In Lieu of a Conclusion

As has been said at the beginning, this author's role in conducting this Survey is simply that of a *reader* of cases. If this *Survey* is capable of yielding any general conclusions about the present or future of American conflicts law, those conclusions must be deduced by the reader. The author has nothing to add except to repeat the phrase with which he has ended his previous Surveys:

Thus ended another year in the life of American conflicts law in its strive for maturity.

GIANMARIA AJANI

By Chance and Prestige: Legal Transplants in Russia and Eastern Europe

Introduction

Central and Eastern Europe, as well as Russia, has again openly become a large-scale borrower of Western models.[1]

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I wish to thank James Gordley, Professor of Law at the University of California, Berkeley, and Ugo Mattei, Professor of Law at the Universities of Trento and California at Hastings, for their helpful comments. Research for this paper has been done at the University of California, Berkeley and San Diego, and at the University of Leiden, in The Netherlands.

1. This article deals with the fact of a widespread borrowing of legal models in post-Soviet States and Central and Eastern Europe; it also raises some questions on the *effects* of that borrowing. In order not to lose the focus of this study, I have not entered the terminological debate on the meaning of current notions used to explain legal change. "Legal transplants," "circulation," "influence," "borrowing," are used here as words that refer to the same phenomenon: a wide supply of scholarly and statutory legal models to post-socialist legislators.

This is not to say that I do not consider the difference between a set of more general terms (such as borrowing, or influence) that indicate the *process* of legal change, and narrower concepts (such as legal transplants, or reception), that refer to the *result* of a circulation.

A second note is related to the aptitude of the new models to match the needs of post-socialist societies. Here I am simply casting some doubts on the consistency between the contents of new models supplied by foreign institutions and the needs of the post-socialist economies. Further research on the *implementation* of the borrowing, as well as on the role of legal professions in the application of new solutions, will help us to understand the capacity and the significance of legal reforms in post-Soviet states and Central and Eastern Europe.

On terminology see Wise, "The Transplant of Legal Patterns," 38 *Am. J. Comp. L.* 1 (1990 Supp.).

Following Wolfgang Wiegand:

> "It is possible to differentiate between transfer, transplantation, importation and reception. A closer observation, however, reveals that such terminology does not adequately describe or explain the effective procedure of reception,"

"The Reception of American Law in Europe," 39 *Am. J. Comp. L.* 229, at 236, fn. 14 (1991).

Alan Watson has noticed that:

> "Actually, receptions and transplants come in all shapes and sizes. One might think also of an imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on, and it would be perfectly possible to distinguish these and classify them systematically. [Watson suggests that there is] no point in elaborating a detailed classification of borrowing until individual instances have been examined to see what they reveal."

Legal Transplants. An Approach to Comparative Law at 30 (1974).

During the Socialist era, despite declamations on the "originality of socialist law," Western models were borrowed, even if a careful legal scholarship disguised them, or judges were unaware of their origin. But the scale was slight, if compared to today's situation.

As it is known, before socialism the legal systems of Central and Eastern Europe were deeply influenced by Roman-Germanic law, by scholarly works and statutes originated in the French, German and Austrian, but also Italian and Swiss, legal systems. Some of the Central and Eastern European legal systems experienced in the first decades of this century the dissociation between a body of codes and statutes patterned on the French model, and the language of the scholars, deeply affected by the German tradition. Czechoslovakia and Hungary somehow maintained a conceptual approach to positive data borrowed from Austria.[2]

In Russia, too, scholars and judges were affected by the enormous influence of *Begriffsjurisprudenz* movement,[3] even though, because of the hostility of the rulers and the "stiffness" of Russian positive law, there was little change in legislation in the fields of constitutional and private law.[4]

2. See Quigley, "Socialist Law and the Civil Law Tradition," 37 *Am. J. Comp. L.* 781 (1989); Sacco, "The Substratum in the Civil Law of the Socialist Countries," 14 *Rev. Soc. Law* 65 (1988); Polay, "Einfluss der Pandektistik auf die ungarische Privatrechtswissenschaft," 19 *Acta Jur. Ac. Sc. Hung.* 175 (1977); E. Schnur, *Einflusse des deutschen und des osterreischen Rechts in Polen. (Schriftenreihe der Juristischen Gesellschaft zu Berlin—95)* (1985).

3. Political factors, rather than cultural difficulties, have prevented the draft of a Civil Code for the Russian Empire, heavily based on a pandectist framework, from becoming positive law right before the First World War. The Draft was then one of the covert model for the hasty codification of Soviet civil law in 1922. Adopted for tactical reasons in a *milieu* hostile to codification, the 1922 RSFSR Civil Code modified the previous trend of criminalization of private business, and imposed to reluctant revolutionary judges a difficult coordination between "socialist" and "bourgeois" rules.

Today, the 1913 Draft has been quoted as one of the models of reference from the Russian jurists working at the project of a new Civil Code for the Russian Federation (see infra at n. 45). Many authors have stressed the continuity in legal reasoning of Russian scholars between the pre-Soviet pandectist era and the socialist one. See O.S. Ioffe, *Development of Civil Law Thinking in USSR* (1989); Ajani, "The Rise and Fall of the Law-Based State in the Experience of Russian Legal Scholarship," in *Toward the "Rule of Law" in Russia?* 3 (D.D. Barry ed. 1992); F.J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, no. 45 of the series *Law in Eastern Europe* 74 (1993). Bernard Rudden has noticed that:

> "In structure, general principles, and in many detailed provisions [Russian civil law] has since 1922 been largely a simplified copy of that found in Western Europe, especially in the German-speaking countries. There seems to be little in the Soviet statutes which expressed a particular ideology and even less that might be thought to be determined by a particular economic infrastructure. So a "pandectist" system fashioned to deal with non-socialist societies is fundamentally quite capable of handling post-socialism. Banality can be a blessing." "Civil Law, Civil Society, and the Russian Constitution," 110 *The Law Q. Rev.* 56, at 61 (1994).

4. Law professors and the Senate's judges have been, in the last twenty years of XIXth century, the main actors of the circulation within the Russian Empire of pandectist models; see for instance the translations into Russian of *Pandekten* of Baron, made by Petrazhitskii, and of *Dernburg*, made by D.D. Grimm. A thorough analysis of the creative role of the highest body of the Russian judiciary has been made by Wagner, "Legislative Reform of Inheritance in Russia, 1961-1914," *Russian Law* 143 ff. (W.E. Butler ed.) (1977); see also, Silvestri, "The Contrast between Modernization and Tradition: Land Ownership during the Last Decades of the Tsarist Empire," 19 *Rev. Central & East Eur. L.* 1 (1993).

Today, after a complete emancipation from ideology,[5] post-Soviet legal systems must be reclassified: they can no longer be grouped within the family of "socialist law."[6] One might automatically conclude that Roman-Germanic legal family has expanded to the East.[7] Indeed, during the last few years post-Socialist legislators have turned to pre-Socialist sources of law that were greatly influenced by classical continental models.

Nonetheless, one could raise a doubt. Perhaps the end of the ideology does not only merely means a return to the models of continental Europe, but to a Western Legal Tradition where the geographic and cultural limits that have traditionally been used in order to classify national legal systems into "legal families" no longer matter.[8] In the 45 (or 70) years that elapsed between the beginning and the end of the socialist experiment, the major distinctions have been blurred, not only among civil law systems, such as the French and German, but between them and the common law. In private as well as commercial law, Anglo-American principles are increasingly influencing continental scholars and judges.[9] At the same time the European Union (EU) and initiatives in uniforming legislation have inspired a rethinking of rules and concepts, while business practice has invented solutions common to all legal systems.

The prestige of common law models has become relevant in Russia and in post-socialist Europe after the demise of socialist law. Initially both Eastern and Western jurists probably over-emphasized the needs of an "international traffic of legal ideas."[10] This emphasis

5. See the volume *The Emancipation of Soviet Law*, no. 44 of the series *Law in Eastern Europe* (F.J.M. Feldbrugge ed. 1922).

6. See Kuss, "Methodische Fragen der Ost-west-Rechtsvergleichung im Zeichen des Systemwechsels in Osteuropa," *Zeit. Vergl. R. Wiss.* 405 (1992).

