisions of the foreign civil codes, whereas the case law and the doctrine "were barely considered".[87] It therefore seems to be advisable to build those professional bridges needed to monitor the Quebec case law and doctrine on the interpretation and application of the transplanted rules, particularly if they were neglected during the codification process; otherwise, the lack of functional guidance "may weaken legal certainty and increase the cost of litigation".[88] The role of judges will be crucial anyway in adapting the transplanted rules to the local needs.[89]

(iv) A remarkable survivor: the *Grundbuch* as a successful contestant among competing legal transplants in Romania

There are some legal concepts that incorporate sound solutions and prevent and/or handle legal conflicts in such a balanced and just way that they can survive and prevail in an alien legal environment.

Instructive from this point of view is the development of the land register in Romania, where the two major concepts on transfer of ownership of immovables (the French consensual system and the Austro-German registration principle) clashed. In those territories of Romania, which once belonged to Austro-Hungary (Transylvania, Banat and Bukovina), the Austrian and German model of *Grundbuch* applied, meaning that to be valid transfers of immovable property had to be by way of registration (in the land register): registration had constitutive effect. In other parts of Romania (Moldavia and Wallachia), there was neither system of land registration nor any land register at all, and the consensual principle of French origin applied in property law in general, based on the first civil code. This was the status at the time of the change of sovereignty in 1918 when Transylvania, Banat

84 *Ibid*., 128, 135, 137, 143.

85 Mónika Józon, "The Influence of European Private Law on the New Romanian Civil Code" (2012) 20 *ZEuP* 568, 570.

86 *Ibid*., 585; see also the systematised summary from the same author on the various parts of the Romanian Civil Code indicating the Quebec influences in each part: Józon (n.83) 138–142.

87 Józon (n.85) 575.

88 *Ibid*., 585.

89 Józon (n.83) 143.

and Bukovina became part of Romania. In 1938, the Romanian Land Register Code introduced the Austrian *Grundbuch* concept, but this could apply only in those provinces that had previously adopted the Austrian–German model as parts of the Austro-Hungarian Empire and where, therefore, a land register existed (although the Romanian government intended to establish a unified land register system in the country, this was postponed due to the 2nd world war). The extension of the Romanian Civil Code (in 1943) and of the Land Register Code (in 1947) to Transylvania did not alter the geographic scope of registration system.

It is thus a unique Central European phenomenon that the uniform Romanian Land Register Code of 1938 could apply only in those territories in which there was underlying Austrian law (including *Grundbuch*). As a consequence, an exceptional and unique mixed legal system came into being in the Transylvanian part of Romania: the consensual principle of French origin applied to movables according to the Romanian civil code, but the German–Austrian registration principle prevailed in respect of immovables, thus partly derogating from the civil code itself (by deviating from the consensual principle).

In 1996, a new land register act was enacted in Romania that abolished the *Grundbuch* concept and introduced the transcription system throughout Romania; consequently, registration was not a precondition to acquiring ownership of the immovable: registration had only declaratory effect (ie, registration was necessary to endow the ownership with *erga omnes* effect, but it was not the act that effectuated the change of ownership).[90]

Romanian scholars severely criticised this choice due to *probatio diabolica* necessarily connected thereto and due to the loss of legal certainty. Finally, the legislator decided to return to the constitutive effect of land registration in the new civil code.[91]

C. Hungary

(i) Development of private law before the first civil code

Shortly after the outbreak of the revolution and struggle for freedom against the Habsburg reign in Hungary in 1848–1849, Act XV/1848 was adopted, which decreed the enactment of a civil code.[92] After the breakdown of the freedom fight, the Austrian Civil Code, the ABGB, was introduced with effect from 1 May 1853. This was later followed by other Austrian laws such as the Land Register Act in 1855. Although there was a real need for modern civil law and the former Hungarian customary law of feudal origins was out of line with the need to modernise the

