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Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics

By Gianmaria Ajani* and Ugo Mattei**

I. Introduction

This Paper will approach the problem of reforming the law of property in former socialist Central and Eastern European legal systems from a comparative law and economics perspective.

The task of reforming private law to make it suitable for a market economy necessarily links the work of legal scholars with that of economists. Property rights, moreover, represent a fundamental topic for both lawyers and economists. However, while lawyers tend to focus on issues of justice, economists prefer to reason on grounds of efficiency. This paper will focus on the issue of efficiency for two reasons. First, because in the area of property law very little conflict remains between justice and efficiency once political choices are set aside. Second, because the analysis and cure of market problems properly falls within the competence of economists.

As lawyers, we can take full advantage of the recommendations of economists by developing a legal framework which is compatible with the needs of an efficient market. This is not to say that we should follow neoclassical economic recipes without critique, as some foreign

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1. A draft of this Paper was presented at the XXIVth Colloquy on European Law held at Kromeriz, September 19-21, 1994. We are grateful to the participants and, in particular, to Mathias Storme and Michele Graziael for their comments.
and domestic advisors have done in recent years. This Paper does not ignore the critical role lawyers can play in applying the abstract models developed by economists. Furthermore, to the extent possible, we try to infuse the economic models with the realities of institutional arrangements and problems. Such problems may, and usually do, vary according to the degree of development of the legal, as well as the economic, system in which they present themselves. The best decision maker to handle institutional choices may also vary accordingly. Indeed, one of the tasks of comparative law and economics is to consider these differences.

Our task is to show that the process of reforming property law should take into account the nature of current post-Socialist law, which is different from both pre-Soviet and Soviet civil law, as well as from the American-based approach shared by Western advisers (sometimes law and economics scholars).

This Paper takes the position that reforms in the post-Socialist family of legal systems call for a careful selection of appropriate institutional alternatives.

As a result, the Paper is structured as follows. Section A deals with the problem of the changing nature of the former Socialist family of legal systems. Section B analyzes the issue of codification, reaching the conclusion that both legal tradition and present conditions support this endeavor in Central and Eastern Europe. Section C discusses property law in a search for patterns of continuity and change from pre-Socialist to post-Socialist law. Section D argues that codifying property law is a sterile exercise if not accompanied by extensive reform of the underlying institutional structures. The role of the public-law/private-law dichotomy in framing an efficient scheme for the codification of property law is also considered. Finally, the Paper considers the role of legal tradition as a source of transaction costs which impair the evolution of the law towards efficiency. We reach the conclusion that this particular kind of transaction cost is relatively low in the present post-Socialist environment. Consequently, we suggest a number of areas in which comparative law and economics analysis offers clear insights to property law reformers.


A. Are Eastern and Central European Countries Still a Family of Legal Systems?

It is widely accepted that before Sovietization, the legal systems of Central and Eastern Europe were deeply influenced by Romanist-Germanic law and, in particular, by French, German, Austrian, Italian, and Swiss statutes and treatises. At the beginning of the century, some of the Central and Eastern European legal systems experienced the dissociation between a body of codes and statutes patterned after the French model and the language of scholars, deeply affected by the German tradition. Czechoslovakia and Hungary managed to maintain a conceptual approach to positive law borrowed from Austria.5

Today, after complete emancipation from ideology, post-Soviet legal systems must be reclassified; they no longer belong to the family of "Socialist Law."6 One might be tempted to assume that they should automatically be included in the Romanist-Germanic legal family. Indeed, in the past few years, post-Socialist legislators have turned to pre-Socialist sources of law that were greatly influenced by classical continental models.

This conclusion, however, may be questioned.7 The end of Soviet ideology does not simply mean a return to prior continental models, but to a Western legal tradition where the geographic and cultural limits that were used to classify national legal systems have lost most of their meaning.8 In the forty-five years that have elapsed between the beginning and the end of the Sovietization process, many of the major distinctions have been blurred, not only among civil-law sys-

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5. See Rodolfo Sacco, The Romanist Substratum in the Civil Law of the Socialist Countries, 14 REV. SOCIALIST L. 65 (1988); E. Polay, Einfluß der Pandekte: auf die ungarische Privatrechtswissenschaft, 19 ACTA JURIDICA ACADEMIAE SCIENTIARUM ÖSTERREICHISCHEN RECHTS IN POLEN 175 (Schriftenreihe der Juristischen Gesellschaft zu Berlin No. 95, 1985).


tems, but also between these and common-law systems. In private as well as in commercial law, Anglo-American principles are playing an increasingly influential role on continental scholars and judges. At the same time, the creation of the European Union (EU) and the adoption of uniform legislation have inspired a rethinking of rules and concepts, while business practice has produced solutions common to all legal systems. Even in the domain of procedure, where most of the long-lasting institutional differences resided, we see phenomena of convergence at play.