7. As it has been written in the conclusion of a study on the new Romanian post-socialist law: "Nous assistons en ce moment à un processus de réintégration du droit roumain dans son système juridique naturel," Zlatescu Morianu-Zlatescu, "Le droit roumain dans le grand système romano-gèrmanique," 43 *Revue Internationale de Droit Comparé* 833 (1991).

8. See Glenn, "La civilisation de la Common Law," 45 *Revue Internationale de Droit Comparé* 559 (1993); Lawson, "The Family Affinities of Common-Law and Civil-Law Systems," 6 *Hastings Int'l. & Comp. L. Rev.* 93 (1982) and, of course, H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

9. W. Wiegand mentions several areas of integration of American law and American legal thought into continental law, such as business and tort law, as well as constitutional law; see Wiegand, op. cit., supra n. 1, at 238-48.

10. See, for instance Anderson, "Exporting Democracy. U.S. Lawyers Help Eastern Europe Draft New Constitutions," *ABA Journal 18* (June 1990); "New Constitutions Look to Our Own," *Trial* 56 (November 1990); Davison, "America's Impact on

was deeply connected with the widely accepted belief that with the introduction of the formal elements of democracy and of the legal pillars of market economies a "happy end" to the transition would have followed.[11]

Foreign and local jurists cooperating in the law reform process have now entered a second stage, marked by a more critical approach towards "paper laws" and by a more conscious attitude towards the "Anglo-American thinking" of legal advisers[12] and of international financial institutions.[13] Nevertheless, the dissemination of new models remains relevant and it affects an immense area included between Warsaw, Poland, and Almaty, Kazakhstan.[14]

Consequently, it may be that the law within Central and Eastern Europe is not as homogeneous as it has been assumed for decades. It may be that the reception of new models has weakened the cultural links that used to tie the legal cultures of these countries to continental influences (scholarly and statutory) that were sometimes French, sometimes German, sometimes Italian and Austrian.[15] Moreover it is certainly true that today, in contrast to the past, reception takes place not only on the initiative of those who receive the new models, but also on that of those who propose them.

Offer and demand of legal models is ruled not only by the technics of legal expertise, but also by the political and economical decisions that govern international relations.

In this last way, three questions are currently raised by those observing post-socialist societies in transition:

a) can legislation act as an important factor in the creation of market economies?[16]

Constitutional Change in Eastern Europe," 55 *Albany L. Rev.* 793 (1992). For a possible explanation, Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law," 42 *Am. J. Comp. L.* 195 (1994).

11. For a critical assessment of "direct and indirect interference by the West into the process of transition in Eastern Europe," see Meier, "The Transition in Eastern Europe. What Went Wrong? The responsibility of the West," 24 *Est-Ovest* no.5, 9ff. (1993).

Paul Brietzke has investigated the links between the "idealized vision" of neoclassical economists, as applied to the Eastern European transition, and the private law perspective. In his opinion "The intense individualism of the neoclassical perspective on law is necessary but ultimately not sufficient to the task of East European reforms," see "Designing the Legal Frameworks for Markets in Eastern Europe," 7 *The Transnational Lawyer* 1, at 18 (1994).

12. The suitableness of Anglo-American models for the CIS and Eastern European legal reforma has been explained making recourse to several factors, such as more flexibility (in relation to bankruptcy law), or more independency of private law rules from public law. See Popa, "Bankruptcy Reorganization and the Death of Communism," 5 *SEEL Survey of East European Law* No. 4 at 3 (1994), stating that "American model of bankruptcy reorganization is the best alternative available among Western insolvency statutes," at 3; see also Brietzke, op. cit. supra n. 11, at 5, discussing the connections between common law principles and the neoclassical search for efficiency.

A different, original thesis has been sustained by Paul Rubin, arguing that "at least a temporary use of common-law principles" in the post-Communist countries would be useful, saving the costs implied by the shortage of skilled lawyers and the slowness of the legislatures' work:

> "The argument here is that the relative price of legislators and skilled lawyers is higher in the post-Communist countries than elsewhere. Thus, whatever the optimal balance between common law and code may be in more settled countries, the optimal mix is more towards a common law process in the newer economies."

Rubin, "Growing a Legal System in the Post-Communist Economies," *Cornell Int. L.J.* [forthcoming]. Following Rubin's speculations post-Communist governments should support the use of arbitration for dispute resolutions. This more flexible process would help a step-by-step improvement of domestic legal cultures and would represent a partial alternative to legal change through legislation.

13. "For many years the ideas of the [neo-liberal economy] school had been implemented in the economic policies pursued by both the Conservative Thatcher government in the United Kingdom and the administration of President Reagan in the United States. The principles of the neo-liberal school also provided a basis for the credit policy of the International Monetary Fund and the World Bank who compelled their insolvent debtors to adopt neo-liberal principles for their economic policies, as was the case in Chile or Bolivia," Bozyk, "The Transformation of East Central European Economies: A Critical Assessment," 25 *Studies in Comparative Communism* 257, at 265 (1992). The adoption of the "Latin America recipe" for the post-Communist countries is discussed by A. Przeworski, *Democracy and the Market* (1991).

14. One should of course distinguish among different legal cultures and traditions, that could differently affect the effectiveness of the transplants. Even within the post-Soviet republics one can notice important peculiarities; the distrust towards Western ideas and solutions, recurrent in the Russian culture, is not known at the same level in Central Asia; at the same time, the roots of continental legal culture are stronger in Russia, Ukraine, Belarus, than in other CIS States. Also because of this, legal personnel in the different countries could have a different understanding of Anglo-American models.

A well known example of important law drafted with the advice of common lawyers is the Russian Law on Pledge. For an analysis of the 1992 Russian Law on Pledge, see Frenkel, "New Russian Secured Transactions Regime," 4 *SEEL Survey of East European Law*, No. 2, 1ff. (1993). See the text, translated by W.B. Simons & K. Hamre, in 18 *Rev. Central & East. Eur. L.* 578 (1992).

A less known example of model law is the draft on secured transactions, drafted by a commission of twenty civil and common layers as an EBRD project. The draft, which contains many concepts that belong to the common law tradition (such as registration without court involvement, and a unitary charge to cover both movables and immovables) has been used in Hungary and Poland. Both countries, however, adapted the text to their conditions of registration and enforcement. See, "A Model Law with Nowhere To Go?," 4 *East Eur. Bus. L.* no. 5, at 2 (1994).

15. Unlikely other European socialist countries, Soviet Russia formally repealed, after 1917, all sources of Czarist law. Because of this and of the longer time elapsed, jurists in the post-Soviet States today have many more problems than their colleagues in Central and Eastern Europe to revive solutions contained in the pre-socialist experience; this factor, combined with a propensity of Russian jurists to accord prestige to Anglo-American models, could favor a loosing of connections with Romanistic schemes. Stronger reasons could push the legal systems of those Central Asian Republics away from this Romanistic frame where Sovietisation has represented the first (and unique) impact with civil law categories.

16. The question, of course, cannot be isolated from two subquestions: a first related to the "type" of legislation we are talking about (fundamental private and commercial legislation, or advanced solutions, originated in the "post-industrial" era, or both?), a second one related to the degree of effectiveness of the borrowing.

It is worthwhile noting that the problem of priority between legislation and "the economic basis of the society" is recurrent. Even in the Stalinist era it has been de-

b) can legislation act as an important factor in the creation and the maintaining of democracy?[17]

c) is the creation and maintenance of democracy a prerequisite for the creation and functioning of the market?[18]

Instead of trying to answer all these questions, I will focus on the first of them. More particularly, Part II and Part III of the present article deal with the promotion of a market economy by the law.[19] In order to mild the impression of a sharp and radical discontinuity between a static and inert socialist era and a new post-socialist era that is dynamic and open to new models, Part I will study the influence of alternative models during the Socialist era.

bated whether the law (in this case *socialist Soviet Law*), originally conceived by Marx and Engels as a result of economic and political conflicts, could drive the evolution towards socialist economy of the People's Republics of Central and Eastern Europe.

