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NEGLECTED CHALLENGES OF LAW IN THE 21ST CENTURY: FOCUS ON POST-SOCIALIST CENTRAL EUROPE

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Abstract: While libraries have been filled with publications devoted to the impact of globalization and the European integration on law, much less was written on the challenges law and lawyers face because of the world changing with unprecedented speed – the scholarly example of which is the birth of internet law. Many of these survive unnoticed until the outbreak of calamities as it was the case with the 2007 Credit Crunch originating in the United States and soon leading to a major global financial crisis. Bearing this in mind, this paper is focused on such perplexing fundamental changes the true dimensions of which have so far largely remained uncharted. Although their presence is at some level noted, they virtually slip from our hands and consequently no panacea has been forged against the risks generated by them. They not only plague comprehension but may lead to fatal errors as amply demonstrated by the post-1990 transitory period of the post-socialist countries of Central and Eastern Europe. Herein, the challenges caused by the following phenomena will be focused upon: 1/ the heightened role of foreign languages, legal terminology and etymology; 2/ the expanded and more direct role of foreign (comparative) law as well as of 3/ interdisciplinarity; and 4/ the growing speed of social-economic changes.

Key words: globalization, transplantation, European Union law, comparative law, legal terminology, etymology, interdisciplinarity, parochialism, legal imperialism, legal innovation, law and economics, pyramid and Ponzi schemes, self-help and private debt collection, secured transactions law reforms, investment companies, horizontal application of human rights.

1 INTRODUCTION

The main postulate of this brief account is that the post-socialist countries of Central Europe face numerous common challenges, many of which escape attention and as a result are neither properly researched nor are devoted sufficient attention to in education or by regulators. Furthermore, irrespective of the common problems, in this niche of the Old Continent still it not customary to learn from the experiences of the neighbors1 and therefore the cross-border reaching academic discourse is far from the desired. The price paid is repetition of mistakes, failures and calamities just in differing forms. The often blind deference to the pet major western jurisdiction(s) or uncritically taken over presumptions – like the incompatibility of AngloSaxon and civil laws – additionally not only limits the vistas of law reformers but may be the catalyst of unwanted consequences. This paper aims not only to back up these thoughts with concrete – admittedly eclectic – examples from the region2 but also to highlight that the last twenty-some years of transition in CEE-cum-globalization and the many other linked changes asks for a completely new perception of some fundamental legal concepts and a new approach to law, legal education and research. These range from the need for a novel attitude to foreign legal terminology and foreign

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1 I regretfully noted this already back in 2006 delivering a speech at the 10th General Meeting of the Common Core of European Private Law Project in Trento, Italy. See Tibor Tajti, the Trento Project: the Way to Rediscover each other in Europe and Beyond, in: Mauro Bussani & Ugo Mattei, Opening Up European Law (Stämpfli, Sellier, Carolina Academic Press, 2007), at 141. Among the very few positive examples is the conference series the Milestones of Law in the Area of Central Europe organized by the Comenius University Faculty of Law.

2 As unfortunately the literature devoted to the region is scarce and given that a huge number of interesting local phenomena have thus fully escaped attention, it is next to impossible to provide long lists of especially English language references. This is the main reason that I relied to a great extent on my own research and publications.
law, a tested method for handling the pressure caused by the increased role of interdisciplinarity through the many challenges brought to the surface by the unprecedented speed of changes.

2 LAW and the NEW ROLE OF FOREIGN LANGUAGES, LEGAL TERMINOLOGY AND ETYMOLOGY

2.1 What has Changed in Post-Socialist Central Europe?

The post-socialist jurisdictions of Central Europe are the best examples of the volte face these systems were forced to make with respect to their attitude to foreign languages. To start with, socialist (communist) systems were introvert, disinterested in the laws especially of western capitalist systems and instead had tried, but had failed, to forge properly functioning idiosyncratic solutions. Consequently, there was no need and ideologically it was highly undesirable to learn foreign languages let alone foreign legal terminology; except for the dominance of Russian language within the Warsaw Pact (but not the former Yugoslavia). This stance had to be given up virtually overnight somewhere after the fall of the Berlin Wall and the beginning of the transition towards market economy and multi-party democracy. These first few years were filled with some peculiar kind of romanticism – including sudden thirst for foreign languages and a renewed interest in western laws – what unfortunately was later followed by gradual decline and eventual apathy. The enthusiasm for learning languages has changed parallel with the prevailing opinion of the society at all times. Notwithstanding the deviations, today the rule of the day is once again that law students are expected to learn foreign languages. International law firms invariably recruit their staff by placing heavy emphasis not just on foreign language proficiency of candidates but also on knowledge of the legal terminology and law of some of the western major jurisdictions.