Initially, both Eastern and Western jurists overstated the need for an "international traffic of legal ideas." This emphasis was due mainly to the widely accepted belief that the introduction of the formal elements of democracy and the legal pillars of market economies would be sufficient to produce a "happy end."

Foreign and local jurists working together in the process of law reform have now entered an advanced stage, characterized by a more critical approach towards "paper laws" and by a more conscious focus on the "Anglo-American thinking" of legal advisers and interna-

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11. See SCHLESINGER ET AL., supra note 7, at 380.


13. For a critical assessment of "direct and indirect interference by the West into the process of transition in Eastern Europe," see Viktor Meier, The Transition in Western Europe. What Went Wrong? The Responsibility of the West, 24 EST-OVEST 9 (1993). Paul Bietzke has investigated the links between the "idealized vision" of neoclassical economists, as applied to the Eastern European transition, and the private law perspective. In his opinion, "[t]he intense individualism of the neoclassical perspective on law is necessary but ultimately not sufficient to the task of East European reforms." See Bietzke, supra note 3, at 42.

14. The suitability of Anglo-American models to the CIS and Eastern European legal reforms has been explained making recourse to several factors, such as more flexibility (in relation to bankruptcy law), or more independence of private law rules from public law. See Scott Horton, Bankruptcy Reorganization and the Death of Communism, SURV. E. EUR. L., May 1994, at 3 (stating that the "American model of bankruptcy reorganization is the best alternative available among Western insolvency statutes"); see also Bietzke, supra note 3, at 42 (discussing the connections between common law principles and the neoclassical search for efficiency).
tional financial institutions. Nevertheless, the dissemination of new legal models remains relevant and may have wide repercussions.

As a result, the law in Central and Eastern Europe may not turn out to be as homogeneous as previously believed. The reception of new models may have weakened the cultural links—both scholarly and statutory—that formerly tied the legal cultures of these countries to continental influences. 15

Moreover, it is certainly true that today, in contrast to the past, reception takes place at the behest of the recipients of the new models as well as their proponents. 16

It becomes clear, then, that today's situation has taken on a completely new character, mainly because of the increase in the demand for new models. To compare it to the post-war period, when the models of bourgeois law were rejected in favor of the Soviet model, would fail to capture its significance.

In the past, new models were offered by the corpus of Soviet law. Today, new models to be assimilated are spread across both national and supernatural sources differing in origin and kind, uniform legislation, and even ideas elaborated by legal scholarship and practice. Moreover, in addition to the "official" supply from bodies institutionally invested with the role of advising legislatures, we find spontaneous advice, sometimes through traditional academic channels, either dependent on personal relationships or organized in other ways.

As a result, it is very likely that the reception of new models is taking place in an inconsistent and fragmented manner. In such a scenario, the question of whether Eastern and Central European coun-

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

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


Following Rubin's speculations, post-Communist governments should support the use of arbitration for dispute resolutions. This more flexible process would help a step-by-step improvement of domestic legal cultures and would represent a partial alternative to legal change through legislation.

15. See Sacco, supra note 5.

16. We should, however, consider the different phenomena of legal imperialism by Western countries. See Michael Hooker, Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws 427 (1975).
tries may still be considered a homogeneous family of legal systems may be posed. We are faced with the largely academic problem of finding a successor to the traditional family of Socialist law, which, together with civil law and common law, made up the framework of macro-comparison.17