17. This question is of particular interest (but not of exclusive jurisdiction) for those studying the transplant of new models in constitutional law; see supra n. 10; see also Arato, "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe," 14 *Cardozo L. Rev.* 661 (1993); see also, Ludwikovski, "Constitution making in the Countries of Former Soviet Dominance: Current Developments," 23 *Ga. J. Int'l. & Comp. L.* 155 (1993).

18. The bibliography related to this third question is vast, and mainly produced by political scientists and economists. See for example Przeworski, op. cit. (1991), arguing that:

> "The durability of new democracies will depend [. . .] not only on their institutional structures and the ideology of the major political forces, but to a large extent on their economic performance" (at 189).

From the juridical side, it is important to notice the increasing series of critical comments (especially in the U.S.) on the schizophrenic role played by the European Union towards some Central and Eastern European States: sustaining economic development and signing agreements from one hand, and barring full membership access from the other hand. See Marko, "A Critical Review of Market Access in Central and Eastern Europe: the European Community's Role," 17 *Md. J. Int'l L. & Trade* 1 (1993) and Kennedy & Webb, "Integration: Eastern Europe and the European Economic Communities," 28 *Colum. J. Transnat'l L.* 633 (1990).

See also, Waelde & Gunderson, "Legislative Reform in Transition Economies: Western Transplants—A Short-Cut to Social Market Economy Status?," 43 *Int. Comp. L.Q.* 347 (1994); having questioned whether legislation can be "a leading force of fundamental change," the authors widen the matter, investigating whether the former Soviet republics are "limited by the existing social, cultural, and legal foundations on which the new framework is to be built" (at 349). Waelde and Gunderson find analogies "which help to generate some concepts and examples" in the reception of Western law in the former colonies, and in particular of U.S. private, commercial, and labor law in Japan after the Second World War (at 366-67).

19. The focus of this article is on the borrowing in the field of commercial and civil law, but one has to remember that a similar game is played within the sector of constitutional law. Precise information on such field is provided quarterly by the *East European Constitutional Review*, published by the Center for the Study of Constitutionalism in Eastern Europe at the University of Chicago Law School in partnership with the Central European University.

See also supra n. 10, at Ludwikowski, op. cit., supra n. 17.

I. Alternative Solutions to the Soviet Model

During the first decade of "Sovietisation" of Central and Eastern Europe (1945-1955) the socialist model in civil as well as in constitutional law restrained the peculiarities of national legal cultures.

Beginning in the late fifties, nevertheless, the influence of Soviet scholarship and legislation, which promoted uniformity, began to interact with other forces leading to diversity, some of which were inspired by "traditional" (i.e., pre-socialist) solutions of the different Central and Eastern European States.

Scholars in Central and Eastern Europe began to free themselves from the conformist attitude of the Stalinist age; national peculiarities came off the limb where they had been confined. At the same time, some private law rules until then considered as "temporary" and merely tolerated, strengthened their position; private property consolidated (especially in Poland) the admittedly limited role it had been assigned. In constitutional law a new praxis (sensitive to pre-Socialist tradition) started to replace several solutions blindly borrowed from the Soviet example.[20]

Between 1964 and 1975 civil law was recodified in many countries, including the fifteen Soviet Union's republics, Poland, Czechoslovakia and lastly (1975) the German Democratic Republic, where the local jurists finally freed themselves from a troubled thirty years' of self-comparison with the scholarly model contained in the German Civil Code (BGB).[21] When the commissions of codification finished their work in the different countries, the Stalinist age of forced reception was over. The jurists who prepared the drafts could then mention the models that influenced them, acknowledging pre-socialist national influences, as well as referring, occasionally, to "international and foreign models."[22]

However the existence of a substratum taken from Roman-Germanic Law does not by itself explain the success of models alternative

20. In Poland, for example, the Parliament (*Sejm*) appropriated since 1956 the fullness of its law making power, a power that between 1950 and 1956 was mostly exercised by its permanent commission according to a constitutional disposition that faithfully followed the Soviet solution; see Izdebski, "Les amendements à la Constitution de la République populaire de Pologne," 36 *Revue Internationale de Droit Comparé* 79 (1984); see also Peteri, "The Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and Eastern European Law," in 61 *Tulane L. Rev.* 1397 (1987).

21. The persistence of East German legal scholarship for the creation of a system of sources and of a theoretical apparatus relating to the law of the economy as a sector entirely separated from the civil law has been explained by making reference to the decennial difficulty of elaborating a civil law in its turn autonomous from the BGB's tradition. See Markovits, "Civil law in Germany. Its Development and Relation to Soviet Legal History and Ideology," 78 *Yale L.J.* 1, at 35 (1968).

22. See for example the introductory report to Parliament of the draft of the Polish Civil Code quoted in Grzybowski, "Reform of Civil Law in Hungary, Poland, and the Soviet Union," 9 *Am. J. Comp. L.* 253, at 254 (1961).

to the Soviet one. A further explanation must be found in the decision (taken, particularly, in the GDR and in Czechoslovakia) to incorporate within the Civil Codes new classifications, so that the socialist law affected also the form of the provisions, and not only their content.[23]

Such choices were often the result of a polemical reaction of the legal culture of a socialist country against a traditional model. In such cases these choices show us the loss of expansive power and the decline of a model (e.g. the model taken from *Begriffsjurisprudenz*) that in other areas was successful and prestigious even after the socialist option.[24]

The same can be said of fields of law other than civil law narrowly conceived.

In constitutional law, though the political significance of many of its provisions left legislators little room for innovation even after the Stalinist era, nevertheless innovations took place in all Central and Eastern European countries, sometimes to reinstate traditional rules and institutions (Poland, Czechoslovakia), sometimes to discover solutions that reflected the peculiarity of the national experience of the building of socialism, as compared with the Russian experience (Albania, Romania).

As the Stalinist model lost its hold, attempts to elaborate new constitutional rules became less sporadic and ephemeral.[25]

23. The strong ideological drive (as well as the consequent abstraction from practical problems that resulted from it) that accompanied some national choices in the sixties, later induced the courts to elaborate makeshift cryptotypes.

The Czechoslovakian Civil Code of 1964, for example, avoided regulating easements law. During the following fifteen years, the courts used other instruments (e.g., the prohibition of abuse of right (*abus de droit*)) in order to achieve results analogous to those that were achieved before the exclusion of easements law from the civil code. The legal scholarship rehabilitated the easements law in the eighties, on the occasion of a revision of the code in 1982.

Similarly, the code of 1964 did not provide a place for the notion of juristic person, so accepting the position of those scholarly theories that insisted on the necessity of "typifying" the notion, with reference to the closed nature of subjects allowed to exercise economic activity (economic organizations) and of other subjects (social organizations). However, within a few years, those theories were abandoned and the legal scholars kept on thinking over the abstract notion of a juristic person.

See Fekete, "Problems of Codification of the Institution of Juristic Person in Czechoslovak Civil Law," in *Questions of Civil Law Codification* 48ff. (A. Harmathy & A. Nemeth eds. 1990).

24. The result of such operations was that the civil law of the German Democratic Republic in the late seventies, for example, appeared to be more distant from the German models incorporated within the BGB than the Russian (positive) civil law (and than the Lithuanian, the Ukrainian, and the Kazakian, etc.). However, one has to consider that the "originality" of the GDR's civil law contained in the *Zivilgesetzbuch* of 1975 was emphasized by a legal scholarship that for ideological reasons was prone to hide the permanence of traditional rules.

25. This is, in particular, Poland's case; see Izdebski, op. cit., supra n. 20, at 79.

The decline of the Soviet model not only led to a rebirth of national solutions, but to the borrowing of socialist models from Central Europe by the Soviet legal system.

An example is family law. During the age when the allegiance to the Soviet model was demanded, it flattened the peculiarities (religious and ethnic) of the various systems. The importance of the rules of Catholic or Reformed, or Orthodox Canon law as well as Islamic law had been replaced by the secular Soviet state model. However, at that time, Soviet Stalinist family law was backward compared to the revolutionary choices formalized by the first RSFSR's Codes on Marriage and Family (1918, and 1926). The Soviet model encouraged laicisation in certain countries, but "regression" in others, where the secularisation of family law was comparatively more advanced (in particular, Czechoslovakia and the German Democratic Republic). The end of the Stalinist age went hand in hand with a change in the ideological attitude towards some rules of family law. As the pendulum moved again towards informality, the libertarian models elaborated by the Eastern German and Czechoslovakian legal scholarship, repressed during Stalinist rule, could find a place.