90 See Alunaru (n.68) pp.83–85 and Alunaru (n.61) pp.113–117.

91 Alunaru (n.61) p.117; see art.557 para.4 and art.885 para.1 of the new Romanian Civil Code.

92 "1. § A ministerium az ősiség teljes és tökéletes eltörlésének alapján a polgári törvénykönyvet ki fogja dolgozni, és ezen törvénykönyv javaslatát a legközelebbi országgyülés elibe terjesztendi". "The Ministry will elaborate on the civil code on the base of full and perfect abrogation of the aviticity, and the draft of the civil code will be laid before the next diet". (Trsl. by the author.)

country, the nation (informally) rejected the ABGB, viewing it as a symbol of Austrian suppression.[93]

Following the defeat of the Emperor at Solferino in 1859, and fearful of another revolution in Hungary and of a war of two fronts, some elements of sovereignty were returned to Hungary with effect from 20 October 1860, through the so-called October Diploma. This is considered to be the first step towards the later compromise of 1867 between the Emperor and Hungary and the establishment of the Austro-Hungarian Monarchy. On the basis of the October Diploma, a *Judex Curiae Conference* (*Országbírói Értekezlet*, High Judge Conference) was convened in 1861, consisting of the judges of the highest court, professors and legal practitioners, in order to identify or rather to determine the laws of Hungary. A return to the legal status before the revolution was not suitable or possible anymore due to subsequent economic developments and the abrogation of feudal tenure in land. The Austrian civil law — as an imposed regime — was still rejected.[94] Although the relevant subcommittee suggested that the ABGB should remain in force, the plenum of the conference decided differently: the ABGB ceased to be applicable in Hungary from 23 July 1861, and it was replaced by the Provisional Juridical Norms (*Ideiglenes Törvénykezési Szabályok*), a collection of transitory rules — procedural and substantive — elaborated by the conference.[95] However, some parts of the imposed Austrian law remained formally in force (for example, the land register system), while others continued to have influence informally, by their persuasiveness and because they filled the gaps in private law (for instance, some parts of property law regarding movables and tort law up to the end of the 19th century).[96] According to Vékás, it is because of the Austrian influence that the Hungarian civil law refused and still refuses the German abstraction principle (*Abstraktionsprinzip*) making the validity of the transfer agreement (*Verfügungsgeschäft*) independent of the validity of the contractual transaction (*Verpflichtungsgeschäft*).[97]

The Austrian civil law, an imposed legal transplant, survived in case law performing a gap-filling function but was superseded by another legal transplant, a kind of competing legal transplant (at least as far as the law of obligations was concerned): the Hungarian Commercial Code of 1875, which adapted the General German Commercial Code of 1861 (*Allgemeines Deutsches Handeslgesetzbuch*, *ADHGB*). Many of its rules were applied by the courts beyond commercial relationships to general civil law relationships, such as the conclusion, interpretation and performance of contracts, contractual penalties and contractual liability. As

93 Lajos Vékás, "Das ABGB und das ungarische Privatrecht" in Fischer-Czermak *et al.* (n.61) pp.307–310.

94 Martyn Rady, *Customary Law in Hungary — Courts, Texts and the Tripartitum* (Oxford: Oxford University Press, 2015) p.225.

95 Vékás (n.93) pp.310–311; however, the ABGB remained in force in Transylvania, Banat, Croatia and Fiume (today Rijeka).

96 Vékás (n.93) pp.312–315. Vékás highlights that in this period even commentaries were written to the ABGB in Hungary, although the ABGB was not in force any more.