Yet the law’s encounter with foreign languages does not end here. While it was easy to introduce teaching of English language, to promote courses devoted to English legal terminology, or even to teach a course or two on English or US law, it would still be exaggerated to claim that things have radically changed for the better no matter that more than twenty years have passed in the meantime. The repercussions of such state of affairs go well beyond the incapability of a significant part of faculty and scholars to meaningfully contribute to or join international research circles. As there is a great degree of truth in this presumption, one may as well legitimately speculate whether and to what extent were the failed reforms – not a few in CEE – attributable to miscommunication or language-linked problems? It seems additionally that there is consensus, neither on how local languages should react to the arrival of such new terms for which no perfect local equivalents are available, nor seems there to be a settled formula for teaching the new terminology. In the lack of properly formulated policies and methods, precious time is lost, resources are wasted and not infrequently entire reform projects could go astray because of the seemingly unimportant language & terminology considerations. Here are a few examples from Central and Eastern Europe (CEE).

2.2 Illustration Number One: the Case of CEE Secured Transactions Law Reforms

Secured transactions law\(^5\) - i.e., use of movables, rights and claims as collateral – was undoubtedly one of those fields of private & commercial law that ranked high on the reform agendas in the entire region. The reason was pretty mundane: in CEE this branch of law was limited to the rudimentary possessory pledge ill-suited to modern financing needs. Yet as no market economy can

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\(^3\) For a brief encounter with the largely forgotten yet genuinely unparalleled creatures of ex-Yugoslav company law see, e.g., Tibor Tajti, Corporate Governance: An Oversold Elitist Idea of no Interest to or for the Central European Transitory Economies?, the Corp. Gov. Law Rev., vol. 1, No. 1, at 2-99 (2005).

\(^4\) Some of the scholars who were earlier at the forefront of promoting secured transactions reforms in CEE have turned to skeptics. See, e.g., Roderick A. Macdonald, Transnational Secured Transactions Reform: Book IX of the Draft Common Frame of Reference in Perspective (2009), 15(4) Zeitschrift für Europäisches Privatrecht 745.

\(^5\) The designation ‘secured transactions law’ is used primarily in the United States though the phrase is now internationally known. In Australia, Canada, New Zealand, the United Kingdom as well as in other earlier English law-influenced jurisdictions this branch is rather known as ‘personal property security law.’ In civil law systems, the books dealing with this topic are named as the law of credit security, the law of security payment and performance or pledge law.
be built without access to credit – be it loan- or sale credit – and as no financier is willing to extend a credit without an easily and cheaply enforceable security, more international organizations have added to their agendas the creation of a modern secured transactions system. In CEE, it was the European Bank for Reconstruction and Development (EBRD) that had set the ball rolling, an initiative that was later followed by others. In a sense, this culminated on the EU level in Book IX of the Uniform Commercial Code (UCC) of the United States (US) – including the Draft Common Frame of Reference (DCFR). Each of these projects departed from the Unitary Model in Article 9 of the UCC and the DCFR that in a sense recommends for Europe a system resting on the pillars of the Unitary Model. Irrespective of the common building blocks, the resulting national systems tend to differ from each other quite meaningfully. For example, different organizations were entrusted with the operation of the newly introduced registry of security interests on movables; while in Hungary and Slovakia the National Organization of Public Notaries and in Poland commercial courts were chosen, in Estonia privately run entities were entrusted with the task. This, as it was realized mainly ex post facto, made registration expensive what eventually negatively affected the popularity of the new system. Romania, assisted by the American USAID, seems to have ventured the farthest as it introduced without any further ado self-help repossession, a concept that is despised by all Continental European laws yet which is an indispensable building block of the mentioned Unitary Model; though the country was later forced to back-pedal in that respect.

As said, the common denominator of the overwhelming part of these projects was that they all are all based on the Unitary Model enshrined into UCC Article 9. The quintessential novelty of this model is that – similarly to the numerus clausus of property rights known to civil laws – a proprietary (in rem) effect is afforded only to those security devices which are agreed upon (attachment) and then perfected as required by it. This, in particular, denotes a priority position both, within and outside the context of bankruptcy. In other words, the system does not tolerate bypassing of its rules and consequently no matter how the parties name their transaction, if they would like to have a security with a guaranteed priority position and would otherwise benefit from the system, they have to comply with the rules. This justifies characterizing the model also as comprehensive. As the Americans had had a considerable number of distinct security devices in the pre-UCC era, each with its own peculiar terminology, and as there was a need to somehow break with the past when drafting the UCC, it was inevitable to simplify and unify the terminology as well. This is the very reason because of why the earlier less frequently used term ‘security

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7 The document was drafted by leading experts from the member states of the European Union and as such one of its weaknesses is exactly that it is ‘Professorenrecht’ or a law made predominantly by scholars. See, e.g., Luisa Antonioli & Francesca Fiorentini, A Factual Assessment of the Draft Common Frame of Reference – Preface (Sellier, 2011), at 5. The influence of US law is not mentioned in the comments to DCFR Book IX and the related welter of scholarly publications escape that details as well. The Comments to the DCFR are a valuable source for researching and teaching European private law in my opinion. The title of the six volumes Comments is Christian von Bar & Eric Clive (eds.), Principles, Definitions and Model Rules of European Private Law (DCFR) (Oxford Press, 2010).