The change is evident in economic law as well. Here, Western law had always had a great influence. In international trade, for instance, the socialist countries had used "traditional" models of commercial law, including banking law and industrial law, and private international law. Such models were sometimes disguised as socialist.[26] They were included in sources that were sometimes very important, such as the Czechoslovakian international commercial code of 1964, and sometimes marginal.[27]

It was not before the early seventies, however, that in some socialist countries the relaxation of central planning and the acceptance of a (partial) pluralism of producers began to induce a break with legislation based on the Soviet model. It began covertly, became more and more open, then became complete during the last period of the Soviet experience. The legislation of the age called *"perestroika"* (1985-1991) was greatly influenced by scholarly and legislative proposals elaborated especially in Hungary, since the end of the sixties, and in Poland, since the beginning of the eighties.

The economic reforms of the Soviet system during the second half of the eighties was thus grounded in a body of enactments, including economic and labour law, previously tested in other socialist systems.

26. Of course, participation in international treaties and uniform conventions is a different story. However, it has to be noticed that in several cases the countries of this area were inspired by certain treaties and conventions in the drafting of dispositions of positive law, even if formally they were not part into them.

27. See Armstrong, "Letters of Credit in East-West Trade: Soviet Reception of Capitalist Custom," 17 *Vand. J. Trans. L.* 329 (1984); Maggs, "International Trade and Commerce," 42 *Emory L.J.* 449 (1993).

The peculiarity of those models was the attempt, that proved to be ephemeral, of reconciling well-rooted dogmas of socialist law with the new options for economic policy, that were captured by the slogan "making of a socialist market." In this way a model that until then was weak, such as the managerial independence of business enterprises,[28] became strong. The solutions elaborated in a slow and troubled way in Poland, since 1980, on the workers' control of the management, on the enterprise's title over the goods, on the organization of the relationship between enterprise and ministerial apparatus, became successful, once the ideology changed, because they could reconcile the "classical" principle of collective ownership of the means of production with the new principle of active workers' participation in production.

The Polish model inspired the Bulgarian, Soviet, and lastly Czechoslovakian Acts on company law that from 1987 to 1989 marked the end of the inelastic model of planning.[29]

A similar event affected another weak model: the cooperative. Before the ideology changed, the requirement of spontaneity of formation had been abandoned, and the cooperative had been transformed into a body subject to the will of the planning authorities. Afterwards, the cooperative took on a new relevance when Socialist legislators at first tolerated and then accepted the development of a private sector.[30] Moreover, the Hungarian (1971) and Polish (1982) Acts on cooperatives, that restored the basic principles of organization of the cooperative, became models for the Soviet legislator at the end of the eighties.

The monodirectional flow that has developed, *ratione imperii*, from Soviet East towards other European socialist countries', progressively changed its direction. The limited influence of alternative models from socialist countries which were supposed to be consistent with the socialist ideology was a brief prelude to today's wider circulation of Western models.

28. As everybody knows the self-managing organization of business enterprises was realized as strong model only in the (heretical) Yugoslavian experience, where it received constitutional protection and a detailed regulation in constitutional, civil and labour law.

29. See Brzezinski, "The EC-Poland Association Agreement: Harmonization of an Aspiring Member State's Company Law," 34 *Harvard Int'l. L.J.* 105, at 111 (1993).

30. The different ways of accepting the idea of a competition between state sector and private sector are examined in *Privatisation and Entrepreneurship in Post-Socialist Countries, Economy, Law and Society* (B. Dallago, G. Ajani & B. Grancelli eds. 1992).

II. The Demand of New Models of Civil and Commercial Law

1. The Extent of the Demand

During socialism, it was difficult for a Westerner to study the Western civil law's influence on socialist civil law. It required examination of hidden ways of formulating rules. During the current post-socialist phase, however, the concealment has changed in an open acceptance of foreign scholarly and statutory models, contained either in *ad hoc* drafts or in enactments already tested by practical application. The concealment disappeared because of pressure of various factors: the need to legislate in a short time and to fill the vacuum left by the previous experience; pressure from supranational organizations as well as of international financial institutions; and also the simple desire of the politicians, and jurists to provide one's system with tools already in use elsewhere.

The picture appears more and more complex as one considers its sheer size.

The birth (or rebirth) of new states, where the jurists, as part of the intellectual class, are often animated by a spirit of polemic against the scholarly and statutory model that was previously dominant, poses new questions for them. To what models do the Polish, Ukrainian, Estonian, Armenian, Slovenian, or Russian jurists feel related nowadays? What "modern" solutions does the ministerial executive of such countries look at when he has to draft an enactment? Moreover, a further complexity is the multiplication of persons and organizations who propose new models to local legislators.

It seems necessary then to focus the attention at first on the *demand for new models*.

An example of cultural continuity is that all countries in the area have maintained a strong sense of "optimistic normativism,"[31] that is to say a belief in the use of the law as an instrument of "social engineering." The new codifications, as well as different enactments on privatization, have been seen as a prerequisite for the creation of a free market.

Many countries in the area have preserved the consulting agencies active during the socialist period in order to assist the legislator in the "planning of the law-making activity."

For example, in the Ukraine, a parliamentary Assembly's decree entrusted the "Legislative Research Center" with the task of drafting bills necessary for a global reform of the judiciary.[32] In Russia, the famous Pan-Federal Scientific Institute for the Soviet legislation car-

31. See the considerations made supra at n. 15, and accompanying text.

32. This decree is published in *FBIS Report. Central Eurasia* 104 (September 1992).

ries on its activity under a different name,[33] supported by new organizations, such as the Private Law Research Center under the President of the Russian Federation, founded in November 1991 as a Soviet Union agency, and later transformed into a Russian federal body, but also active in the preparation of drafts for other Member States of the Commonwealth of Independent States,[34] or the Federal Commission for the Provision of a Legal Information System.[35]

If we observe the programs produced by these agencies during the three or four years after the events of 1989, and the mass of enactments by the lawmakers in the area, we can classify the areas that have required new interventions in the fields of civil and commercial law as follows:

— general legislation (on rights of ownership, commercial companies, negotiable instruments, types of contracts, bankruptcy, competition, trade marks, labour, consumer protection, environmental protection, taxation, and so forth);

— specific legislation on aspects of finance and credit (on the banking and insurance systems, on stock exchanges, on the activity of the Central Banks, on the organization and activity of investment Funds, and so forth);

— economic legislation (mainly focused on the different aspects of transforming the state enterprises, in order to create a legal framework for the privatisation of state assets);

— legislation on foreign investments and international trade.[36]

In the first place, the fact that most of the systems concerned adopted, in a short lapse of time, legislative and administrative enactments in these areas, raises questions about the models they were

33. The forced unification of the sources of law in the fifteen Republics that were part of the USSR is over, as everybody knows, since the Union's extinction (December 1991). The treaties that founded and regulated the organization of the Commonwealth of Independent States (CIS) did not provide for production of supranational sources. A limited possibility of "spontaneous" unification of national legislations was provided for by a disposition according to which governments and parliaments of the Independent States shall adopt "plans of legislative production" every six or twelve months, including Presidents' decrees, and shall cooperate to determine the content of such plans.

Recently, the idea was proposed of proceeding to a recodification of civil law within the Member States of the Commonwealth of Independent States by reference to a (not binding) common model. See the "Recommendations" of the International Conference *Grazhdanskie Kodeksy Gosudartsv Sodruzhestva: Kharmonizatsilia i Modelirovanie* (The Civil Codes of the Commonwealth of the States: Harmonization and Modelling) held in St. Petersburg in March 1994.

34. The Research Center for Private Law was endowed with personality by the President's order of 14th July 1992; according to its corporate purpose, its main activity consists in the preparation of drafts for the Presidency of the Russian Federation, in the various sectors of private and commercial law.