97 *Ibid*., p.317.

a result, when the codification process of a civil code started at the end of the 19th century, the ABGB was just one of the patterns considered.[98]

Although the German civil code, the BGB was one of the most important sources of inspiration, the drafters did not import the German code or any other codes word for word. Rather, they engaged in a careful comparative analysis and as a result — however influential the BGB was — the codification committees decided, for example, not to adopt the concept of legal acts (*Rechtsgeschäftslehre*). Since special rules applied to the most important unilateral acts anyway (ie, to wills), it seemed to be more reasonable to design rules for contracts and to apply these rules to unilateral legal acts accordingly (except those unilateral legal acts that were covered by special rules like wills). The first draft Civil Code of 1900 did not have a BGB-like General Part, and this model was similarly followed by the later drafts of 1913 and 1915.[99] The last draft, the Draft Civil Code of 1928 (*Magánjogi Törvényjavaslat, MTJ*), was inspired, to a greater extent, by the Swiss Law of Obligations (*Obligationenrecht, OR* of 1911). This draft never became law but has been referred to in case law as a source of the customary laws of Hungary. The reason why this draft never became law is historical. After the first World War, significant parts of the country were transferred to neighbouring states, but still Hungarian law continued to be applied in some areas and the Hungarian legislator did not want to interfere with that provisional legal unity with those parts through the adoption of new codified civil law.[100]

(ii) The first civil code of Hungary (1959)

It is a paradox that the first codification of civil law took place in Hungary at a time when the country was behind the iron curtain, where the single party system and state-controlled economy prevailed under a communist dictatorship. This had a significant influence on the content of private law (for example, general clauses and principles were reformulated and filled with socialist ideology), especially property law and the law governing enterprises, which were state owned. Nevertheless, the Civil Code preserved the roots and achievements of the former civil law. Even the drafters and law professors emphasised that rules and institutions should not be rejected out of hand simply because they were developed at a different stage of the country's history. They advocated their retention after critical review and reconstruction, if necessary, to adjust them to the requirements of socialism.[101]

98 *Ibid*., p.316.

99 *Ibid*., p.316 and similarly, István Sándor, "Az 1959. évi IV. törvény megalkotása és módosításai 1989-ig" [The Establishment of Act No. IV/1959 and its Amendments until 1989] in Tamás Sárközy (ed.), *Tanulmánykötet az 1959-es Polgári Törvénykönyv előkészítéséről, alapvető intézményeiről és fejlődésmenetéről* (Budapest: Magyar Lap- és Közlönykiadó, Vol.1, 2018) p.16.

100 Lajos Vékás, "Bevezetés" [Introduction] in Lajos Vékás and Péter Gárdos (eds.), *Kommentár a Polgári Törvénykönyvhöz* (Budapest: Wolters Kluwer, 2nd ed., 2018) p.28.

101 Miklós Világhy, "A Magyar Népköztársaság polgári törvénykönyvének rendszeréről" [On the System of the Civil Code of the Popular Republic of Hungary] (1955) 10 *Jogtudományi Közlöny* 457, 480;

The general characteristics of socialist codes (simplicity of the doctrine and text) applied to a lesser extent to the Hungarian code, which was drafted "more in the long shadow of previous drafts and with a watchful and critical eye on foreign models […] it is generally considered as a code of outstanding technical quality"; ie, there was no radical departure from the pre-socialist tradition of civil law.[102] That is why large parts of it could be kept and remained in force during and after the transformation at the end of the 20th century.[103]

The standard and content of the Civil Code that was enacted finally as Act No. IV of 1959, entering into force on 1 May 1960, depended very much on the literacy and education of the drafters and reporters taking part in the codification process (they all were educated and academically socialised in the pre-war period). Although it was obligatory to consider the solutions adopted by the Soviet, Czechoslovakian, Bulgarian and Polish legislators, due to the comparative curiosity of the reporters and drafters, concepts of French, German, etc. origin were also taken into consideration.[104] However, the scope and profoundness of comparative analysis preceding and supporting the codification depended very much on the language skills, interests and academic attitudes of the drafters and reporters.[105] The tort law draft elaborated on by Géza Marton may be taken as an example of a broad and profound comparative analysis. Marton analysed the practice of French courts on *responsabilité du fait des choses,* ie, the struggle to establish a general strict liability regime[106] and commended the Swiss approach on equity (in reducing the damages to be paid) in the Law of Obligations.[107] He referred to the French doctrine (Colin and Capitant) while criticising the fault principle.[108] He carried out a functional analysis of the broad strict liability and the German approach of *prima facie* evidence of fault.[109] He considered the codified concepts on contributory

