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Recodification of Private Law in Central and Eastern Europe and in the Netherlands

A Personal Introduction

It is a pleasure to celebrate today the tenth anniversary of Hungary's accession to the European Union. So much has happened in the course of one or two generations. When I read law in Leyden in the early 1960s, I specialised in the law of the socialist nations. We would read writers such as Pashukanis[1] and Vyshinsky,[2] and study Stalin's 'solution' to the 'problem of the nationalities'. My teacher for three years was Zsolt Szirmai (1903–1973), a Hungarian-born lawyer who fled to the West, where he founded the Documentation Centre for Central and East European Law at Leyden University.[3] I continued my studies in New York with John Hazard (1909–1995), founder of the Russian Institute at Columbia University, and Zbigniew Brzezinski (1928–), the later National Security Advisor of the United States under President Jimmy Carter. The main question raised by John Hazard was what was communist in Soviet law of that time. He would for instance read the disposition in the Grazhdansky Kodeks stating tht a forced heir is entitled to a forced share of the estate. The American students in the class would immediatley qualify this as 'typically communist'. Whereupon John Hazard would turn to me to ask how the law on forced shares was in Western Europe. Which happened to be almost identical to that in Russia, which indeed at the time, with some exceptions such as in the law of property, was almost unaldulterated civil law.

At the time, students of socialist law were torn between two opposing views. One was the economic view that implosion of the socialist system was imminent. The other was the political view that communism by what Henry Kissinger called the 'domino policy' was gradually taking hold of most of the world's economies, especially in Africa, Asia and Latin America. By now, of course, we know that the implosion idea fortunately prevailed.

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1 Evgeny Pashukanis, *The general theory of law and marxism,* 1924.

2 Андрей Януарьевич Вышинский, Miscellaneous speeches.

3 See *Codification in the communist world: symposium in memory of Zsolt Szirmai (1903–1973)* (Brill 1975, Leyden) 353.

I A Topical Introduction

Central and Eastern Europe are sometimes regarded as the orphans of the European Union. Having had to overcome fifty years of socialist stagnation in the development of the law,[4] they are supposed to yearn for tutorship from the West. Although there may be some thruth in this, the West could learn a good deal from the East as well. A good example of this lies in the realm of civil law codification. Over the past decade, several Central and East European countries have recodified their civil law, and there is more to come. In this paper I intend to give a brief overview of some of these endeavours and to explore what they could contribute to issues such as the unity of the civil and commercial law as well as the position of consumer protection and of family law. In doing so, I will rely heavily on three recent publications: Péter Cserne's chapter in a volume on globalisation and private law which was edited by that author and Pierre Larouche,[5] Reiner Schulze's and Fryderyk Zoll's *The Law of Obligations in Europe – A New Wave of Codifications,*[6] and – already of some time ago – Lajos Vékás'essay on *Privatrechtsreform in einem Transformationsland.*[7] Other information will be drawn from Rudolf Welser's also slightly earlier- *Privatrechtsentwicklung in Zentral- und Osteuropa*[8] and from a mainly French language volume based on a meeting organised in Moldova by the *Association Henri Capitant,* also in 2008.[9] English language translations of Central and East European Civil Codes are widely available on the internet.[10]

I will conclude with some observations on Central and Eastern Europe and the harmonisation of private law in Europe. Russia and its allies will not be dealt with in this paper.[11] In order for this paper not to end up in only a theoretical exercise, I will add some experiences with the Dutch Civil Code, the main part of which entered into force in 1992.[12] Because of its modern

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4 Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Nijhoff 2011, Leiden) 311.

5 Péter Cserne, 'Chapter 4' in Pierre Larouche, Péter Cserne (eds), *National legal systems and globalization: new role, continuing relevance* (Springer 2012, Vienna) 45-88.

6 Reiner Schulze, Fryderyk Zoll (eds), *The Law of Obligations in Europe – A New Wave of Codifications* (Sellier 2013, München).