10 ‘Perfection’ is a terminus technicus of UCC Article 9 denoting provision of public notice on the creation and existence of security interests to the other participants of the market by way of registration, transfer of possession of the assets used as collateral or by control (e.g., bank accounts or dematerialized securities). However, the term is used quite widely also by international scholars.

11 For example, instead of [chattel] mortgagor and mortgagee or lessor and lessee the new terms of secured creditor and debtor replaced all the earlier terms.
interest’ came to be the designation of the central category of the Unitary Model. EBRD, as a London-based financial organization, chose to name the central category of its Secured Transactions Model Law not as ‘security interest’ but as a ‘charge’ – undoubtedly following the designation of the two most popular security devices of English law, the fixed and floating charge.

Now, when the Unitary Model originating in UCC Article 9 reached via EBRD the CEE countries, the cavalcade of overlapping yet often conceptually differing terminology, turned to be genuine obstacles for civil lawyers accustomed to the duet of possessory pledge and mortgage of immovables. Poland, for example, opted for the oxymoron of ‘registered pledge.’ True, EBRD had felt that legal terminology might be a real hurdle and had drafted a simplified vocabulary nonetheless of what it is still a challenge not to get lost in the quagmire of terms being in use in Europe. As a result, it was not unusual to hear proposals that a new local language designation should be invented for the term of ‘security interest’ as none of the locally known categories seemed to be appropriate. Some authors even today feel more comfortable using the English terms in the local language texts or use the local names in English language publications. What is striking, however, is that nobody seems to admit that terminology was and is one of the causes of the mistakes made in the context of secured transactions reforms, though the emphasis afforded to terminology by the drafters of the DCFR seem to denote a new beginning.

Another source of terminology problems is that civil lawyers often forget that English and US law (or other common law systems) have become radically different by now and the resembling terms as a rule have different connotation. One of such sticky points for civil lawyers is, for example, the differentiation of the English ‘floating charge’ from its US kin, named as the [concept] of ‘floating lien.’ In this case one can superbly realize that terminology means always more than mere selection of terms and that there is always also a conceptual discrepancy in the penumbras. In case of the ‘floating securities’ this importantly means that while a perfected US floating lien creates simultaneously with its perfection a priority position that is not the case under English law where the priority point arises solely at a later point in time – when the charge crystallizes and transforms into a fixed charge. As the English floating charge was widely employed in business life in Australia, Canada (the common law provinces) and New Zealand prior to the taking over of the American Unitary Model – which was thus incompatible with the inherited laws in these countries – these systems were forced to find a reconciling solution. The end result was the floating charge’s “conversion into a fixed charge with an implied licence to the debtor to carry on business.” Now, nothing unusual but rather something quite normal yet indicative of the importance terminology played during the earlier phases of transition.

For example, while the local kin of the UCC Art. 9 ‘floating lien’ or the English fixed & floating charge were introduced in Hungary with the amendments of the Civil Code in 1996 – named as ‘property encumbering charge’ (“vagyont terhelő zálogjog”) – nine years were needed to clarify the legal nature of the device and to fix its priority position by the Supreme court (decision Gfv. IX. 30.247/1005). See István Mándoky, A vagyont terhelő zálogjog ranghelye [the Priority Position of the Property Encumbering Charge], in: Bulletin of Public Natories, Nos. 7-8, July-August 2006, at 14. I have also expressed my doubts already in 2001 claiming that borrowing the features of a legal institution from two otherwise differing legal systems cannot lead but to problems. See Tibor Tašti, Comparative Secured Transactions Law (Akadémiai könyvkiadó, 2002), at 310 et seq.

See Jacob S. Ziegel, Benjamin Geva and R.C.C. Cuming, Commercial and Consumer Transactions (Emond Montgomery, 3rd ed., Toronto 1995), at 387. The same occurred in Australia that with the passage of the Personal Property Securities Act 2009 (Cth) also transformed the

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12 See, e.g., András Hanák, Magyar zálogjog nemzetközi kitekitéssel, in: Gazdaság és Jog, vol. 7, No. 9, at 3-6 (1999) proposing that in addition to or rather instead of the already known ‘lien’ (“zálogjog”) a new term of (“biztosítéki jog”) should be introduced for the sake of simplification of the language used by lawyers and bankers.

13 See, e.g., Edita Ćulinić Herc, Ugovorno osiguranje tražbina zalaganjem pokretnih stvari bez predaje stvari u posjed vjerovnika [Securing Obligations by way of Contracts Pledging Movable without Transfer of Possession] (Published by the Law School of the University of Rijeka, 1998), a publication in Croatian language yet which quite often used the English terms rather than finding a Croatian equivalent. For example, a separate section was entitled as ‘Floating Charge’ instead of ‘Lebđeća zaloga;’ a term that later became routinely used in Croatian texts. ld. at 270. This is nothing unusual but rather something quite normal yet indicative of the importance terminology played during the earlier phases of transition.

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when CEE countries, not knowing for any kind of floating security, had first faced this
comprehensive security device, they could have easily been mislead by the resembling designations
actually meaning incompatible things in the said English-speaking jurisdictions.