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similarly, Gyula Eörsi, "A Polgári Törvénykönyv tervezetének vitájához" [Contribution to the Debate on the Draft Civil Code] (1958) 13 *Jogtudományi Közlöny* 1, 2.

102 Cserne (n.48) pp.54, 64.

103 Attila Harmathy, "A polgári jogi kodifikációról" [On the Codification of Civil Law] in András Kisfaludi (ed.), *Liber Amicorum Studia L. Vékás dedicata* (Budapest: ELTE ÁJK Polgári Jogi Tanszék, 2009) p.328; Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" (1995) 43 *Am J Comp L* 93, 106.

104 Sándor (n.99) p.230. See also János Verebics, "Szerződési jogunk 1945 utáni fejlődése és a polgári jogi kodifikáció" [The Development of Our Contract Law after 1945 and the Codification of Civil Law] in Tamás Sárközy (ed.), *Tanulmánykötet az 1959-es Polgári Törvénykönyv előkészítéséről, alapvető intézményeiről és fejlődésmenetéről* (Budapest: Magyar Lap- és Közlönykiadó, Vol.2, 2018) pp.201–202; he refers to the Soviet Civil Code of 1922, the Czechoslovakian Civil Code of 1950, the Polish Law on Obligations of 1950 and the Bulgarian Law on Contracts and Obligations of 1951.

105 See, for example, the draft tort law (and law of damages) elaborated on by Géza Marton, "Tervezet egy polgári jogi törvénykönyv kártérítési fejezetéhez" [Draft on the Chapter on Tort Law and Law of Damages of a New Civil Code] from 1945-46, manuscript, printed in *Az Igazságügyminisztérium iratanyaga az 1959-es Polgári Törvénykönyv előkészítésével és hatályba léptetésével kapcsolatban* (Budapest: Magyar Közlöny Lap-és Könyvkiadó, Vol.I, 2017) pp.101–173.

106 *Ibid*., p.112.

107 *Ibid*., p.114.

108 *Ibid*., pp.118–119.

109 *Ibid*., p.123.

fault of the victim in the various civil codes.[110] Comparative fundaments and arguments underpin the draft. However, this does not change the overall evaluation that, however remarkable the comparative analysis was, there was no systematic approach and guidance.

The same applies to the preparations for and drafting of the first comprehensive amendment of the Civil Code in 1977, when, as the result of the so-called new economic mechanism which commenced in 1968, the strict planned and controlled economy was relaxed, for example, by granting more autonomy to state enterprises and by permitting small family farms and artisan businesses, which resulted in an increased significance of contracts and contract law.[111]

(iii) The 2013 civil code of Hungary

Although, as referred to above, the first Hungarian Civil Code survived the economic and political turnaround in 1989–1990 and seemed to be well-suited to the new circumstances of the country, the civil law became fragmented by the end of the 20th century. The Civil Code was amended numerous times; the civil law itself was very much developed further in case law and the implementation of EU law added a new shift to the law.[112]

In 1998, the government decided to adopt a new Civil Code and in 2002 published the concept elaborated on by an academic codification committee (consisting mostly of law professors and senior judges). The first draft was published in 2006 and went through several rounds of public debate during the period 2006–2007. The Ministry of Justice then dissolved the academic codification committee and completed the draft on its own. The final government draft was submitted to parliament in 2008, and the first version of the new Civil Code was adopted as Act No. CXX/2009. However, the Constitutional Court declared the code unconstitutional and of no legal effect, because of the lack of an appropriate preparatory period before the code entered into force. After the general elections, the new government decided that the recently enacted Civil Code would not enter into force and re-established the academic codification committee to improve the draft. The committee submitted the reviewed draft to the Ministry of Justice in 2011, which the government submitted to parliament in 2012. After some amendments

110 *Ibid*., pp.138–139.