The question also assumes a largely practical dimension when approached with an eye to law reform. Indeed, conscientious law reform needs to take into account the structural reality upon which it operates. To be effective, reform proposals cannot afford to ignore the substratum. It is therefore unavoidable to pose the question whether Central and Eastern European countries still share a sufficiently homogeneous background to justify reform proposals aimed at the entire region. Of course, there are substantial differences within the region itself. Poland and the Czech Republic, for example, always enjoyed a very developed legal culture which for centuries placed them within the mainstream of the Western legal tradition. On the other hand, in many of the former Soviet states (limiting our discussion to the European portion of the former Soviet Union) and even in some of the states belonging to the Russian Federation, the tradition has always been very different. Even leaving aside the question of democracy—largely overemphasized and ethnocentric—we find a substantial layer of Islamic law operating within a widely developed legal pluralism. These deep differences, completely overlooked by the state- and party-centered approach of Socialist law, can no longer be ignored.18

It is true, however, that four decades of superimposition of a strongly enforced layer of centralized legal and economic regulation have introduced in these legal systems a common historical experience, deep enough to affect their laws even today. Situations may change and take different directions in different geographic areas according to the pre-Socialist experience. However, scholars cannot predict the future and today's reality is that there is a clear willingness in these systems to change and reform in the direction of a pluralistic market economy. There are, therefore, at least two important points of contact: a heavy political, economic and institutional heritage, and a direction for the future. This may be enough to consider former Socialist countries as a family of law in transition.

This tension between local peculiarities—both legal and social—and common structural characteristics must be taken into account in

17. See SCHLESINGER ET AL., supra note 7, at 68.
addressing the issue of the codification of property law. In fact, it is widely accepted that an important area of real property law is strictly tied to local factors. While codes may well offer a common framework, one should not lose sight of this important aspect.

B. Are New Codes Necessary in Former Socialist Legal Systems?

This inconsistent and nonsystematic reception may create a phenomenon of legal fragmentation within former Socialist legal systems. Such fragmentation may lead to difficulties in attracting foreign investments or in setting up projects of legal cooperation between independent states facing similar problems. Such conditions of legal fragmentation are usually considered one of the most important motivations behind the codification of Western civil law in the nineteenth century.\(^1\)

A case has been made for codification as a way to prevent inconsistencies in the reception.\(^2\) At least in certain parts of civil and commercial law, resort to codification could be an effective method of preventing such unsystematic reception.

Of course, treating the broad issue of codification—debated today as it was in the nineteenth century—would go well beyond the scope of this Paper. It is important to note, however, that comparative law and economics cannot provide a single, clear answer to the question of whether codification is an efficient choice.\(^3\) On the other hand, comparative lawyers and economists point out that under certain circumstances, resort to codification will avoid wasting resources and therefore lead to an efficient solution. Codes lower the information costs of legal research. Though hardly as complete as their proponents claim, codes still serve a fundamental purpose in offering a guide to several areas of the law. Their function is not merely to serve as a collection of legal rules—which is usually incomplete—but rather to provide a systematic framework to analyze the law and a common

\(^{19}\) See Schlesinger et al., supra note 7, at 287-90. For a recent article disagreeing with this opinion, see James Gordley, Myths of the French Civil Code, 42 Am. J. Comp. L. 459 (1994).


\(^{21}\) This question about comparative law and economics was posed in clear cut terms by one of today's harshest enemies of codification, Professor Reinhard Zimmermann, at a seminar on comparative law and economics held at Regensburg, Germany in July, 1994.
language in which lawyers can communicate. In a situation of legal transition, where a fresh start is actually desirable, codes may offer a viable option. If the law is approached from a dynamic perspective, it is possible to justify the worldwide success of the French Napoleonic Code on efficiency grounds. A relatively simple yet broadly worded document, open to interpretation in accordance with local circumstances and easy to comprehend, is bound to succeed precisely because it lowers the information costs of the legal process, especially in a community in which trained lawyers are a scarce commodity. Of course, this is true not only of codes but also of other "nutshells" such as the Institutes of Gaius or Blackstone's Commentaries. Of course, we do not mean to suggest that former Socialist countries should ignore the importance of developing a sophisticated legal community. In the long run, such development may be the only defense against subtle forms of legal imperialism of both Western European and American origin.

A further argument based on efficiency considerations may be advanced in favor of codification. Since the area has already experienced wide phenomena of codification both in the pre-Soviet and Soviet periods, reform efforts by means of codification may provide substantial savings. First, it is possible to preserve the existing structure of the codes and adapt a new state of affairs by modifying only the sections in need of revision. In addition, the past history of codifications in the region prevents costly frictions and abrupt breaks in legal tradition which might arise from the introduction of completely new codes or from the adoption of case-by-case decision making based on unprincipled special enactments. Rather than reworking old areas of the law into newly formulated conceptual frameworks—as would be required to become effective case lawyers or introduce completely new codes—it is preferable in a system in which trained lawyers are scarce to devote their energies to new and rapidly growing areas of the law, which may themselves become the object of new codifications.