To make things worse, German scholars tend to use the established English vocabulary
when writing in English about their idiosyncratic security devices (i.e., the so-called kautelarische
Sicherheiten or contracts-based security devices)\(^\text{16}\) even though these are not subject to any kind of
registration – yet what is a sine qua non requirement under the Unitary Model. That the terminology
was misleading and that many things were unclear in the early days of the reforms is well illustrated
by the autochthonous introduction of the mentioned latent security interests of German law by
German and Austrian banks spreading to CEE and the parallel imposition of registration and
common law-based secured transaction systems by local legislators. The most expressive examples
of the many problems the resulting conflicting systems of security devices caused were Hungary
and Poland.\(^\text{17}\) In these countries, few precious years were lost because of such uncontrollable
borrowing of irreconcilable concepts; obviously partly due to incomprehension and ignorance of
foreign laws. Although the moneys lost as a result could hardly be quantified, still that should not
lead to the conclusion that thus no harm was done.

2.3 Illustration Number Two: Imperfect Terminology in other Fields

Another problem is that often terminology is not the result of conscious choice but rather is
the result of hectic organic growth where the selection is resulting from ad hoc improvisations of the
affected industries. While the earlier hinted at terminology innovations of Grant Gilmore and the
other drafters of UCC Article 9 could be an example of perfection, the designations of the main
actors in the world of banking, capital markets and financial services, for instance, are the exact
opposites. This disorder not only causes quite a headache but requires substantial time for
mastering the terminology and comprehending of how such state of affairs affects the content of the
pertaining law. For example, the designation of one of the main actors of contemporary global
financial markets is a misnomer because ‘investment banks,’ (like Goldman Sachs) in fact, are not
‘banks’ given that they “do not accept deposits and, apart from selling securities, [do] not deal with
the public at large.”\(^\text{18}\) Irrespective of what no major initiative seems to have been launched to find a
more fitting designation for them. Further, in common law systems – especially in the US – a
separate diverse category of financial organizations living from secured transactions law exists: the
so-called ‘non-banks’ or ‘non-banking financial organizations.’ This deserves mentions as to
Continental Europeans accustomed to universal banks reigning the world of finances may sound strange, to say the least.

The related field – the law of investment companies – is another illustration of the
hardships terminology may generate. Here, it is not the designation of these specific types of
companies that causes unease but that the paradigm investment company in the United States (US)
is the entity with the generic designation of ‘mutual fund,’\(^\text{19}\) yet ‘fund’ means (even in the US) something qualitatively different from a ‘company.’ Similarly puzzling is the story of nowadays often
mentioned ‘hedge funds’ which have grown into systemic risk-generating behemoths by the 21\textsuperscript{st}
century. Their designation is due to that fact that they manage to escape from under the reach of the
Investment Companies Act (1940) and thus may engage in much riskier yet potentially more
profitable investment activities than the other forms of investment companies. If one forgets about

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\(^{17}\) See Krzysztof Kaźmierczyk & Filip Kijowski, Enforcement of Contracts in Poland, in: Stefan Messmann & Tibor Tajti, the Case Law of Central and Eastern Europe – Enforcement of Contracts (Eur. Univ. Press, Bochum – Germany, 2009), at 609 et seq.

\(^{18}\) Quoted from the Black’s Law Dictionary (United States).

\(^{19}\) Black’s Law Dictionary defines mutual funds as “[a]n investment company that invests its shareholders’ money in a usu. Diversified selection of securities.”
the generally valid caveat that crossing the borders normally means different terminology and different law, then further obstacles would obscure easy comprehension as EU law would speak of ‘UCITS funds’ and on national level funds would as a rule be only ‘funds’ and not separate business vehicles known to company law. Because of these reasons passing of local regulations and in particular coining of the new vocabulary for all these key terms in local languages would be a real yet inevitable challenge to deal with.

The list of terminology & etymology queries does not end, however, with these few examples. The point stressed here is that heightened attention should be given to foreign terminology and that it pays devoting some attention to etymology of key legal terms as that is the token of proper comprehension. Without clarifying the meaning of key concepts the chances that mistakes would be made by local reformers are heightened. There are also a number of misconceptions like that the meaning of key terms used by common laws is the same (e.g., the above-mentioned English floating charge versus the US floating lien) or that the closeness of two languages (e.g., French and Romanian) is the guarantee of accuracy. Sometimes the designations resemble but cover categories of different breadth like the extremely narrow concept of self-help of civil laws versus its developed powerful kin in common laws.  

3 FROM THE REIGN OF CONFLICTS OF LAW THROUGH COMPARATIVE LAW TO TEACHING FOREIGN LAW?

3.1 What has Changed since Socialism?

Given that the socialist systems of CEE were introvert, parochial and largely disinterested in western capitalist law, the main window to the West was in those days through conflicts of law (i.e., private international law as known by civil law systems). The relatively developed comparativist movements in some and the quite intense involvement of socialist states in the work on various international legal instruments, like the Vienna International Sales Convention (CISG), were the exceptions that corroborate rather the negate this claim. For the overwhelming part of the legal community, in other words, it was conflicts of law that meant some connections to foreign capitalist law notwithstanding that the statistical numbers on the actual resort to this branch of law in courtrooms in reality was very low.