111 See, for example, the instructive comparative analysis provided by Eörsi on defective performance and its consequences: Gyula Eörsi, "A hibás teljesítés jogkövetkezményei (kellékszavatosság, jótállás, kártérítés)" [The Consequences of Defective Performance (Warranty, Guarantee, Damages)] from 1972, manuscript, printed in *Az Igazságügyminisztérium iratanyaga az 1959-es Polgári Törvénykönyv 1977. évi novellájának előkészítésével és hatályba léptetésével kapcsolatban* (Budapest: Magyar Közlöny Lap-és Könyvkiadó, Vol.I, 2018) pp.63–137; Eörsi refers, for example, to the German BGB and case law differentiating between *Leistungsinteresse* (performance interest) and *Schutzinteresse* (protective interest) regarding damages (pp.107–110); he emphasises the English contract law's feature to include a strict liability for losses caused by the breach of contract and touches upon the role of equity to grade that strict liability (p.113).

112 Vékás (n.100) pp.28–29.

in parliament, the new code was adopted as Act No. V/2013 and entered into force on 15 March 2014.[113]

According to Vékás, the head of the academic codification committee, the new Civil Code did not have any one particular foreign prototype or model. The major European civil codes like the German BGB, the Austrian ABGB, the French Code Civil and the Swiss ZGB were already considered during the drafting of the first drafts at the beginning of the 20th century and during the preparations of the first Civil Code of the country in the 1950s. These experiences became part of Hungarian civil law thinking. The drafters of the new code drew some inspiration from the Quebec Civil Code (1991) and the Dutch *Burgerlijk Wetboek* (1992) as regards how a modern civil code was to be structured or what kind of relationships fell within the scope of such a code. However, neither of these two codes served as a model. Much was preserved from the earlier Civil Code, and the time-proven achievements of case law were incorporated into the code. One could say the same about the content of EU directives. Occasionally, some concepts of the CISG, the UNIDROIT Principles of International Commercial Contracts, the PECL and the DCFR served as possible models.[114] There was, however, no comprehensive comparative analysis: "Some parts are based on extensive comparative work, while others do not show any impact of it".[115] There was comparative analysis regarding some new or sensitive areas or in so far as legal transplants were envisaged. Again, the scope and depth depended on the particular reporter.[116]

IV. Conclusions

A. Some general findings on the Central European region

The general statements made in scholarship on legal transplants in action in CEE are tendentially true but to different extents regarding each of the respective countries. For instance, it is stated quite frequently that the civil law from before the 1990s was not suitable for the conditions of a market economy,[117] ie, the socialist civil law was qualified as useless and *tabula rasa* was achieved. This statement is true for the Baltic countries which, in their desire to replace the Soviet heritage with modern private law, turned to "Western" models (state laws and/or model laws) and/or to their own civilian heritage from before the Soviet occupation.

113 *Ibid*., pp.29–31.
114 *Ibid*., pp.32–34.
115 See the evaluation of Cserne (n.48) p.80 who refers to general contract law as a kind of comparative treasure chest with reference to the reform of the German law of obligations (2002) to the recent Dutch civil code and to many European model laws.
116 The reporter and drafter of tort law and law of damages was Tamás Lábady, a judge and (former) president of the Pécs Regional Court of Appeal, and an academic and honorary professor with remarkable comparative experience.
117 Rehm (n.17) 34.