7 Vékás Lajos, 'Privatrechtsreform in einem Transformationsland' in Jürgen Basedow et al. (eds), *Aufbruch nach Europa/75 Jahre Max-Planck-Institut für Privatrecht,* (Mohr 2001, Tübingen) 1049–1064.

8 Rudolf Welser (ed), *Privatrechtsentwicklung in Zentral- und Osteuropa* (Manz 2008, Vienna) 225, with papers on Bosnia-Herzegovina (Meliha Povlakovic), Croatia (Tatjana Josipovic), the Czech Republic (Lubos Tichy), Hungary (Levente Tattay, Zoltán Nemessányi and Lajos Vékás), Poland (Jerzy Poczobut), Romania (Christian Alunaru), Serbia (József Szalma), Slovakia (Ján Lazar) and Slovenia (Verica Trstenjak).

9 *La recodification et les tendances actuelles du droit privé* (2008) 2 Studia Universitatis Babes-Bolyai, 201.

10 See, for instance, the website of the University of Edinburgh School of Law.

11 But see also the paper by Gert Brüggemeier, 'Risk and Strict Liability: the Distinct Examples of Germany, the US and Russia' [2013] ERPL 923-958.

12 The most recent translation into English is the one by Hans Warendorf, Richard Thomas and Ian Curry-Sumner, *The Civil Code of the Netherlands* (Wolters Kluwer 2013, Alphen aan den Rijn) 1301.

appearance,[13] this Code has often been used by way of model by Central and Eastern European nations, such as Poland and Russia.[14]

II A New Code for Romania

In 2011 a new Romanian Civil Code entered into force. The Code consists of seven books: on persons, on family (including legal persons), on property, on succession, on obligations, on prescription, and on private international law.[15] The Code heralds the return to the Civil Code of family law, which Western codes have traditionally included following the example of the Code Napoléon.

A new concept which the Code introduces is that of *fiducia,* a legal relationship by which one or more settlors transfer present or future rights to one or more trustees, with a maximum transfer period of 33 years. The contract is null and void if its intention is to make an indirect donation to the beneficiary. Trustees can only be credit institutions, investment management companies, insurance and reinsurance companies, public notaries and attorneys at law. In relation to third parties, the trustee will be deemed to have full ownership rights over the estate. The opening of insolvency proceedings against the trustee shall have no effect on the estate, but it will terminate the *fiducia.*[16]

The Dutch Civil Code of 1992 does not comprise the notion of trust. To the contrary: Eduard Maurits Meijers, the founding father of the Code, found this notion so alien to the structure of West European property law, that he provided an outright prohibition of *fiducia cum creditore* as it had been accepted in case-law.

The Rumanian code is available on the internet. There also is available a commercial text edition in French.[17]

III A Prague Spring

Romania is not the only Central European country with a new Civil Code. The Czechs likewise adopted a new Code, which entered into force on 1 January 2014. The Code has five parts: a general part; family law; absolute rights including property law and succession law; relative

[13] The draftsman, Eduard Meijers, actually started with his ideas in the early twentieth century, much inspired by the then recent German *Bürgerliches Gesetzbuch.*

[14] Information received from Professor Ferdinand Feldbrugge, the successor of Zsolt Szirmai in Leyden, who refers to the Russian translation of the Dutch Code by Maxim Ferschtman *(Grazhdanskii Kodeks Niderlandov).*

[15] See M. Dutu, M. Tomita (eds), *The new Romanian civil code, two years after its entry into forc/Theoretical and practical problems* (Medimond 2013, Bucharest) 273. Likewise, the Dutch have codified private international law in Book 10 of their Civil Code (not wholly uncontested).

[16] See Florentin Giurgea, 'Changes to the Romanian Civil Code: fiducia – the Romanian concept of trust' SSRN 2037041.