35. The Federal Commission was created by a Presidential Edict on January 1994; see, 4 *Russia and Commonwealth Business Law Report*, no. 20, 11 (1994).

36. See, 1 *Law in Transition. A Newsletter on Legal Cooperation & Training Form the EBRD* (Winter 1992-93).

using. Secondly, one would expect a revision and a systematic arrangement of that vast body of legislation.[37] In some cases those sources (in particular the legislation on commercial and company law of the Russian Federation and of other CIS countries, were adopted at a time when compromises with remaining dogmas were still necessary. In other cases, legislation was enacted to achieve an immediate political goal, such as admission to international banking bodies, or partnership to the General Agreement on Tariffs and Trade.[38] In some other cases, the quick evolution of the economic situation made the rules adopted obsolete and inconvenient. Sometimes innovation was spurred by ad hoc agreements with the interested parties. Sometimes it was adopted to attract foreign investments. An example is tax legislation comprehensively granting privileges to foreign investors when the national private enterprise was almost non-existent.

Here, it is necessary to differentiate among models, by distinguishing between contingent models and lasting models, between political macro-models, that incorporate choices of economic policy (for example, organization of an autonomous Central bank, the authoritative protection of competition) and technical models, that can accompany those choices.[39]

In particular, the legislators seem to be aware of the temporary nature of some choices. Sometimes they have formally chosen an *interim* rule. Sometimes they have implicitly accepted the temporary character by using administrative rules instead of legislation. Sometimes they have restored pre-war enactments that are only suitable as general regulations.

37. As an example of the impressive amount of legislation the new parliaments and governments of post-Soviet States are called to adopt or to amend in a short time, one could mention a letter the Russian President Boris Yeltsin has sent to the Chairman of the Russian Assembly (the *Duma*), including a list of 54 bills the Head of the State wanted to submit to the lower chamber of the RF Assembly in the course of 1994. The list refers, among others, to: the judicial system of the RF; the Constitutional Court; the Supreme Court; the prosecutors' office; the procedure for passing federal constitutional laws and federal laws, and their coming into force; the Civil Code; the Criminal Code; the Criminal Process Code; the Land Code; the Housing Code; the right to information; the banking system; the bar; the administrative justice; the status of political parties and of non-profit organizations; the elections of the President of the RF; the legal status of foreign citizens; see, 4 *Russia & Commonwealth Bus. Law Report*, No. 22, 9-10 (1994).

38. See Breskovski, "Bulgaria and the GATT: A Case Study for Accession," 17 *World Competition* 95 (1993); Ebenroth & Grashoff, "Trade-Related Investment Measures (TRIMS) osteuropaischer Reformstaaten in der Erweitungsphase des GATT," 40 *Recht der Int. Wirtschaft* No. 3, 181 (1994).

39. The organization of an autonomous Central Bank, the anti-trust legislation, the central control over the stock-exchange are models of economic policy that are traditionally referred to the development of the American economic system.

A country of Central-Eastern Europe that today adopts an Act to regulate competition can not only use the technical model represented by the American law, but also the technical model incorporated in the EU legislation, or specified by the German, French or Italian Acts.

It then appears clear that, mainly because of the size of the demand for new models, today's situation has a completely new character. To compare it to post-war period, when the solutions of bourgeois law were repudiated and the Soviet model was adopted, would not capture its significance.

Formerly, the new models were contained within the statutory and scholarly *corpus* of Soviet law. Today, the new models to be assimilated are spread in national and super-national sources that differ in origin and kind, in uniform legislation, as well as in ideas elaborated by legal scholarship and practice. Moreover, beside the so-called "official" demand of bodies institutionally established as legislator's advisers, there is a spontaneous demand, that sometimes follows traditional academic channels and depends on the accident of personal relationships, and sometimes it is organized in other ways.

Very likely an inconsistent, fragmented, chance reception of new models is taking place.

2. *Projects of (Re)codification*

To prevent an inconsistent and unsystematic reception, one could resort to codification, at least for certain aspects of civil and commercial law. Despite the decline of civil law codification in Continental Europe, there is a myth of civil law codes among Central and Eastern European countries that, since the early Nineties', has made codification a priority in the legal reform agenda. The myth dates back to the socialist age, when virtually all countries in the area codified and recodified civil law (or civil and economic law),[40] and it has been strengthened today by East-West co-operation in the legal reforms.

Indeed, initially, national legal scholars and foreign commentators generally agreed on the structural validity of the old socialist civil codifications, except the codes that searched too daringly for originality, such as the East-German *Zivilgesetzbuch* and czechoslovakian *občanski zakoník*.

Thanks to their Roman Law structure,[41] the socialist Civil Codes seemed at a first stage to be suitable for the transitional phase from plan to market. Today, however, the radical nature of the innovation process, together with the interest of those who propose new models to exaggerate the failures of the old texts, has convinced many not only that the socialist civil codes are inadequate, but also that a simple re-styling would not be enough.

40. See Ajani, "The Soviet Experience with Codification: Theoretical and Comparative Perspectives," *The Soviet Sobranie of Law* 184ff. (Richard Buxbaum & Kathryn Hendley eds. 1991).

41. See Rudden, op. cit., supra, n. 3, 61ff.

One reason so much emphasis is placed on the drafting of civil codes is the interdependence of economic and legal reform. Among economists there is general agreement that, although all structural reform measures can not feasibly be introduced simultaneously, a *critical mass* of comprehensive reforms has to be introduced at the outset of the transition, in order to create minimal conditions for the development of market relations. Substantial legislation needs to be introduced to prevent both producers and consumers from adopting a wait and see attitude in the expectation that current policies may be subsequently reversed by the government.[42]

Accordingly, many local jurists and foreign advisers have argued that an orderly transition to and the formation of a market economy must be supported and consolidated through the creation and, when possible, the restoration, of a comprehensive and permanent legal framework for the exchange of goods, services and capital, that will provide the basis for other law reforms.

Transformation of the whole economic system requires the repeal of a huge body of pre-existing legislation mainly in the administrative field, but also in the area of economic law. The organization of a new hierarchy of the sources of law is, therefore, necessary to give an equal status to all owners (individuals and entities) that would manage the means of production. It also would establish rules and standards that traditionally support and regulate decentralized economic activities.

To avoid inconsistency in the adoption of the rules, a comprehensive modern codification of civil law seems to be the best tool to prevent chaos and provide the *technical* guarantees for the further development of both civil and commercial legislation. In this respect a Code is the necessary complement to *political* guarantees embodied in a new Constitution and in International agreements. Therefore, far from being a simple legislative act, a Civil Code can also be considered as a depository of the fundamental rules for the new economic freedoms and commercial relations.

Historically, in the European continental experience, Civil Codes have contained the fundamental legal decisions supporting private initiative and autonomy. The following set of provisions and rights that were not fully recognized under the feudal system were embodied in the Civil Codes of Europe:

a) the recognition of a general legal capacity of individuals and legal entities (see, for instance, Sect. 1 of the 1804 French Civil Code, par. 17 of the 1811 Austrian Civil Code);

42. See Przeworski, op. cit., supra n. 13, at 190-91.

b) the abolition of restraints on the free trade of goods and on the sale of land and property within the State (Sect. 537, 544 of the French Civil Code, par. 308 of the Austrian Civil Code);

c) the acknowledgement of a wide degree of autonomy in contractual relations (Sect. 1107-1134 of the French Civil Code).[43]

Under the command economy all the principles just above mentioned were subordinated to the paramount principles of Marxism Leninism as interpreted by the Communist Party leadership. With the creation of a market economy all economic agents must be treated equally under the law, and these principles must reacquire their classical meaning.

The complexity of the role recognized to civil law codification explains why in the five years following the collapse of the Soviet-type regimes, the Civil Code has been the great latecomer. Everywhere, in Poland, as well as in Hungary or in Ukraine, the Codes of the socialist age have been thoroughly amended.[44] Everywhere legal scholars have complained about the inadequacy of such measures. Almost everywhere politicians showed that they understood such complaints and set up commissions for recodification.