In the European continental experience, civil codes have been historically deemed to encompass fundamental legal decisions supporting private initiative and autonomy. The following set of rights

and provisions, 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;\(^{26}\)
b) the abolition of restraints on the free trade of goods and on the sale of land and property within the State;\(^{27}\) and
c) the acknowledgement of a wide degree of autonomy in contractual relations.\(^{28}\)

Under a command economy, all of these principles were subordinated to the paramount principles of Marxism/Leninism, as interpreted by the Communist Party leadership.\(^{29}\) With the creation of a market economy, all economic agents are treated equally under the law, and these principles reacquire their classical meaning.

Despite the decline of civil-law codification in Continental Europe, there is a myth about civil-law codification in Central and Eastern European countries that, since the early nineties, has placed codification very high on the legal reform agenda. The myth dates back to the Socialist era, when virtually all countries in the region were intent on codifying or recodifying their civil law,\(^{30}\) and has now been strengthened by the East-West cooperation on legal reforms.

Initially, at least, both national and foreign scholars agreed on the structural validity of the old Socialist civil codes. Thanks to their structure patterned after Roman law, Socialist civil codes appeared to be suitable for the transitional phase to market economies. It is now clear, however, that the radical nature of the innovation process, coupled with the interests of the proponents of new models stressing the failures of the old system, have rendered Socialist civil codes inadequate and in need of more than cosmetic changes.\(^{31}\)

One reason for placing so much emphasis on the drafting of civil codes is the interdependence of economic and legal reforms. Econo-

\(^{26}\) See, e.g., Code Civil [C. civ.] §1 (1804)(Fr.); Allgemeines Bürgerliches Gesetzbuch [ABGB] para. 17 (1811)(Aust.).

\(^{27}\) C. civ. §§ 5371, 544 (1804)(Fr.); ABGB para. 303 (1811)(Aust.).

\(^{28}\) C. civ. §§ 1107-1134 (1804)(Fr.). See also Gambaro, supra note 22; Bristzke, supra note 3.


mists generally agree that, although not all structural reform measures may be introduced at the same time, a critical mass of comprehensive reforms must be introduced at the outset to create the minimal conditions necessary for the development of market relations. Substantial legislation is needed to prevent producers and consumers alike from adopting a wait-and-see attitude in the expectation that current policies may be subsequently reversed by the government. A comprehensive, modern codification of civil law would appear the best avenue to avoid inconsistencies in the adoption of new rules, prevent chaos, and provide the technical guarantees for further development of both civil and commercial legislation. In this respect, codes provide the necessary complements to the political guarantees embodied in new constitutions and international agreements. Therefore, far from being simple legislative enactments, civil codes can also be regarded as depositories of the fundamental rules of the new economic freedoms and commercial relations.

C. From Pre-Socialist to Post-Socialist Property Law: Continuity or Change?

Property is a fast growing area of the law. Its structure has changed dramatically all over the world in the last half century. Even outside ex-Socialist countries, state institutions have experienced tremendous growth. Such growth has, on the one hand, created new forms of property interests (sometimes referred to as "new properties"), but, on the other hand, has tremendously curtailed the powers of traditional owners (e.g., land use regulation). Another important structural change in property law is a consequence of a phenomenon referred to in civil law as the "commercialization" of private law. If ownership is still to be regarded as a valid legal principle, all the new forms of wealth need to be recognized within the framework of property law. These new forms of wealth range from the invention of computer programs to the issuance of corporate stocks and bonds. In both of these areas, the common law and civil law have followed substantially different paths, employing principles, terminology, and assumptions often foreign to one another. In approaching the codification of property law in transition, these developments cannot be ignored. A codification of property law taking place today cannot merely duplicate the agrarian codifications of property law of the twentieth century.

Throughout the Western legal tradition, property lawyers have realized that technical solutions in the domain of property must be preceded by political choices regarding distribution. Should entitlements be given to polluting industries or to environmental protection movements? Should individual shareholders and consumers be protected or multinational corporate governance be trusted for the sake of economic growth?  

