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

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 attitude 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]."

During the Socialist era, despite declarations 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 of socialist law," Western models were borrowed, even if a careful 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 statues 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.

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


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 of the Civil Code was then one of the covert model for the hastily codification of Soviet civil law in 1922. Adopted for tactical reasons in a alterus hostile to codification, the 1922 RSFSR Civil Code modified the previous trend of criminalization of private honor, 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); Apati, "Das Rassere and Fall of the Law-Based State in the Experience of Russian Legal Scholarship," in Towards the "Rule of Law" in Russia? (U.D. Barry ed. 1992); F.J.M. Feldbrugge, Russia's Legal Tradition: The End of the Soviet System and the Rule of Law, no. 46 of the series Law in Eastern Europe 74 (1993). Bernard Rudzen has noticed that: "The structure, general principles, and in many detailed provisions Russian civil law has since 1922 been largely simplified, and much found in Western Europe, especially in the German-speaking countries. There seems to be a double in the Soviet statutes which expressed a particularist domestic model, even less that might be thought to be determined by a particular economic infrastructure. So a 'pandectist' system fashioned to deal with non-pandectist countries is fundamentally quite capable of handling pan-societal societies 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 XXth century, the main actors of the circulation within the Russian Empire of

Today, after a complete emancipation from ideology, post-Soviet legal systems must be reclassified: they can no longer be grouped within the family of "socialist law." One might automatically conclude that Roman-Germanic legal family has expanded to the East. Indeed, during the last few years post-Socialist legislatures 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. 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. 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." This emphasis on pandectist models; see for instance the translations into Russian of Pandekten of Baron, made by Perzshchakiev, and of Dernburg, made by D.D. Grumix. 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, 1961-1974," Russian Law 143 (1985); see also Silvestre, "The Conflict between Modernization and Tradition: Land Ownership during the Last Decades of the Tsarist Empire," 19 Rev. Centr. & Est. Eur. L. 1 (1993).


9. 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, supra n. 1, at 238-45.

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. 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 advisors and of international financial institutions. Nevertheless, the dissemination of new models remains relevant and it affects an immense area included between Warsaw, Poland, and Almaaty, Kazakhstan.

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 link between the laws 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. 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 techniques of legal expertise, but also by the political and economic 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?

b) How can the legal system be shaped as an internal factor in regulating the state and economy?

c) Can the legal culture in transition be shaped as an external factor in regulating the state and economy?

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 role of continental legal culture are stronger in Russia, Ukraine, Belarus, than in other CIS States. Also because of this, legal systems in the different countries could have a different understanding of Anglo-American models.


A less known example of model law is the draft on secured transactions, drafted by a consortium of twenty civil and common law jurisdictions 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 unilateral change to cover both moveables and immovables) has been used in Hungary and Poland. The model, however, adapted the text to its conditions of registration and enforcement. See, "A Model Law with Newer To Go?" 4 East Eur. Bus. L. no. 0, 2 (1994).

15. Unlike other European socialist countries, Soviet Russia formally repealed, after many years of discussion and debate, the "Czarist Law," or the Code of Civil Law. Because of this and of the longer time elapsed, jurists in the post-Soviet States today have many more problems than those of 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 furthering of connections with Romanist schemes. Stronger reasons could push the legal systems of those Central Asian Republics away from this Romantically based framework where Sovietism has represented the first (and unique) impact with civil law categories.

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, originating 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) in 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.

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 Latafek, "Les amendements à la Constitution de la République populaire de Pologne," 26 Revue Internationale de Droit Comparé 79 (1984); see also Petri, "The Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and Eastern European Law," in 61 Tulane L. Rev. 1387 (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 then unusual task 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).
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 Begriffstheorie juristischer Prüfungen) 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 organisations) and of other subjects (social organisations). However, within a few years, those theories were abandoned and the legal scholar kept on thinking over the abstract notion of juristic person.


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 code as incorporated within the GDR than the Russian (positive) civil law (and than the Lithuanian, the Ukrainian, and the Kazakh, etc.). However, one has to consider that the "originality" of the GDR's civil law contained in the Zivilrechtsbuch 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 Reform, 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 legalization 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 socialists 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" (1986-1991) 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.

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 1989, 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 (1992) 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 on strong model only in the (heretical) Yugoslav experience, where it received constitutional protection and a detailed regulation in constitutional, civil and labour law.
30 The different ways of accepting the idea of a competition between state sector and private sector are examined in Privatization and Entrepreneurship in Post-Socialist Countries, Economy, Law and Society (B. Dallago, G. Ajani & B. Grencelli eds. 1992).
ries on its activity under a different name, 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, or the Federal Commission for the Provision of a Legal Information System. If we observe the programs produced by these agencies during the three or four years after the events of 1991, 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 privatization of state assets);
- legislation on foreign investments and international trade.

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 built on.

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 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 (text binding) common model. See the "Recommendations" of the International Conference Gratchnitt Die Kodifikation Des Socioeconetzwirtschaftlichen Rechts: Kharmonisierung im Modelljurisprudenz (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.


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

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 Constitutions of the RF, the Supreme Court; the prosecutors' office; the procedure for introducing 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, a Russia & Commonwealth Bus. Law Report, No. 22, 9-10 (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), 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 občanský zákoník.