[17] Daniela Borcan et al.,(eds), *Nouveau Code civil roumain* (Futuroscope: Juriscope, Dalloz 2013, Paris).

rights including contracts, torts and unjust enrichment; and transitional and closing provisions. Like in Romania, the notion of trust has been introduced.[18] The Czech Commercial Code has been repealed. One part has been incorporated into the new Civil Code whilst another has become a separate new Act regulating business corporations.

The adoption of the new Czech Civil Code was preceded by in-depth academic study.[19] The Dutch have likewise prepared the new Code with academic work, very much of a comparative law nature. Under Communist rule, the Czechs – and Slovaks – were, together with the German Democratic Republic,[20] among the few Socialist jurisdictions to adopt a truly Socialist code.[21]

IV Poland: the Discussion has been Opened

In 1996, Poland decided to entrust the preparation of a new Civil code to a commission, which then prepared several drafts. In 2011, a proposal for a general part of the law of obligations was published. The Polish developments resemble those in the Netherlands, where it also took a long time before drafts were enacted and where practitioners had serious reservations about the recodification effort.[22] Not surprisingly, the Polish drafting commission has been assisted in its efforts by Dutch civil servants;[23] the main civil servant, Dr Aneta Wiewiorowska, obtained a Dutch PhD.[24]

V Hungary: a Succesful End for a Seemingly Never Ending Story[25]

Hungary has a long history of unfinished draft civil codes. True to its tradition, Hungary recently struggled to adopt a new code. A committee of experts, chaired by Attila Harmathy and later by Lajos Vékás, submitted a draft in 2008, which was not accepted. The Hungarian Parliament then adopted a government proposal, which was, however, vetoed by the President. By 2011, a new group of experts, once again including Lajos Vékás, submitted a new draft, which finally was approved. This year, on 15 March 2014, the new Hungarian Civil Code came into force. In this issue of ELTE, Hugh Beale analyses some paragraphs of the Hungarian provisions on contract law.

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[18] Lionel Smith (ed), *The worlds of tghe trust* (University Press 2013, Cambridge) 281.

[19] Klaus Westen, Joachim Schleider, *Zivilrecht im Systemvergleich/Das Zivilrecht der Deutschen Demokratischen Republik und der Bundesrepublik Deutschland* (Nomos 1984, Baden-Baden).

[20] See J. Švestka, J. Dvořák, L. Tichý (eds), *Sborník statí z diskusních fór o rekodifikaci občanskeho práva* (Wolters Kluwer 2007, Prague) 354.

[21] Th.J. Vondracek, *Nieuwe begrippen in het Tsjechoslowaakse Burgerlijk Wetboek en hun socialistiische karakter* (PhD thesis, Leiden 1981, Hague).

[22] Cserne (n 5).

[23] Aneta Wiewiorowska, *Reforming the Polish Civil Law*, presentation Humboldt University 12 February 2013.

[24] Aneta Wiewiorowska, *Consumer sales guarantees in the European Union* (PhD thesis, Sellier 2012, Utrecht, München) 345.

[25] Heading borrowed from Cserne (n 5).

VI Bulgaria and Slovenia: yet to Come?

Under socialism, *Bulgaria* adopted separate codes on family and personal status law (1949), obligations and contracts (1950) and property (1951). During the past decades, these Codes have been revised. There seems to be no interest in recodification. According to Cserne, this is because Bulgaria first needs to incorporate the EU *acquis communautaire.*[26]

Slovenia has retained the Socialist codes on succession and family law (1977). After it gained independence, Slovenia did adopt new codes on obligations (2001) and property (2002). In 2011, it adopted a new Family Code, but this was rejected in a referendum held in March 2012 because the provisions on same-sex marriage were considered too liberal.[27]

As for the other Balkan states, *Croatia* refrained from adopting a full-fledged new code, but rather introduced partial recodification in the shape of codes on succession (2003), obligations (2006) and consumer protection (2007). *Serbia* has introduced partial codifications in the areas of family law, property law, succession law, company law and labour law in the 2003-2005 period. There is no project for a complete recodification. *Bosnia-Herzegovina* has a fragmented private law with no prospect of recodification either.[28]

VII Earlier Codifications

In 1994, a new *Albanian* Civil Code encompassing 683 articles, entered into force. The Code consists of five books: a General part including Family law, the law of legal persons and prescription, ownership and property, succession, obligations, and contracts (no specific contracts). The Code continues to include traditional provisions, such as those on the ownership of a swarm of bees (Article 189).Some provisions are directly inspired by European directives. Articles 628-634 for instance reflect the 1983 EU Directive on Product Liability, Articles 635-637 the Directive on Misleading Advertising.