The task of framing rules of ownership in post-Socialist societies, far from being a purely neutral exercise, needs to take into consideration social and economic realities. In this context, three issues are commonly advanced by the scholars of law in transition:

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

b) can legislation act as an important factor in the creation and preservation of democracy?

c) is the creation and preservation of democracy a prerequisite for the creation and functioning of the market?

Different approaches are clearly possible. A more traditional approach would consider the continuity between the pre-Socialist and post-Socialist experience passing through the codification of civil law during the Socialist era. We could say that codified property law, as part private law, is politically neutral, and that political choices fall primarily in the domain of public law regulation. If we were to follow


34. The question, of course, cannot be isolated from two sub questions: a first related to the “type” of legislation we are talking about (fundamental private and commercial legislation, or advanced solutions, originated in the “post-industrial” era, or both), a second related to the degree of effectiveness of the borrowing. It is worthwhile to note that the problem of priority between legislation and “the economic basis of the society” is recurrent. Even in the Stalinist era it was debated whether the law (in that case, socialist Soviet law), originally conceived by Marx and Engels as a result of economic and political conflicts, could drive the evolution towards a socialist economy of the People’s Republics of Central and Eastern Europe.


this path, the old issue of the "neutrality" of Romanist-Germanic principles would preempt the field; adopting a formal approach to the law of property, as civilians traditionally did, shifts the focus to administrative regulation.

However, if we consider the matter from the wider perspective of the influence of new legal solutions on Central and Eastern European lawmakers, we include in our analysis insights from comparative research and economic analysis of the law.

A good reason to adopt a critical approach is that, in spite of the formal continuity between "old law" and "new law," the situation is new and would render the old philosophy rather unsatisfactory.

Let's consider, for instance, the economic aspect in which, for the first time, the process of choosing and creating legal rules on property is taking place in concomitance with the physical allocation of relevant goods to their owners. We could also consider the theoretical aspect in which "at least in the early stages of transition, the pendulum has swung from one utopia to the other, from a [S]ocialist to a nineteenth-century vision of property rights."37

In the nineteenth century, historian Fustel de Coulanges argued that "societies can always be situated between two revolutions: one which deprives the rich of their wealth and one which brings them again in the possession of that wealth."38 In the post-Socialist experience, we are faced with a double-edged phenomenon: on the one hand, constitutions and bills of rights proclaim the right in abstracto of all subjects—private and public, individual and collective—to become owners; on the other, a set of rules, usually contained within highly detailed enactments on privatization, concretely decide (or have decided) to whom the assets should be allocated in the first stage of privatization.

At this point, we could ask ourselves what role civil code provisions could play between the wide powers of the owners, framed by constitutional provisions, and the detailed language of privatization enactments. There is tension between the rules on privatization and the rules on ownership contained in the civil code; the privatization

38. Katlijn Mafflet, On Property Rights in the Russian Federation (unpublished manuscript, on file with the authors), quoting FUSTEL DE COULANGES, LA CITE ANTIQUE (1864).
process is meant to be a temporary one, while the codification of civil law is an attempt at a more lasting phenomenon.  

If we look at the Western European experience, we see that the main issue in the development of property law in the last twenty years has been that of control. The rules on control, in fact, have developed mainly outside the civil codes, either by means of European Union (EU) regulations or domestic commercial law. A case may be made today in Eastern Europe for incorporating such notions into the codes.

Because of the idealization of laissez-faire capitalism in 1989, economic reforms in post-Communist societies have stressed the pursuit of utility and efficiency as the main avenue for the success of privatization. In fact, an in re ipsa reasoning has developed, making the success of privatization an automatic result of an efficiency-oriented process.

Law and economics analysis, however, warns us that the pursuit of efficient rules (by means of codification of judicial interpretations) can be obtained only after the issue of distribution has been politically solved. In other words, what is needed is a sufficient theory behind the "original forms of acquiring property." This lack of theory results in the weakness of the control apparatus. Weak controls undermine the success of privatization both in terms of efficiency and of social justice.

Under a planned economy system, the rules on ownership did not fully explain the inner workings of the system. The recent ruling was contained in sublegal enactments defining the rights and limits of state enterprises activity. In practice, at the end of the Stalinist era, enterprises’ bargaining power was stronger than the administrative power of planning agencies. Enterprises developed informal ways of hiding their productivity from ministerial control. Citizens, either as workers or as customers and consumers, lacked control.