With the start of transition, a radical change was inevitable as western capitalist law became of top importance overnight what presumed heavy borrowing from the earlier despised West. Simultaneously, the process of the dethronement of conflicts of law and the ascension of comparative law with a pragmatic edge has begun. What was virtually unconceivable earlier is not unheard of anymore: teaching of foreign law in (some) law schools of the region. The prestige of foreign law further increased with every step made towards the European Union (EU). As a consequence, at least, courses on EU law have been added to the curricula of many law schools. The same could be said also vis-à-vis the impact of the jurisprudence of the European Court of Human Rights (ECHR), the spreading of international commercial arbitration, or the impact of such successful international conventions as the CISG. Still, depending on various local factors from availability of lecturers, foreign language proficiency of the faculty and students through opposition to the intrusion of foreign law (i.e., “legal imperialism”), the outcomes differ widely in the region. These changes have occurred in a peace-meal manner and were often of experimental nature. The analysis of the gained experiences is, however, lacking and open questions abound.

This, however, does not mean that the state of perfection has been reached. Notwithstanding the courses – which tend to remain of introductory nature and limited to the single

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20 The acronym UCITS stands for ‘undertakings for collective investments in transferable securities,’ which are mutual funds in the US. See, e.g., Hal S. Scott, International Finance (Foundation Press, 2009), at 238.

21 For example, the German concept of self-help is limited to self-defence ["Besitzwehr"] (§859(1)) and the right "to recover the object from the dispossessor immediately after the interfering act" ["Besitzkehr"] (§859(2)). See, e.g., Sjerf van Erp and Bram Akkermans, Cases, Materials and Text on Property Law (Hart 2012), at 115. As opposed to German law, English law looks upon self-help as one of the eight principles of the ‘philosophy of commercial law’ or something that should not be curbed (like in German law) but encouraged. See Roy Goode, the Codification of Commercial Law (1988) 14 Monash L. Rev. 136, 148.
jurisdiction from where the guest lecturers stem from – and the increased availability of information on foreign law due to the Internet, legal education is overwhelmingly still parochial. Though, Central Europe ranks comparatively high in the respect: Europeans often shockingly realize that – especially – top US law experts have never even been outside of their home country let alone having studied foreign laws. The intellectual response of Europeans not infrequently is ignorance US law; what might not necessarily be the wisest solution in all situations. Apart from these excesses, the legal history of the last few decades amply illustrates the risks the ignorance of the omnipresent foreign law presents. Not only court cases have been lost because of it, but – as the data supporting the EU’s recent Common European Sales Law (CESL) project show – especially small and mid-scale businesses do not engage in cross-border business because of fear from foreign law (and language).

On a macro level, reform projects have been given up because of incomprehension and fear from foreign law – suffice to mention UNCITRAL’s dropping of the idea of dealing with secured transactions law in 1980 or the putting aside of the Draft Common Frame of Reference by the EU today.

3.2 Novel Reasons Making Resort to Foreign Law Inevitable

Borrowing from the others is hardly a new development. It has been ongoing throughout the capitalist era irrespective that the 19th and 20th centuries were characterized by the triumph of national states each trying to forge its own distinct law. Globalization has changed that and made study of foreign law a top priority again: what differs now is the more direct role foreign law plays. Put simply, the enhanced cross-border activities and the increased speed of changes presumes knowledge of foreign law and not only of – what used to be somewhat mistakenly referred to as – ‘international’ law. As opposed to even the 1990s, thanks to technology this is becoming increasingly possible. The price paid for ignorance of foreign law has many facets from lost court cases to failed reform projects. A good illustration of the former is the unhappy fate of non-registered German security devices before US and courts of those other common law jurisdictions that look upon registration of security interests as such a public policy issue that cannot be waived.22 Yet more dangerous are the ill-suited substitutes that are resorted to when no mature legal categories or rules are available for imminent real problems; what was often the case in post-socialist CEE countries. In the lack of tailor-made laws, resort was typically made to classical branches of law; a practice that could not but lead to dissatisfactory, if not disastrous, results – though these were not talked of but behind the coulisses. The same applies to moneys lost during the socialist and transitory era by local businesses caused by ignorance of foreign law in this or that form.23 Yet as opposed to corruption and the lack of the rule of law – those weak points of post-socialist (and emerging markets) about what libraries have already been written and many projects have been launched – the many unhappy consequences of the ignorance of foreign law have essentially escaped attention.

Now, a few further thoughts on why there is a need for a new approach to foreign law. First of all, many areas of life change so fast that the local law’s catching up with the developments cannot be left to organic growth of law anymore. Hastily passed laws are not unheard of either even

22 See the leading US case of the Hong Kong and Shanghai Banking Corp., Ltd., v. HFH USA Corporation (805 F.Supp. 133, W.D.N.Y. 1992). In the case, the German supplier’s retained title was subordinated to the security interest duly perfected for the benefit of the Bank in the US because the retained title validly created under German law was a latent (secret) security. This notwithstanding that the German supplier and the US buyer have agreed on the application of German law.