Of the three Baltic countries, *Estonia* adopted a new code by way of a step-to-step procedure (somewhat like the Netherlands did earlier, among others because the number of civil servants available in the Justice department was insufficiënt to do everything at once). In 1993, a new law on property was adopted, in 1994 a general part and in 2001 a law of obligations. Latvia simply re-enacted its 1937 code in 1992. The Latvian code consists of 2,400 articles in 4 books (family, succession, property, obligations), modelled after the German *Bürgerliches Gesetzbuch.* Company law is dealt with in a separate commercial code. Lithuania adopted a new civil code in 2000, which

[26] Cserne (n 5).

[27] The Code was rejected by 280,000 (55 per cent) against 233,000 (45 per cent) of votes, with a 30 per cent turnout (The Independent 26 March 2012). Earlier, all polls had predicted the opposite result.

[28] Meliha Povlakić, 'Privatrechtsentwicklung in Bosnien und Herzegowina' in Welser (n 8) 185-225.

was influenced by Dutch, Italian and Quebec law,[29] as well as by the UNIDROIT Principles of International Commercial Contracts.[30]

VIII Other Central and Eastern European Systems

In his paper on the recodification of private law in Central and Eastern Europe (referred to above), Péter Cserne distinguishes three groups of countries.[31] The first consists of nations which have opted for harmonisation with the law of the European Union member states. It has three sub-groups: Central Europe (the Czech Republic, Hungary, Poland, Slovakia and Slovenia), the Baltic states (Estonia, Latvia, Lithuania) and the Balkan countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia)[32]. The second group includes Belarus, Moldova, the Russian Federation and Ukraine. These countries do not try to harmonise their law with that of EU countries. The third group includes former Soviet republics in the Caucasus and Central Asia.

IX How to Cope with EU legislation

A major difficulty for the new and the prospective EU Member States has been how to cope with the many directives and regulations which form part of the *acquis communautaire.* At least three problems had to be met: whether or not to follow the text literally or to adapt it to the country's national tradition,[33] where to integrate the new text – in existing legislation such as a Code or in separate form, and, in the case of minimum harmonisation, whether to provide more protection than strictly needed. It is suggested that these issues, which also face the older Member States, are such that all countries can learn from each other. Faced with the enormity of the task, new member states often had to resort to new procedures, which may be of use to Member States of the older generation. One option frequntly adopted in order to bring the courts into line is to appoint special judges in each court who serve as internal experts as to European Union law. Another option, used in countries where the traditional courts were more difficult to win over, has been to let the Constitutional Court take the lead. Speedy information is also of major importance.[34]

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[29] Simona Selelionyte-Drukteinuene, Vaidas Jurkević, Thomas Kadner Graziono, 'The impact of the comparative method on Lithuanian private law' [2013] ERPL 959-990.

[30] See my paper in the Liber amicorum Valentinas Mikelenasn (2008).

[31] Cserne (n 5).

[32] To this I would add Macedonia, as it is usually referred to in Western Europe (Greeks prefer to call it the former Yugoslav Republic of Macedonia or FYROM).

[33] As Cserne (n 5) observes, lack of time in the early years has often led to literal translation, which was later rued.

[34] A project such as that of ERPL directed by Hans Micklitz at the European University Institute in Fiesole may be particularly inspiring. The project makes available to all users the most recent case-law on EU consumer law of that very day.