Czechoslovakia — although it was not formally occupied — enacted civil codes in 1950 and 1964 in a true socialist spirit and deviated greatly from the Roman and Austrian heritage. Consequently, an overall reform took place in 1991, and two decades later, a new Civil Code was enacted in 2012, while Romania, Hungary and Poland upheld their "classical model" civil codes (inspired in places by the French, German and Swiss codes so that the culture of civil law was "substantially less ruined" compared to some other CEE states). These codes operated successfully in the new economic circumstances, and changes could be made incrementally. Thus, in those countries where the civil law had become more distanced from its civilian heritage during socialist times, the change was dramatic and there was a remarkable gap between the status of the law and the needs of transforming reality.[118]

The same is true of the second finding, namely, that the legal reception (compounded by unnecessary haste, without public debate and appropriate education) at the end of the 20th century in CEE is characterised, to a greater or lesser extent, by a lack of ownership (ie, "hasty transplants" took place without careful and patient adaptation, ignoring local needs), by insufficient resources in terms of time and money and by excessive segmentation, preferring narrow focuses and overlooking systemic correspondence with other laws ("losing focus through hyperfocus").[119] This applies more to some CEE countries and less to others.

The third finding is that despite the rapid changes, including in legal rules, procedures and institutions, certain patterns of the "socialist" legal culture have been well preserved, for example, the formalistic, magisterial and deductive judicial style.[120] In other words, in some countries, it was (and is) rather difficult to change from "formalistic interpretation" to "teleological considerations".[121] Some scholars attribute this to the "lack of comparative interest" of judges.[122]

B. Conclusions drawn from the analysis of the three Central European countries

Legal transplants are much more shaky and *volatile* if they are *not based on rational authority* but on prestige and/or are imposed. The prestige (and the anticipated legitimacy generating effect) of the model legal system can indeed defeat the rational choice "in the context of a strong legal-cultural dependency".[123]

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118 Cserne (n.48) p.79, see also Luboš Tichý, "Process of Modernisation of Private Law Compared, and the CFR's Influence" (2008) 15 *Juridica international* 35, 36–38, 40–42.

119 Wade Channel, "Lessons Not Learned: Problems with Western Aid for Law Reform in Post-Communist Countries" (2006) 1 *J Comp L* 321, 322-26; she cites examples from Albania and Croatia.

120 Cserne (n.48) 49.

121 Tichý (n.118) 41; Józon (n.85) 574 highlights also "the strongly positivistic legal culture" in Romania, since the courts "never inquire into the underlying policy of the law, this being considered the exclusive domain of the legislator". See also Józon (n.83) 136–137.

122 With reference to Romania, see Manuel Gutan, "Comparative Law in Romania: History, Present and Perspectives" (2010) 1 *Rom J Comp Law* 9, 39.

123 Gutan (n.64) 136.

The goal of developing a modern legal system and a modern legal identity can be thwarted by the alienness of the carriers of this goal, ie, of the transplanted rules and concepts themselves, as the Romanian example showed. An externally imposed transplant will generally fail once the external rule ends, such as when a country gains independence from a foreign power, unless the transplant had already taken root owing to its rational authority.[124] As already shown with regard to Romanian and Hungarian laws, the Austrian (and German) Land Register managed to break through the wall of emotional rejection of the law of the suppressor in the 19th century because it presented a reasonable solution to ensure certainty of legal transactions. The Austro-German model of registration is still the basis of the land register law in Hungary, and it squeezed out the French concept of consensual system (as far as immovables are concerned) in Romania despite the close connections of the country to France and the French legal system.

If there is no clear commitment to a comprehensive comparative analysis as the background to the drafting stage, ie, the codification process in general, then the scope and depth of the comparative approach will depend heavily on the experience, language skills, academic curiosity and preferences (or lack thereof) of the scholars involved. This increases the level of randomness of selection and decreases the chance to identify and adapt the best possible solution based on comparative experience, learning from the shortcomings of the foreign experiences used for the comparison. Comparative experience confirms that the transplantation can be more successful if the legal concept being transplanted is not completely alien. For example, the concept of trust was "imported" from the Civil Code of Quebec into the new Czech Civil Code: when a trust is created, "a separate and independent set of assets arises, not owned by anybody". This approach might have been chosen due its compatibility with Czech legal thinking, since the so-called *hereditas iacens* (ie, "an inheritance not entered upon by the heir" or "a vacant succession"[125]) is something similar in essence.[126]

Transplantation takes place in time and space. Time and timing play a significant role at least in two aspects.