A new phase of civil and commercial law codification began within Central and Eastern Europe, as in most of the CIS member states. As everybody knows, however, the codifying commissions' work is a difficult one, particularly as far as *private law* codification is concerned. Scientific rigour and political analysis intersect. The legal scholar on a commission thinks according to time scale of the scientific research, which is longer than that of political pragmatism. For the moment, one can only note the faster speed of the adoption of new Commercial Codes (in Albania, Bulgaria, Czech Republic) as well as of pre-war Commercial Codes amended in Romania, Poland and in the Baltic States. At the same time, drafts of new Civil Codes, that proclaim their dissimilarity to those of the socialist age, are circulating within the Russian Federation,[45] in some other CIS's member states (Belarus, Georgia, Kazakhstan, Kyrgyzstan, Ukraine,

43. See Gambaro, "Codes and Constitutions," 2 *Italian Studies in Law* 79 (1994); see also Brietzke, op. cit., supra n. 11.

44. See Glatz, "Die Novellierung des polnischen Zivilgesetzbuches," 37 *Recht in Ost und West* 44 (1993).

45. The draft of a new Civil Code for the Russian Federation has been elaborated by Research Center of Private Law; the commission, chaired by Academic Professor S.S. Alekseev, was also supported by meetings with jurists from the Netherlands, who collaborated in the drafting of the new Dutch Civil Code (NBW), as well as from other European countries and the United States.

See Dozortsev, "Trends in the Development of Russian Civil Legislation During the Transition to a Market Economy," 19 *Rev. Central & E.E. Law* 50 (1993); see also the informations contained in Frenkel, "Summary of Developments in Russian Commercial Law in 1993," 5 *Survey of East European Law*, no. 1, 1ff. (1994).

Uzbekistan), in the Czech Republic and in Albania.[46] The Russian Federation and Albania lead the group, having adopted a new Civil Code in 1994.

Unlikely Civil Codes, the codification of commercial law seems to be a smoother venture.

Within the area now divided between the Czech Republic and the Slovakian Republic, for example, pragmatism prevailed over concerns for systematic consistency. On January 1, 1992 a *new* Commercial Code came into force. It absorbed several areas of the law of obligations that traditionally belonged to the Civil Code.[47]

The new Czech enactment restored traditional rules and concepts: it has, consequently, eliminated quantitative and qualitative limits to the exercise of property rights, and protected possessory rights, and minor *rights ad rem*. These enactments also gave great importance to uniform models. Dispositions of the Vienna Convention on the international sale of goods of 1980 have been included in portions of the revised Civil Code that concern the formation and breach of contract, and in those of the new Commercial Code that concern delivery and guarantees for the seller. The Czechoslovakian Commercial Code was also a step towards a reorganization of sources of law. It repealed both of the "socialist" predecessors, the Economic Code and the International Trade Code of 1964. It also repealed enactments of the transitional period (such as the Law on stock companies, borrowed from a German model, enforced in 1990 and now arranged within the second book of the Code, the Laws on companies with foreign stake of 1988 and on economic relations with foreign subjects).

Not much can yet be said about the slower and more traditional way legal transplants occur: through the initiative of scholars. One can only mention some trends. In Russia, legal scholarship, once it freed itself from rules of style and methodology supported by the ideology, has turned to the task of advising the legislator and, to a lesser extent, of reporting legislative novelties to interpreters. It has not yet arrived at a new methodology. Within the whole area of the former Soviet Union, old and new legal periodicals turned to foreign and comparative law. Such studies are focused on the macro-analysis of normative solutions, more than on the micro-comparison. Eclecticism dominates in the choice of subjects to study, areas to take into

46. See Ajani, "Die Kodifikation des Zivilrechts in Albanien," 37 *Recht in Ost und West* 257 (1993).

47. It was not by chance that Czechoslovakia was the first country to recodify commercial law; the early civil codification of 1950 (favoured by the presence of a draft of the immediate pre-war period) induced to a new codification, more clearly "socialist" in 1964; the inadequacy (substantial, but also formal) of such last codification to cope with the new economic order that the country entered into after 1989 can explain the pragmatic choice adopted in 1992.

consideration, methods to follow. It goes together with a widespread awareness of the presence of new models of foreign origin in the recent enactments.

Such an awareness may make it possible in the future to evaluate how the newly received models fit into the legal system.

III. The Supply of New Models

1. *Indirect Influence Through the Activity of International Organizations*

We can now examine the persons and organizations who are supplying models and how these models work.

Immediately after 1989, the legal systems of Central and Eastern Europe were influenced by an heterogeneous set of persons and organizations making proposals as part of technical and legal programs. Sometimes this activity was part of a larger program, traditionally devoted to developing and emerging countries.[48] More frequently it is now due to *ad hoc* initiatives, sometimes from requests of Central and East European governments, and sometimes from outside the area. In certain cases, adoption of the proposal merely depends on prestige of the proposed model or of its proponents. In other cases, further variables come into play.

Initiatives to propose new legal enactments[49] take different forms: assistance given by national bodies, such as the German Technical Cooperation Governmental Office (*GTZ*), or the French Interministerial Mission for Central and Eastern Europe (*MICECO*), or the Dutch Government's Center for the Cooperation with Eastern Europe; assistance given by international organizations, such as EU, Council of Europe,[50] EFTA, UNCITRAL,[51] European Bank for Reconstruction and Development,[52] World Bank, International Monetary

48. One can think of the activity of the UN's bodies like ILO, UNIDROIT, the United Nations Development Program, but also of the United States Agency for International Development.

49. As everybody knows, legal assistance activity can include not only the preparation of new bills, but also the revision and critical analysis of the law in force, as well as the supply of economic advice about the best legal policy to follow, or sociological analysis about efficiency of regulations, or training activity for the re-qualification of jurists that will have to utilize the new rules, or technical assistance as to the informatisation of legal data, and so forth.

See Westen, "Die Rolle der Rechtsvergleichung im ost- und mittel- europaischen Reformprozess," in 35 *Recht in Ost und West* 1 (1991).

50. See "Council of Europe's Support to Legislative Reform in Eastern Europe," 1 *Law in Transition. A Newsletter on Legal Cooperation & Training Form the EBRD*, 4 (Winter 1992-93).

51. Among the several models worked out by UNCITRAL and followed by post-socialist legislators one could mention, for instance, the "Model Public Procurement Code," approved by the UN in July 1993. The model has inspired the Polish public procurement law; on its contents see 4 *East Eur. Bus. L.* no. 94, 6ff. (1994).

52. See Wold & Zaelke, "Promoting Sustainable Development and Democracy in Central and Eastern Europe: the Role of the European Bank for Reconstruction & Development," 7 *Am. U.J. Int'l L. & Pol'y* 559 (1992). The EBRD organised, in association with the International Development Law Institute and the Harvard Program on International Financial Systems a workshop in London (November 1991), in order to set up a more rational organization of the Technical Assistance in the field of legal reforms. Lack of coordination among the several institutions providing legal assistance is still a major cost of the whole process.

Fund, OECD,[53] assistance given by private organizations and foundations, such as the *Stiftung fur internationale rechtliche Zusammenarbeit*, the *Adenauer Stiftung*, the Soros Foundation, the American Bar Association, but also big law firms and research centres of multinational companies[54] and assistance given by University centers.[55]

The type of assistance affects not only the geographical extent of its influence but also its chances of success. To locate the areas where these proposals have the greatest chances to end in reception, it is useful to consider two types of international organizations: the international banking and credit organizations, such as the International Monetary Fund, the World Bank, the EBRD, and the European Union (in particular, the Commission of the European Union).

53. The OECD, and more in particular its Directorate for Financial, Fiscal and Enterprise Affairs, mostly operates within the field of economic assistance, but such activity has obvious implications with legal regulation. The Organization, among other requests, received one for assistance from the Russian government, as regards the drafting of a new legislation on trademarks, and the revision of the law on consumers' protection and on investments protection, as well as a Bielorussian request for assistance as regards drafting of provisions on drawing up balance sheet.

54. Already in 1989, the Soros Foundation ordered a development project for "open sectors" within the Soviet Union, where new legal rules should have supported free and private organization of trade and production. The solutions elaborated at that experimental phase were then used to provide assistance to the legislators of Soviet Republics as regards the creation of "free economic zones."