Massive privatization and the enactment of securities and stock exchange legislation set up an entirely new structure of ownership re-

39. In Western societies, civil codes lasted for decades, sometimes for centuries. During 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.
40. See Cooter, supra note 2.
41. Id.
42. See Michael McSaul, State Power, Institutional Changes as a Politics of Privatization in Russia, 47 WORLD POL. 210 (1995).
lations. The separation of ownership from work, adopted de facto in
Communist societies, has become a deliberate choice in post-Commu-
nist economies.

The classical rules of sales and purchases have been used to gov-
ern the process of divestiture of state ownership, but the lack of a
sophisticated set of rules governing the emergence of financial mar-
kets has hindered legitimation of the process of change of ownership.
In the meantime, collapse of the planning agencies and shift of control
from state ownership has transferred economic control to manage-
ment.43 Far from being fair, this process raises concerns as to its effi-
ciency, as the dangers of self-management in the absence of owners’
control have been clearly demonstrated by former Yugoslavian
enterprises.44

D. The Comparative Law and Economics Approach to Law
Reform: Considering the Legal Process

Property law, far from existing in an abstract set of principles and
rules, is rooted in institutions that may or may not be able to enforce
those rules. These institutions vary greatly from one system to an-
other. A perfect civil code, containing the best possible abstract regu-
lation of property law, would have no impact on the market without
institutional reform.

In other words, markets are not affected by laws on the books:
what matters is the law which is applied. A legal system cannot have
any property laws if it does not have a decently organized system of
courts, equipped with qualified lawyers, or if it does not have a rea-
sonably efficient system of law enforcement.

Of course, legal history is full of instances in which foreign pow-
ers have imposed on weaker legal traditions Western-styled statutes
and codes as a precondition to any investments. Japan and China at
the beginning of the twentieth century would probably be the best
examples. In such cases, however, there was an attempt to defeat ex-
treme risk aversion on the part of foreign investors or, at least, to
obtain symbolic satisfaction. Whatever the motivations and the eco-

43. Malfllet, supra note 38.
44. See Gianantonio Benacchio, La Proprietà nell’Impresa Autogestion-
aria Jugoslava (1988).
The enactment was not accompanied by any reforms on the grounds of "legal process."

In the case of Central and Eastern European countries, we are concerned with a reform of private law (and more specifically of property law), aimed to build up the legal infrastructure needed for an efficient local market. We can not disregard, however, the importance of the legal process; whichever solution we propose in terms of substantive law, we must consider the problems posed by its implementation. This means to make a serious effort to provide plaintiffs with a set of legal remedies which are easy to enforce (i.e., both affordable and effective).

From this standpoint, a system of property law inspired by remedial creativity administered by the courts would be preferable. When the legal issue is a clear measure, injunctions (both mandatory and negative), astreintes, and interlocutory orders could be introduced for the purpose of creating an efficient system of justice.

In all modern legal systems, property law involves private law as well as a good deal of public law. Economists tend to disregard this point, but it is crucial for lawyers. Lawyers see private law and public law as cooperating in defining property rights. Economists usually see private law as creating property rights and public law as destroying them.45

Indeed, in the standard neoclassical economic approach, private law is the province of the market, while public law is the province of the state.46 A strong antipublic law bias usually follows from this assumption.47 In more sophisticated economic terms, however, property law is justified as a cure of externalities. Property rights are given to individuals in order to avoid consumption of resources outside market mechanisms. Each market actor should pay for his or her consumption of scarce resources without passing the cost along to his or her neighbor.

It is not necessary to stress that a system cannot deal with externalities defining property rights in a pure private law (i.e., decentralized or Coasian) approach nor in a pure public law (centralized or Pigouvian) way.48 This is only the translation on institutional grounds of the impossibility of "a pure market" and of the related impossibility

47. See generally Brietzke, supra note 3.
of the “absence of a market.” Each legal system will therefore establish, in addition to a private-law cure, a more or less extended public-law cure of externalities reflected by a larger or smaller role of administrative regulation and enforcement.\(^\text{49}\)