Information may also be obtained from the European Court of Justice. Putting prejudicial questions is an excellent way of getting the Courts's opinion. No suprise for central and eastern European nations, who are among the champions in using this procedure. As for the Directive of unfair contract terms of 1993 and the power it leaves to national courts to apply the directive on their own motion, the Hungarian and Slovak (and Spanish) requests outnumber those coming from other member states.

X What about Consumer Protection?

In 2012, the *Deutscher Juristentag* discussed the question whether consumer protection law should be incorporated in a single consumer protection act, such as already exists in Austria, France, Italy, Luxembourg, Portugal and Spain, or should remain in the *Bürgerliches Gesetzbuch,* at least insofar as the private law provisions are concerned. A substantial majority came out in favour of retaining the present state of affairs, under which consumer protection has largely been integrated into the civil law. The same applies in the Netherlands. Whether to enact separate codes or to integrate consumer protection into existing legislation is also an issue in Central and Eastern Europe. Many of these jurisdictions appear to have adopted the Dutch-German approach rather than the French-Italian one.[35] It is suggested that research into the reasons for adopting either of these solutions could be useful for Western Europe.

XI Family Law: In or Out?

Socialist nations have traditionally regulated family law in separate codes. This tradition now appears to be obsolete – and correctly so: new family law research shows the increasing links with contract law and the general part of the law of obligations.[36] Although inclusion in a single Code is no prerequisite for such cross-fertilisation, bringing them together seems more appropriate.

XII Europe

The upsurge in recodifications of the private law raises the question whether these may usher in the codification of the private law at the European level. In the final issue of the 2012 volume of the European Review of Contract Law, Reinhard Zimmermann (Hamburg) argues that this

[35] Some jurisdictions, such as the Czech Republic, opted for a compromise, with the main part of consumer law being incorporated into the Civil Code, while specific topics such as consumer credit law would remain regulated by specific statutes – Tichy, 'Ein neues ZGB für die Tschechische Republik (kritische Skizze)' Zeitschrift für Europäisches Privatrecht (forthcoming).

[36] Contractualisation of family law is one of the themes of this year's meeting of the International Academy of Comparative Law in Vienna (general reporter Frederick Swennen).

will not be the case.[37] From a historical perspective, Zimmermann examines the characteristics of codifications and the conditions in which they may develop. As matters stand, the prerequisites for a European codification seem to be far from ideal. There is no common language, no common court, no common narrative. The arguments in favour are weak and there is no affinity with a European identity. Also, the task is much more strenuous than anticipated now that some thirty autonomous jurisdictions, including those governed by the common law, are involved. The project for a *Draft common frame of reference* can therefore be dismissed as an 'overambitious aberration' and even CESL raises the question whether or not such harmonisation is feasible.

European harmonisation is also an issue in the countries mentioned in this paper. On the one hand there are authors who advocate closer cooperation; on the other hand there are those who are reluctant to surrender their recent hard-won legal independence.[38] Elsewhere I have defended the position that adoption of CESL, even with its in-built restrictions, would be a major step forward in the harmonisation of private law in Europe.[39]

[37] Reinhard Zimmermann, 'Codification/The civilian experience reconsidered on the eve of a common European sales law' (2012) 8 European Review of Contract Law 367-399.

[38] See, for instance, Raluca Bercea in (2008) 2 Studia Universitatis Babes-Bolyai 65-84: such harmonisation is '*non seulement douteuse au point de vue de sa constitutionnalité et légitimité, mais aussi artificielle, non-conforme à la logique même du système communautaire, inappropriée au point de vue instrumental et inouïe diachroniquement*'.

[39] Ewoud Hondius, 'Common European Sales Law: If it does not help, it won't harm either (?)' (2013) 21 European Review of Private Law 1-12. See also Ewoud Hondius and Anne Keirse, 'Does Europe go Dutch? The impact of Dutch civil law on recodification in Europe' in Reiner Schulze en Fryderyk Zoll (eds), *The law of obligations in Europe/A new wave of codifications* (Sellier 2013, München) 303-317.