We can add the *Treuhand-Osteuropa-Beratungsgesellschaft mbH*, founded in 1992 by the *Treuhandanstalt*, the body that is in charge of privatization of the production apparatus of the former German Democratic Republic, in order to provide legal consultation on problems connected with the privatisation process.

The *Stiftung für internationale rechtliche Zusammenarbeit*, active since May 1992 in Bonn, is, in reality, a private foundation financed by the German government. Its activity, in connection with the activity of the German Ministry of Justice, is directed to give legal assistance to East-Central European and CIS governments as well as to work on legislative drafts.

On the assistance program passed by the American Bar Association and called Central and Eastern European Law Initiative (CEELI), see the ABA's President's article: D'Alemberte, "Our Eastern European Challenge. Providing Technical Assistance to Struggling Democracies," *ABA Journal* 8 (March 1992).

55. In certain cases the university centers involved in proposing "market-oriented legislative models" are the same that, during the past decades, represented a privileged observation site for Western sovietologists.

In an intermediate position between "scientific" consultation and "professional" consultation lies the activity provided, for example, by the University of Houston, that, with the World Bank's and oil industry's financing, prepared several bills of technical regulation on mining law matters for the Russian Federation. See the proceedings of the "Symposium on the Russian Petroleum Legislation Project at the University of Houston Law Center," 15 *Houston J. Int. L.* (1993).

Membership in the IMF, obtained by all the countries of the area in the early 1990's,[56] was in many cases preceded or accompanied by formal demands for technical assistance in the preparation of statutory texts. The IMF, and particularly its Legal Department, encouraged the development of law regulating financial matters such as banking legislation, regulations on the activity of the central banks, monetary orders for almost all of the CIS member states, for the three Baltic republics, for Albania, Bulgaria, Poland and Romania. The Legal Department of the World Bank intervened in order to propose drafts on tax law and foreign investments protection in the same countries.

In certain, highly technical, sectors, the presence of a single proponent can promote uniformity.[57] The fact that the proponent also grants credits and other economic aids may guarantee the adoption of the proposed model. However, when the assistance involves enactments of great importance (for example, parts of Commercial Codes, or company laws), the casualness variable may concur with the "prestige factor" in the determination of the model to be transplanted. In these cases the organizations commit decisions to foreign experts and to jurists who are working where the bills are prepared, that is, at the Ministries, more than at the Faculties of Law. Experience shows however that bad communication between the foreign and the local experts, cultural misunderstandings on the fields that must be covered by the new legislation and, last but not least, a weak translation can heavily influence both the choice and the drafting of the new rules. Furthermore, the way the project team acts is in some cases reminiscent of the procedures adopted when drafting uniform laws or international conventions. Conflicting opinions (both at the technical level and at the political one) may generate vague formulas.

Therefore, to determine the organization that provides assistance is not *always* to determine with certainty the origin of the model. Chance and prestige concur to blur the marks of the new map

56. By 1992 every Central or Eastern European country (including Albania) was a member of the International Monetary Fund. So the relationships between international banking organizations and former socialist countries changed drastically within a few years. In fact, until the eighties objective factors related to the economic organization of such countries, such as the structural impossibility of enacting the monetary and fiscal policy measures that the IMF required as a precondition to receive the loans, barred the contact more than political factors. See Pissulla, "Zur Rolle von IMF, Weltbank und GATT in den Ost-West-Wirtschaftsbeziehungen," *Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien*, No. 16 (1991). See also Reisman, "The World Bank and the IMF: at the Forefront of World Transformation," 60 *Fordham L. Rev.* 349 (1992); J.M. Starrels, *L'aide à la Réforme dans les Pays d'Europe centrale et orientale* (1992).

57. Similarly, in the field of intellectual property protection, for example, uniform new rules are developed by following the standards prepared by the World Intellectual Property Organization (WIPO). See the Hungarian Acts on utility models and software protection, Nos. XXXVIII e XIX, in force since 1st January 1992.

of post-socialist legal systems that is being drawn up by locating uniform technical models.[58]

The picture becomes more complex if we consider that some proponents do not limit their activity to the assistance in drafting legislation, but also train legal personnel and suggest changes in the system of legal education. The division between the models of positive law and the discourse of scholars and judges is a common phenomenon in many European countries.[59] What is more peculiar in the case of Central and Eastern Europe and CIS states is the adoption of common law solutions, because of the insistence of proponents and commentators who are more familiar with such solutions,[60] in a body of law having continental style and structure.[61]

The play of reforming and approximating legislation making recourse to a numberless set of models and to a wide set of proponents

58. In Albania, for instance, the government, as a part of a project of technical assistance with the German government, ordered a team of German jurists to prepare the Company Law as well as the first part of a Commercial Code. The proposed model, instead of reflecting the influence of Germany, was based on the French *droit des sociétés*. More precisely, the parts related to company law are inspired by the French *Loi sur les sociétés commerciales* of 1966, whereas the draft of the First Book of the Commercial Code restores part of the content of the Albanian Commercial Code of 1932, based on a draft of C. Vivante, an Italian jurist. The founding of the commercial register follows the German model.

59. During the first half of our century, the most recurrent division has been the one between a system of rules based on the French codifications, and a legal scholarship influenced by the pandectist ideas originated in Germany.

60. For example, the American Bar Association organized under the CEELI project (see supra n. 54) a network of correspondents at the Ministries of Justice or other governmental offices of the countries of the area; these correspondents gather the most important drafts (of "local" production as well as those elaborated by foreign subjects assistance) and they submit them to the Association's member in order to receive comments and opinions. Once "annotated" in this way the texts are given back to the local authorities who proceed with the legal drafting. Following such a procedure, only in Central and East Europe, have the drafts of the Czechoslovakian Commercial Code (prepared by a commission at the Czechoslovakian Supreme Court), the Bulgarian draft on antitrust law, the Albanian drafts of the Civil Code, of the Commercial Code and of the Constitution been revised. Quite often the comments are not limited to an analysis of the text's internal coherence and completeness, but they propose alternative solutions based on the American experience.

See, ABA Section of Antitrust Law, "Comments on Draft Bulgarian Antitrust Law," *Antitrust Law Journal* 245 (1991). More recently, CEELI's assistance has also turned towards the implementation of legislation (an example is the Russian Federation "Jury Law" of July 16, 1993), and the training of legal personnel. See, for a comment to the 1993 Jury Law, JNH [John N. Hazard], "Juries as Alternative to Traditional Trial in Russia," in 4 *SEEL Survey of East European Law*, No. 9 1ff. (1993). For an assessment of CEELI's legal assistance projects in the CIS, see 3 *CEELI Update*, No. 5, 14ff. (1993).

61. One can recall the sub-statutory sources enforced by the Soviet legislator in 1990 in order to regulate the activity of stock companies and limited liability companies, or the Ukrainian Act on the stock exchange; in such sources the interpreter is bound to operate on definitions that are now borrowed from Anglo-American ideas, now from continental models.

See Sukhman, "New Foreign Investment Regimes of Russia and other Republics of the Former USSR: A Legislative Analysis and Historical Perspective," 16 *B.C. Int'l Comp. L. Rev.* 321, at 401ff. (1993).

may encounter serious difficulties regarding both the differences in the priorities of countries and of proponents as to the areas of law to be reformed.

2. *Approximation of Laws Through Association with the European Union*

Finally, in some cases, foreign and international organizations induce a reception in countries that enact laws inspired by European Union's models, because they are planning to become EU member states, or in order to sign temporary agreements.

Examples are those Central and East European countries that signed "Association Agreements" with the EU in 1991 and 1992.[62] They then have a status in relation to the EU member states like the one enjoyed by the EFTA countries in the past. The Association Agreements imposed duties to adapt positive law[63] and collateral technical regulations. These duties have to be combined with the engagements already made by the national legislators by enforcing antitrust Acts based on the EU model.[64] The direct approximation is

62. See Brzezinski, supra n. 29; Wagner-Findeisen, "From Association to Accession: An Evaluation of Poland's Aspirations to Full Community Membership," 16 *Fordham Int. L.J.* 470ff. (1993).