A proposed reform of property law should take into account this assumption as well as the role that public law actually plays in the system to be applied. Comparativists distinguish two different approaches to public law within the Western legal tradition; while civil-law jurisdictions, based mainly on the French or German model, tend to rely very extensively on public-law regulations, common-law jurisdictions tend to be much more private-law oriented. Such a traditional view is slowly disappearing, as public law increases its role and scope everywhere.\(^\text{50}\)

However, the legal process impact of this distinction still has important implications: while civil-law systems organize and select a different body of administrative judges, common-law systems tend to keep a unitary judiciary. In perspective, particularly from the standpoint of countries in transition, the common-law approach appears more promising. First, in the presence of a shortage of trained lawyers it is preferable to control the number of courts to staff. Second, there may be a tendency to staff administrative courts with public servants less sympathetic towards individual rights, and therefore less inclined to make the needs of the market prevail on those of bureaucratic control. Third, the existence of a unitary judiciary tends to make judicial decisions more grounded in terms of public policy. Judges are conscious that the primary responsibility of respecting public policies resides with them and not with entities such as administrative courts or agencies.

As a result, under a common-law approach, we find a better kind of judicial creativity and responsibility, and bureaucratic judicial reasoning is strongly discouraged.

The choice between public law and private law in taking care of externalities should not be conceived in abstract terms, but grounded on solving concrete problems. Public-law regulation in the form of command and control is cheaper in terms of administrative costs but more expensive in terms of enforcement costs. Drafting a clear-cut rule is rather cheap for a technical bureaucracy; however, we must

\(^{49}\) The point is clearly made in Calabresi, *id.; see also* B.A. AKERMANN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1973).

also consider the fact that the State must provide monitoring, control, and sanctions for any violations. Private-law regulation is more expensive in terms of administrative costs (coming out with a rule or standard as a result of litigation is much more expensive than drafting the rule \textit{ex ante}), but it is much cheaper in terms of enforcement costs because it passes them along to private parties.\textsuperscript{51}

Keeping this trade-off in mind, property law reform must strike the right balance between public and private law for each problem. Where transaction costs are very high, as for example in pollution cases, it is difficult in general to rely on private law and it is very unlikely, in particular, that property-based remedies such as injunctions would work at all.\textsuperscript{52} Even though environmental law is a crucial point that countries in transition should address as soon as possible, we would not introduce specific environmentally-aimed provisions in the chapter of the civil code devoted to property. A code is necessarily made of broad provisions, while environmental law should be based on specific regulations made on a case-by-case basis. Rather, the entire law of property should be based on a conception of property rights which takes into account the need for internalization.

The legal system should not recognize property if it cannot pay for its social costs. Power brings with it liability. As a result, liability rules should be part of the very idea of property rights, powers, and immunities that are traditionally considered the essence of property rights. For example, industrial property rights should not be protected by the law (say against a taking or a requisition), unless they offer workers social security, insurance, and a decent wage. This is a concrete economic formulation (no property rights without internalization of social costs) of the widely known, but only sporadically applied, theory of the "social function" of property rights. This theory, developed at the beginning of the century by the French scholar Duguit, has met with tremendous success in the constitutional arena. So far, however, it has been devoid of any practical economic meaning. Transition from state-run economies to free markets may offer an occasion to give a concrete economic meaning to this formula.

The private law of protection of the environment or of security within the workplace—however serious the idea of the "social function" of property rights is taken—has never been enough. A provision like section 127(1) of the Czech Civil Code may on its face appear

\textsuperscript{51} See Mitchell Polinsky, \textit{Introduction to Law and Economics} 63-65 (1934).
\textsuperscript{52} See Cooter & Ulen, \textit{supra} note 45.
as a sufficient guarantee for a clean environment, if considered within neoclassical economic logic. After all, since the common welfare is just the arithmetical sum of individuals' welfare (i.e., the aggregate utility function of all individuals), if each individual is entitled to clean air around him, the result must be that the entire environment will be clean. Such an assumption fails to take into account, however, the so-called public dilemmas arising from the fact that certain resources simply cannot be appropriated. In such conditions, environmental regulation outside of the Code appears unavoidable.

It is very important at this point to avoid the mistake—typical of the French and Italian administrative law approach—of insulating the private law process of decision making from the public one.