First, the status of the donor system (*status quo* or *status quo* ante) that serves as inspiration. Care should be taken in the course of transplanting: reaching for an earlier status of the donor system can result in overlooking recent experiences and in importing outdated rules and/or rules that cannot operate properly any longer. Tichý calls this "disorientation" (*Orientierungsverlust*) of the legislator,[127] who

124 Jonathan M Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 *Am J Comp L* 839, 842, 847, 868.

125 The source of the English definition is the Merriam-Webster Dictionary, see https://www.merriam-webster.com/dictionary/hereditas%20jacens (visited 1 March 2019).

126 Miloš Kocí, "Hungarian Fiduciary Asset-Management Contracts in the Context of Czech Law" (2014) 2 *ELTE Law Journal* 143, 145–146.

127 Luboš Tichý, "Die Bedeutung des ABGB für das gegenwärtige tschechische Privatrecht — Das ABGB als Modell für das neue tschechische ZGB?" in Fischer-Czermak *et al.* (n.61) pp.290–291.

imports some rules and concepts, which are not in use any more (ie, they are not part of the law in action, although still part of the law in the books of the donor system).[128] Instead of black letter transplantation of statutory rules only, case law and doctrine should also be taken into consideration.

Second, the success or failure of a legal transplant depends very much on the moment when we stop the clock or freeze the movie. It should be recognised that all legal transplant-related findings are relative to a particular moment in time. The first Romanian Civil Code is a very instructive example. This code could have been evaluated as an archetype for Teubner's legal irritant, having triggered new evolutionary dynamics including the reconstruction of the rule and the fundamental change of its environment.[129] Initially, there was the possibility of clear rejection of (codified) law, ie, an alienation and disassociation from (legal) reality. In the long term, however, notwithstanding contradictions and tensions, the transplanted rules, concepts and institutions did contribute to and did participate in the transformation and modernisation. They have had an impact on and shaped relationships in society, habits and attitudes.

I share the view that subsequent to the legal import, the developments, case law and doctrine of the donor legal system should be continuously analysed and evaluated by the recipient system's legal professionals. This happened in Romania after the first Civil Code entered into force: there has always been an intensive and to some extent critical recapitulation of the French case law and doctrine in Romania, which supported the operability and the internalisation of the transplanted concepts. This seems to be more than reasonable in relation to the new civil code and its Quebec origin. However, it may take some time for legal professionals to get used to searching the roots elsewhere (in Quebec) rather than in France.[130]

The source of and instructions on post-transplantation adjustment often originate from doctrine, since at the very beginning (immediately after the new code enters into force), there is not yet any case law. This adjustment can be aimed at the preservation of the achievements of the former case law and doctrine, especially if there is no reasonable explanation why the legislator omitted to incorporate those achievements in their entirety. This happened, for example, to the codification of compensation for non-pecuniary losses in the new Romanian Civil Code. Although this category of losses was not previously codified, their eligibility

128 Tichý (n.50) 480. Referring to the draft Civil Code of 1937, he mentions some "obscure" rules, such as the rules on eaves, s.1270; discharge of rainwater, s.1271; the right on cattle drive and of way, ss.1275–1277 and the right of pasture, ss.1278–1282.

129 Teubner (n.41) 12–13. A "legal irritant" is a concept well known to comparatists, ie, a transplant that triggers a reaction that might be positive or negative.