23 As the author of this paper used to be a corporate counsel of a former Yugoslav major company prospering from being capable of manufacturing products that were saleable in western markets, I remember some such examples ranging from the failure to ship goods to a foreign buyer without any kind of security (albeit reliance on letters of credits had been something quite common already in the 1980s in Yugoslavia) or an attempt to understand and prepare a defense against a products liability claim of a US machine operator by resort to local Act on Obligations and local Yugoslav civil procedure law.
in leading systems. Yet postponement of the passage of needed laws or failing to heed to the experiences of those who had already faced the same challenges is still quite characteristic to the CEE region. The direct effects of cross-border reaching pathological phenomena just adds another layer of novel risks. Takeover law might be a good example from and for the region: while this branch of law is as a rule underdeveloped here – typically not going much beyond than what EU law requires – financially strong and by experts heavily supported private equity or other types of institutional investors are already very much present and are looking for lucrative investment opportunities in the region. Once control of a pearl of a national economy is taken over by a hostile bidder, the prospect of a local court potentially deciding against the deal after a number of years is hardly more than a painful delusion for local regulators, businessmen and politicians alike. The novel challenge is posed by the fact that understanding takeover law and formulating appropriate defense strategies based on the freshly imported and untested local law is next to impossible: the token of success in such situation is resort to mature foreign laws.

The financial pathology known as pyramid and Ponzi schemes is yet another example though of a different sort. Their example is especially telling because no emerging market is immune to them. Additionally, typically they are not looked upon as phenomena belonging to the bailiwick of lawyers what is most unfortunate as economists tend to be of the same opinion as well. Yet when they emerge they generate lots of headaches to prosecutors, regulators, bankruptcy lawyers and courts – professions and offices predominantly filled exactly by lawyers. Irrespective of the risk that the same or similar version of a pyramid of Ponzi scheme would reemerge in a neighboring country, the interest in the related experiences of the neighbors is normally minimal and cross-border reaching analysis of these does not even seem to exist. This is to certain extent driven by the positivistic traditions of Central Europe which – by focusing on written law organized into a seemingly perfect system – tends to ignore pathology, at least, more than case law-oriented common laws.

4 THE REPERCUSSIONS OF THE INCREASED ROLE OF INTERDISCIPLINARITY

Another buzzwords of our times is ‘interdisciplinarity;’ suggesting its increased importance as well. Not infrequently though interdisciplinarity is equated with the US-originated ‘law and economics movement’ that has long ago reached Europe as well. Not much time was needed to realize, however, that its mainstream versions’ obsession with mathematics and incapability to keep the too abstract theories characteristic to modern time economics at bay make it too distant from real life. The reaction of market needs-sensitive schools was the introduction of masters programs featured as ‘law and business,’ indeed, to express that the curriculum is more down-to-earth. It is a strange twist of fate that this experimentation and failure to find the properly balanced mixture of elements from law, business and economics resembles the struggle with the imposition of Marxist political economy on law schools during socialism. However, apart from this macro-level aspect, more concrete examples of the imprint interdisciplinarity leaves on law could be found in recent times. While it might seem far-fetched to speak of a trend, these changes do occur and often survive unnoticed by legal scholars.

From that perspective, one may differentiate the narrower intra-law from the farther-reaching meta-law type of interdisciplinarity. The first denotes the increased infiltration of public law into the domain of private law. In fact, all branches of law that may qualify as a form of ‘regulation’ represent such a mixture of public and private law elements starting with the fact that

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25 For the main Ponzi schemes of CEE see the introductory sections in each of the chapter in Stefan Messmann & Tibor Tajti, the Case Law of Central and Eastern Europe – Enforcement of Contracts. See also, Tibor Tajti, Central European Contribution to the American Debate on the Definition of ‘Securities’ or Why does the Definition of ‘Security’ Matter?: the Fiasco of the Hungarian Real Estate Investment Cooperative, Pyramiding, and Why Emerging Markets should be Equipped to ‘Act’ rather than ‘React’: 15 Transnat’l L. & Contemp. Probs. 111 (Fall 2005).

26 As defined by MacNeil “[t]he term ‘regulation’ is nowadays understood more specifically to refer to rules and procedures created by statute and administered by dedicated agencies. […]”
they grew out of administrative (thus: public) law and the basic tools with which they operate stem as well primarily from public law. This is most readily visible in case of mature systems though (i.e., regulatory states). For example, US federal environmental law relies not only on the substantial powers of the Environmental Protection Agency (EPA) but also on tort law inclusive strict tortious liability. Likewise, one of the quintessential building blocks of the US federal capital markets and securities regulation – Europe has already embarked on borrowing it – is private securities litigation with the law of collective actions. Though one may legitimately wonder also where European-type labor law should be also added to the list as it is a branch of law primarily characterized by limits and duties imposed by the state rather than by freedom of contract – collective bargaining agreements obviously being in nature closer to legislative or administrative acts than to contracts. The so-called ‘horizontal application of human rights’ may be an equally important, in Europe increasingly present, example. This indirectly is the expression of the limits of private law which is often not capable of providing appropriate remedies and protection to parties what requires resort to public law.