Thanks to their Roman Law structure, 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.

41. See Redon, 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.

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 (Sec. 537, 544 of the French Civil Code, par. 308 of the Austrian Civil Code);

(1) the acknowledgement of a wide degree of autonomy in contractual relations (Sec. 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 Marxist 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, 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, 1993 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

43. See Gambare, "Codes and Constitutions," 2 Italian Studies in Law 79 (1994); see also Brutkowska, op. cit., supra n. 11.
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 Droutsev, "Trends in the Development of Russian Civil Legislation During the Transition to a Market Economy," 19 Rev. Centr. & 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, ff. (1994).
47. It was not by chance that Czechoslovakia was the first country to re-examine commercial law; the early civil codification of 1950 (facilitated 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 organizations 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 enaction
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,
EFTA, UNCITRAL, European Bank for Reconstruction and Development, World Bank, International Monetary Fund, OECD, assistance given by private organizations and foundations, such as the Stiftung für internationale rechtliche Zusammenarbeit, the Adenauer Stiftung, the Soros Foundation, the American Bar Association, but also big law firms and research centers of multinational companies and assistance given by University centers. 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).

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 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 requalification of jurists that will have to utilize the new rules, or technical assistance as to the informatization of legal data, and so forth. See Wentor, "Die Rolle der Rechtserrichtung im ost-und mittel-europäischen Reformprozess," in 35 Recht in Ost und West 1 (1991).


51. Among the several models worked out by UNICENTRAL and followed by post-socialist legislators one could mention, for instance, the "Model Public Procurement Code," approved by the UN in July 1993. This model has inspired the Polish public procurement law; on its context see 4 East Eur. Bus. L. no. 94, 68 (1994).

52. See Wold & Zalka, "Promoting Sustainable Development and Democracy in Central and Eastern Europe: the Role of the European Bank for Reconstruction &
Membership in the IMF, obtained by all countries of the area in the early 1990s, 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. 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 can 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 formulations.

Compliance, 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 national 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 possibility of creating the monetary and fiscal policy measures that the IMF required as a precondition to receive the loans, and the directors were largely political factors. See Passiella, "Zur Rolle von IMF, Weltbank und GATT in den Ost-West-Wirtschaftsbeziehungen," Berichte des Bundesinstituts für wissenschaftliche 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'idee `a la Reforme 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.

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 societes. More precisely, the parts related to company law are inspired by the French Loi sur les societes commerciales of 1990, 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 (se 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 jurists and submit them to the Association's members 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 Czechoslovak 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," 71 Geo. Wash. L. Rev. 456 (1993). More recently, CEELI's assistance has also turned towards the implementation of legislation (an example is the Russian Federation "Jury Law" of 1983), and the training of legal personnel. See, for example, from the 1983 Jury Law, JMJ (John N. Janssen), "Juries as Alternative to Traditional Trial in Russia," in 4 SEEL Survey of East European Law, No. 91 ff. (1983). 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.

may encounter serious difficulties regarding both the differences in
the priorities of countries and of proponent 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. They then have a status in relation to the EU member states like the one enjoyed by the EPTA countries in the past. The Association Agreements imposed duties to adapt positive law 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. The direct approximation is

63. The point is made explicit in the texts of the Agreements. Sections 67-68 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."
64. Antitrust Acts in Poland (February 1990), Czecholelovakia (March 1991), Hungary (January 1991), Bulgaria (May 1991), Ukraine (April 1992) and Russia (July 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. J. Int'l L. & Pol. 347 (1991). Skeptical views on the action of the new Antitrust Authorities of Eastern Europe also in Bratskie, op. cit., supra n. 11, at 24 and in Rubin, op. cit., supra 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.
67. Examples are the legislation on products liability, or certain rules on consumer protection including product liability, indirect taxation, technical rules and standards, transport, and the environment.
68. The Community shall provide Hungary with technical assistance for the implementation of these measures which may include: the exchange of expertise; the provision of information; organization of seminars; training activities; aid for the translation of Community legislation in the relevant languages.
69. The EU level of protection of intellectual and industrial property rights, as 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 software. In a unilateral statement, Poland committed itself to the enforcement of the European Convention on Patents and to the Nice Agreement on Trademarks Classification within 1997, as well as to enter the Bern Convention on Copyrights (Paris 1886) and to the Madrid Protocol on Trademark Registration.
70. See Hartnell, supra note 64, at 196 (1993).
71. 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 legislators: 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 harmonise 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. 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.77
Legal drafters in the area should consider the question "Does the X model respond today to the needs of a post-socialist economy?". Local jurists and legal advisors experienced in "Western law" should be supported by the advice of economic analysis of law as well as comparative law experts. 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.

"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 290).

A pragmatic attitude characterizes also J.P. Nef's long article on protection of consumers rights in the Russian Federation; he states that "...[t]he 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." Nef, "Empowering the Russian Consumer in a Market Economy," 14 Mich. J. Int. L. 740, at 825-26 (1995).

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. 66. See Raco, "Legal Formalism: A Dynamic Approach to Comparative Law," 39 Am. J. Comp. L. 345, 345ff. (1991); Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics," 4 Jnl. Rev. L. Econ. 3 (1984).

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. Raco 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 300.

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. Raco, supra n. 69, at 390.