130 See Józon (n.83) 144. Taking stock of the doctrinal reflections of the new code, Józon concluded in 2011 that the Civil Code is still evaluated in the light of French doctrine and case law. She confirmed this earlier conclusion in 2018 too (regarding extracontractual liability), with reference to three academic treatises (in Romanian) from 2014 and 2015. Mónika Józon, "28 Romania" in Benedict Winiger, Ernst Karner and Ken Oliphant (eds.), *Digest of European Tort Law — Vol.3: Essential Cases on Misconduct* (Berlin: De Gruyter, 2018) p.92.

for compensation (and categories) had been recognised since the interwar period (some aspects since the 1970s) and they were elaborated on in case law and doctrine, mainly with reference to French case law and doctrine. Article 1391 of the new code now contains explicit provisions on non-material losses, but it does not reflect all the categories of these and seems to deviate from the *status quo ante*. The preservation of the former approach (and classification of non-pecuniary losses) is advocated in scholarship, combined with an extensive interpretation of the codified statutory rules.[131]

C. A plea for more applied comparative law

It is still the case that taking advantage of the traditional applied and functional comparative approach is useful: it helps to avoid pitfalls and to identify (or create) reasonable and fair concepts to be included in the legal system. This remains true even if the use of the comparative tool is not always systematic and involves a twist of randomness depending on the interests and command of languages of the comparatists. Incomplete or partial comparison is better than no comparison at all.

Academics have a responsibility to direct their comparative findings to the legislator and to the courts. This responsibility is twofold. First, they "supply" the content: concepts, solutions, interpretations, results of discretion and estimation, etc. Therefore, their responsibility is even greater: since legal professionals read (if at all) the domestic authors first (at least this seems to be the case in the CEE region), therefore every misunderstanding and misinterpretation by comparatists multiply itself and may "infect" the domestic application of the law. Second, it is their task to sensitise the users and adopters of law such as judges, attorneys and notaries to be open minded about comparative approaches and findings.

This is especially important as far as legal transplants are concerned, because the post-transplantation adjustment can be supported and facilitated by continuous monitoring of the case law and doctrine of the donor system, including the legislative or judicial changes there. One can see some promising attempts. For example, Czech authors undertake comparative analysis of CISG regarding new rules of the Czech Civil Code, which have been inspired by the CISG.

It is never too late to conduct comparative research. Even if it was omitted during the reporting or drafting phases of law reform, unbiased comparative analysis can serve as tools of independent evaluations or as mirrors to see how domestic law developed after the legislative transplantation and how the existing

131 See Alunaru and Bojin (n.82) 105, 106, 119. They remark that the legislative content does not cover all aspects of non-pecuniary losses identified in case law and legal literature, which were categorised and referred to according to the various aspects (appearances) of personality (each of which can be infringed), such as the physical, the emotional and the social. They argue that the rules ought to be interpreted more generously. See also Alunaru and Bojin (n.69) pp.542–543 and Christian Alunaru and Lucian Bojin, "XXIII Romania" in Ken Oliphant and Barbara C Steininger (eds.), *European Tort Law 2012* (Berlin – Boston: De Gruyter, 2013) pp.564–566.

results shaped autonomously, and sometimes in isolation. Such local developments may be evaluated and verified or falsified in the light of comparative findings.

This applies particularly in the CEE region, which is characterised and distinguished by a varied history, including struggles between modernising endeavours and insisting on (legal) identity, symbolised by often outdated rules and concepts; imposed and voluntary legal transplants, sometimes even a confusion of competing legal transplants; and rapid transformation at the end of the 20th century that triggered sometimes prudent and reasonable but sometimes hasty and servile legal borrowings.

These dynamics can be smoothed out and balanced by a comparative approach as a kind of methodological vibration damper (also *ex post*); the emotional elements can be sorted out by the calm reasonableness of comparisons. Comparative law can still serve as the coach of legislative actions and/or judicial decisions. Precisely because of their turbulent (legal) history and dynamics, Central European countries need and deserve more applied comparative law.