63. The point is made explicit in the texts of the Agreements. Sections 67-69 of the Agreement with Hungary, for instance, states that:

> "The Contracting Parties acknowledge that the major precondition for Hungary's integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible.
>
> The approximation of laws shall extend to the following areas in particular: customs law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, food legislation, consumer protection including product liability, indirect taxation, technical rules and standards, transport and the environment.
>
> The Community shall provide Hungary with technical assistance for the implementation of these measures which may include: —the exchange of experts; —the provision of information; —organization of seminars; —training activities; —aid for the translation of Community legislation in the relevant sectors."

64. Antitrust Acts in Poland (February 1990), Czechoslovakia (March 1991), Hungary (January 1991), Bulgaria (May 1991), Ukraine (April 1992) and Russia (May 1991) provoked a wide range of comments.

For a skeptical point of view, see Blitzer, "Is Competition Policy the Last Thing Central and Eastern Europe Need?," 6 *Am. U. J. Int'l. L. & Pol.* 347 (1991). Skeptical views on the action of the new Antitrust Authorities of Eastern Europe also in Brietzke, op. cit., supra n. 11, at 24 and in Rubin, op. cit. supra at n. 12. About Hungary, see Lauter, "Does Hungary's Antitrust Law Put the Cart Before the Horse?," 2 *SEEL Soviet & East European Law* No. 3, 4 (1991). In particular, the legislation of the area seems to follow the EU model (and to deviate from the American model expressed by the Sherman Act) as regards the typification of prosecutable activities.

The Association Agreements mentioned above provided for the temporary activity of mixed committees—awaiting the creation of Association Councils—to which the task of harmonizing antitrust rules was committed. See, "Competition Policy in Transition. CSFR, Hungary and Poland," *East Eur. Bus. L.*, No. 7-8, 10 (1992); "New Ukrainian Competition Act," *East Eur. Bus. L.*, No. 4, 15 (1992).

The EU level of protection of intellectual and industrial property rights, ex article 36 of the Treaty of Rome, will be reached in 1997. In particular, the Agreement with Poland gives as models the directives 89/104 on marks, 87/54 and 91/250 on softwares. In a unilateral statement, Poland committed itself to the enforcement of the European Convention on Patterns and to the Nice Agreement on Trade Marks Classification within 1997, as well as to enter the Bern Convention on Copyrights (Paris 1971) and to the Madrid Protocol on Trade Marks Registration.

65. See Hartnell, "Central/Eastern Europe: the Long and Winding Road Toward European Union," 15 *Comp. L. Yearbook of Int'l Bus.* 179, at 196 (1993).

66. For a thorough assessment of the EU role in providing assistance in the approximation of legal systems of the state members of CIS, see the report: "Shaping a Market-Economy Legal System. A Report of the EC/IS Joint Task Force on Law Reform in the Independent States," in *European Economy*, no. 2, 99ff. (1993).

67. Examples are the legislation on products liability, or certain rules on environment protection, that, if applied with the severity required by the text, could lead to the elimination of some sectors of production of the Czech, Hungarian and Polish economies. Waelde and Gunderson correctly point out that "excessive amounts of legislative activity at the expense of other parts of the reform process can have negative effects" (supra n. 18, at 360); in their opinion.

supported by a strong awareness in the countries concerned of the importance of making compatible the domestic legal systems with the one worked out by European legislator: even before the signing of European Agreements both Poland and Hungary have created special offices, called to assist the Parliament and the Government in their efforts to harmonize and coordinate the process of adaptation of legislation to EU requirements.[65]

Conclusion

1. *A Practical Conclusion*

The influence of foreign models, and their reception by the legislators of old and new post-socialist states has reached dimensions never before seen. For obvious reasons observers dwell upon sectors that are closer to business practice, but new legislation based on comparative analysis is now a common practice in all sectors of the legal system, affecting constitutional law, criminal law and legal procedure.

Prestige and political opportunity together encourage the spread of models developed by the EU within the whole Central and Eastern Europe.[66] In some cases those models can be directly transplanted, without much modification. In other cases those new models are contained in EU member states special legislation, or in EU enactments not yet implemented at the country level. In all cases a preliminary economic analysis of costs and benefits implied by the adoption of a "new" rule would be advisable, as EU solutions contain operative rules that generally reflect a preference for mass protection (of consumers and buyers) over the needs of pure economic development.[67]

Legal drafters in the area should consider the question "Does the X model respond today[68] to the needs of a post-Socialist economy?". Local jurists and legal advisers experienced in "Western law" should be supported by the advice of economic analysis of law as well as comparative law experts.[69] This would surely prolong the time necessary to carry out legal reforms, but it would also increase the chances of the new legislation lasting and receiving within the recipient country the authority it requires to become effective.

2. *A Theoretical Conclusion*

The study of foreign and uniform influences in post-socialist law adds a new reason for changing the static approach of Comparative law, based on a conventional division in Legal Families, into a dynamic examination of the converging flows between the two major systems; such dynamic examination is called not only to give order to the outcome of legal transplants at the level of "positive law," but also to analyse the influence of the new factors of circulation, both normative or scholarly, on the legal process, and on the implementation of the new solutions.[70]

"Technical assistance agencies perhaps tend to over-value the impact of legislative reform because it is here—in the production of formally sanctioned texts on paper—that visible results for gratifying public consumption and justification of the organisation can be reached much more rapidly than change in real-life institutions and business culture"
(id. at 360).

A pragmatic attitude characterizes also J.P. Nehf long article on protection of consumers rights in the Russian Federation; he states that

"[. . .] legislators and administrators during these critical transition years must ensure that consumer rights are taken seriously, but that economic development is not sacrificed at the altar of consumer protection. Care must be taken to strike an appropriate balance between empowering the Russian consumer and encouraging much needed entrepreneurial initiative."
Nehf, "Empowering the Russian Consumer in a Market Economy," 14 *Mich. J. Int. L.* 740, at 825-26 (1993).

68. In Western societies civil codes lasted for decades, sometimes for centuries. In the socialist experience their life was shorter. In the post-socialist experience the old "pretension to eternity" of the civil codes has to face the changing framework of the economy during the period of transition.

69. See Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 343, 364ff. (1991); Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics," 4 *Int'l. Rev. L. Econ.* 3 (1994).

70. As it is known, even in countries sharing the same fundamental "legal culture," identical laws, adopted as a result of legal transplant, generate in the long run, different interpretations; a good example is the application of the Civil Code in Belgium, as compared with the French experience.
R. Sacco has argued that

"Since legal rules do vary, it is legitimate to ask—even if jurists themselves rarely do—whether these variations conform to any law: not in the sense of a higher legal standard but in the sense of an intelligible pattern. Research into the cause of variations in legal rules is, in part, the job of the sociologist. It becomes the job of the jurist as well, however, whenever the cause of variation in the rule depends on its nature or contents," supra n. 69, at 390.

Given this picture, the statement that post-socialist law has simply returned within the Roman-Germanic family from where it originated[71] is open to two challenges:

— the idea of Roman-Germanic family neatly separated from the Anglo-American legal family today does not have a steady foundation either in the practice of the law in action, or in the theory of some jurists who are examining legal transplants;[72]

— new models, by which post-socialist law reforms are inspired, are not *only* definable as continental models, since they are also models borrowed from the EU, the uniform law, and the Anglo-American experience.

Often in legal culture the jurists' analysis lives longer than the phenomenon examined. An example is how long the influence of Dicey's work lasted in emphasizing the contrast between systems based on the rule or supremacy of law and systems based on the *droit administratif*.

Comparative analysis is grounded on facts and takes into consideration as mere "facts," or elements, or "formants" of a system also opinions and ideologies of jurists belonging to the system analysed.[73]

In order to prevent even comparative analysis from running a similar risk of wrong perspective, a new, dynamic approach is necessary today to understand and evaluate the convergences now taking place between Western Legal Tradition (as a whole) and post-Socialist law.

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71. See supra, at n. 7.

72. See Mattei, supra n. 69; Glenn, supra n. 8; Wise, supra n. 1; Waelde & Gunderson, supra n. 17, at 373-74.

73. Sacco, supra n. 69, at 390.