Stepping beyond the strict confines of law (i.e., meta-law), instances where economics, accounting or other disciplines infiltrate are myriad. Let us mention a few. For example, while company law is looked upon as the bailiwick primarily of lawyers, corporate governance - the post-Enron worldwide success discipline – is hardly that anymore as it gives extremely wide room to accounting and ethics. The already mentioned US federal Sarbanes and Oxley Act (SOX), passed to tackle the calamities caused by the fall of Enron and other companies in 2001, properly displays this. Whistleblowing, for example, is a tool that plays an important role in SOX and yet which primarily relies on the presumed sensitivity of injustice of individuals; the role of law here is limited to providing protection to whistleblowers. Further, while Continental European company laws still maintain their legal capital rules, American corporate laws have almost completely done away with them and as the concomitant result the role of accountants has visibly increased. The decision on whether and how much dividends should be paid to shareholders, for example, has by now been mainly transferred into the hands of accountants.

A similar yet different type of encounter of law and other disciplines is increasingly becoming the rule of the day in courtrooms where generalist judges are expected to pass decisions on issues that require expertise in subjects not taught in law schools. The dimensions and characteristics of the new expectations imposed on courts and judges vary. The recent NML v. Republic of Argentina decision of the federal District Court for Southern District of New York might be an example of these challenges because here the court ordered Argentina to pay hedge fund creditors in full on Argentina’s defaulted bonds irrespective that these creditors were earlier unwilling to accept any haircut (i.e., reduction) – i.e., they were uncooperative. Such a position would obviously serve justice to this limited category of creditors only yet what would be a clear injustice to the remaining 93% of creditors whose payments would thus be endangered irrespective that they were cooperative and were willing to enter into compromises that would have benefitted all sides. It is also a question how just it is to threaten the solvency of the Argentine Republic itself for form of regulation started in the United States in the early 1930s, largely as a response to the events that culminated in the Wall Street Crash of 1929. See Iain G MacNeil, the Law on Financial Investment (Hart Publishing, 2005), at 20.


28 The role of lawyers, in the context of US corporate law, has been reduced rather to “ensur[ing] that a directorial decision does not inadvertently give rise to personal liability.” Hamilton & Macey, Cases and Materials on Corporations Including Partnerships and Limited Liability Companies (Thomson-West, 9th ed., 2005), note 1, at 414.

debts incurred long time ago. Another example may be a German labor law case from the 1990s in which a German court adjudicated that the employer of an elevator-serviceman has to pay the addition to basic wage for staying alert also for the period when the employee-serviceman had been on vacation.\textsuperscript{30} The common denominator of the two cases revolves around the question whether judges are to serve justice in a case without taking into account the effects of their decisions on the wider economy or on other stakeholders: a fundamental legal issue the contours of which are often being obviously reshaped, or at least questioned, exactly in cases involving considerations dictated by other disciplines but law.

5 LAW, EFFICIENCY AND THE INCREASING SPEED OF CHANGES

It should be uncontested that the speed with which changes are occurring has increased dramatically by the 21\textsuperscript{st} century. Suffice to compare, to the extent imaginable, the times when the great European civil codes were drafted with what we eyewitness on a daily basis nowadays. Although this is something obvious especially to generations of lawyers born into these swiftly moving times, hardly have these challenges – brought to the surface by this metamorphosis – been systematically tackled. We simply do not realize that the balance among the basic functions of law that had gained their shape somewhere during the earlier phases of capitalism underwent major changes by now. This multi-faceted phenomenon has myriad repercussions of varying nature.

One of the common burning issues is the intensifying incapability of lawmakers to catch up with the developments; admittedly more of a problem in civil laws that still refuse to give up the dogma that it is only the legislature that is empowered to make law. Irrespective that it is normal nowadays to plan the number of statutory acts a parliament is foreseen to pass a year, there is a constant lag complained of typically by the opposition and constitutional lawyers. Apart from the false presumption underlying this technique according to which it is not life that dictates the tempo of changes but rather humans, it is becoming clearer year by year that there is an increasing mismatch between what should be and what has been regulated. Oftentimes the political preferences of the governing political forces admittedly further reshuffle the priorities. What civilian systems refuse to recognize in that respect is that in-depth systemic changes have already been under way for years in particular related to the increased role of court decisions and regulations as distinct sources of law.

For example, the already mentioned famous German security devices, the \textit{kautelarische Sicherheiten}, have come into existence and have survived successfully to this date without being enshrined into the venerable German Civil Code: innovative lawyers invented them and courts gave green light to their exploitation later. The related law, in other words, is essentially an amalgam of court made law and industry as well as banking practices. Another example pointing in the same direction is hidden in the reasoning of the German Constitutional Court’s decision in the renowned \textit{Princess Soraya case}\textsuperscript{31} indirectly recognizing the power of courts to make law.\textsuperscript{32} Less known is, however, that the increased role of court decisions as a source of law is a reality also in many CEE countries.\textsuperscript{33} In some, these changes are modest yet in others more daring moves have been made

\textsuperscript{30} The case was commented upon in the magazine ‘\textit{Wirtschaftswoche}’ No. 41, of 5 Oct. 1995, at 27-28 in the article entitled “\textit{Völlig losgelöst}.” As the journalists opined, even though in Germany court judgments do not have the strength of authoritative precedents, the major decisions of high courts are being followed on the basis of what they concluded that the peppercorn value involved in this single case (272 German Marks plus interest) led to increase of prices in the service industry what had negative effects eventually on the competitiveness of German economy.

\textsuperscript{31} Princess Soraya Case, Fed. Constitutional Court of Germany, 34 BVerfGE 269 (1973).

\textsuperscript{32} As the Constitutional Court stated in the judgement “[t]he judge’s task is not confined to ascertaining and implementing legislative decisions. […] Where the written law fails, the judge’s decision fills the existing gap by using common sense and ‘general concepts of justice established by the community. […]’ The judge’s freedom to creatively develop the law necessarily grows with the ‘aging of codifications’ with the increased distance in time between the enactment of the legislative mandate and the judge’s decision in an individual case.”

\textsuperscript{33} For examples from CEE see, \textit{e.g.}, Editors’ Introduction to Stefan Messmann & Tibor Tajti, the \textit{Case Law of CEE – Enforcement of Contracts}; available also via <http://www.SSRN.com >. Ukraine
to a great extent because the legislation is incapable of reacting in due time to the novel challenges. On the other side of the Atlantic, in the United States, precedents remain important source of law yet regulations – of increasing size – are equally important, if not more important, tools for solving burning problems. This systemic rapprochement is, however, not the outcome of deliberate human action but rather a set of changes dictated by the exigencies of our times.

Speedier business life also requires “speedier” law or a law based on which private parties can more efficiently enforce or protect their rights. It should not come as a surprise that exactly those laws that have developed such mechanisms are also the most favored ones when choosing the law applicable to cross-border transactions. It is not without reason, for example, that the English ‘Mareva Injunction’ was apostrophized by commentators as the “nuclear weapon of the law” as it gave general creditors the right to freeze assets of debtors virtually instantaneously and ex parte. Although the US Supreme Court refused to follow the suit and introduce a similarly powerful device in the Grupo Mexicano case, Justice Scalia formulating the reasoning found it important to stress that there is a tension between the old law that aimed to “secure a just result in an age of slow-moving capital and comparatively immobile wealth” and the postulates of modern times. Thus, in more business-friendly jurisdictions the problem is noted and reacted upon. The irony is that some jurisdictions possess equally efficient devices as the mentioned Mareva Injunction yet they are not thought to be of importance and are not “advertised” as investor or creditor-friendly mechanisms. Last but not least, if there is a degree of truth in this train of thought, then effectuation changes in the priorities of what is being taught as part of courses like civil procedure would be necessary to make the law on preliminary and provisional measures a priority.

In the context of capital markets, financial services and corporate finance characterized by intensive innovation and pathological phenomena from isolated pyramid and Ponzi schemes to burst of bubbles of systemic dimensions (e.g., the 2007 Credit Crunch), prevention or at least timely reaction is quintessential. In this domain, in addition to the protection of investors and the integrity of the system it is of pivotal to assure ex ante rather than ex post protections – the latter denoting years-lasting court proceedings of little or no use to investors having lost their investments in a bubble. The drive to innovate coupled with globalization and insensitivity to these problems by local regulators and legal communities invariably results in new risky financial products seamlessly crossing national borders and problems becoming visible only after the harm has been done or when already it is too late. This extreme vulnerability would require teaching of these disciplines in law schools what has been so far the exception rather than the rule. Coverage of EU law – which due to the subsidiarity principle is inherently limited and thus not functioning as a comprehensive shield – is insufficient similarly to a personal computer protected solely by an antivirus program but not a firewall system. Similar considerations apply in other areas of regulation. In fact, ‘regulation’ came into being and lives from the incapability of classical branches of law of providing ex ante protection. In brief, all fields of regulation from environmental through even labor law that are characterized by interference by way of mandatory rules presents yet another facet of the uneasy relationship of speed and law.

6 CONCLUSIONS

It is hoped that the above elaboration is thought-provoking and that it properly illustrates that Central Europe has such fundamental and yet shared problems which have largely escaped attention. It is most unfortunate that international conferences where experiences, positive or even the disheartening ones, could be more freely talked of are scarce in the region. This is regretful given that – as the post-1990 experiences of this niche of Europe amply prove – serious mistakes and quantifiable losses could have been avoided had discourse rather than disinterest in foreign law been the rule of the day. What matters the most is that each of the challenges pointed at is at our doors, is multi-faceted and generates questions not just for lawmakers or scholars but puts question marks to presently employed teaching methods as well.

seems to lead the way as it made uploading of all court cases to a centralized database mandatory by a law in 2006.

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