Consider a regulation allowing the emission of fumes up to a quantity of 100. Entrepreneur A, located close to the house owned by B, emits fumes in a quantity of 99.9. He is clearly within the regulatory limit. At this point it is crucial, in order to benefit from both private and public law protection of the environment, not to introduce a presumption that such emission of 99.9 is automatically reasonable. B must be allowed to sue in order to show that, in his or her particular circumstances, emissions which are within the regulatory limit are nevertheless unreasonable and must be stopped or reduced. Such cooperation between public and private law is also the efficient solution in such crucial areas of property law as city planning, mining, and so forth.

E. Legal Tradition as a Source of Transaction Costs in Reforming Private Law

As we have already noted, the process of transition from state planned economies to free markets in Central and Eastern Europe has shown, among other things, that the old dichotomy of civil law versus common law may be rediscussed and substituted by the broader idea of the Western legal tradition. A system in transition is in the ideal position, therefore, to get rid of the aspects of the Romanist law of property which are most inefficient from the economic point view.

53. Czech Civil Code section 127(1) recites in pertinent part: "The owner of a thing must refrain from anything that would beyond a reasonable extent vex another person or that would seriously jeopardize the exercise of the latter's rights . . . ." Czech Civil Code § 127(1).

54. See Ajani, supra note 7.
Broadly speaking, we may assume that the more efficient legal theories and solutions would spread around in a world with zero transaction costs. In such a world, efficient legal solutions would survive, while inefficient legal solutions would disappear. The legal reality, however, is one of very high transaction costs. Such costs, opposing the spread of efficient laws, are created by a series of factors which may be roughly characterized as "tradition" or "prestige." An efficient English solution will find its way in France with difficulty because the two systems are built on deeply and profoundly different traditions. Transaction costs that oppose such transplants are therefore very high. Such transaction costs are created by "tradition." In addition, even a very efficient rule originating today in Russia, with or without foreign advice, may have more difficulty spreading to Central European systems than a very inefficient German or French rule might. These are transaction costs created by prestige.

As for property law, transaction costs created by tradition are very high because the law of property is at the very core of the diverging century-long development of civil and common law. The Romanist civil-law tradition pays a very high price in terms of efficiency to the so-called unitary theory of ownership, to the so called *numerus clausus*; as well as to the idea that property rights create an area of individual sovereignty valid against the entire world.

Civilian unitary theory, for example, led generations upon generations of comparativists to believe that trust law could not be transplanted into the civil law. Today, not only is this transplant happening, but it is likely to cause only minor problems. Indeed, from a functional standpoint, the difference between the trust and its civil-law counterparts is not at all staggering. Trust law, therefore, could be introduced into the codification of property laws, as it has proven to be a very powerful tool in attracting foreign investments. This is exactly the reason why France eventually decided to introduce

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55. This is an obvious application of the famous Coase Theorem in the domain of legal transplants.


57. See generally Mattei, supra note 4 (discussing the relationship between natural law based ideas and American and French laws of accession).


the trust in its legal system despite the huge aforementioned transaction costs.

The *numerus clausus* principle also has created problems for continental legal systems in such areas as "transfer development rights," city planning, and the so-called "time sharing ownership."\(^{60}\)

Generally speaking, however, the common-law approach to property is more pragmatic from several points of view. For example, property law is clearly divided in the two subcategories of real and personal property, roughly similar to the civil law dichotomy of immovable versus movable things. The rules of real property and the rules of personal property are not discussed within a unitary framework, but they are traditionally conceived as different areas of the law. The opposite is true in the civil law, where the definition of property rights and their rules are usually thought of as if the physical object were irrelevant to the legal regime. The law and economics approach teaches us that the nature of the object of property rights is a crucial element in creating an efficient legal regime. The rules for land cannot be the same as the rules for fugitive property such as gas or water. The rules for cars cannot be the same as the rules for property rights in information or in a magnetic spectrum.\(^{61}\)

This means that there is not just one property law regime that could be incorporated into a civil code, but rather there are at least two major fields of property law that need to be tackled together in order to obtain an economically efficient solution. The section of the civil code devoted to property should therefore be further subdivided in two parts, one devoted to land and other immovables and another devoted to other forms of property. This would discourage redundancies and allow jurists to analyze property law problems within a clearer framework.

Of course, there are other areas where the common-law approach is weaker than the Romanist one. For example, the recording system of land registration as developed and applied by German law is probably the most efficient way of recording property rights in immovables.\(^{62}\) Another example of common-law weakness is found in the area of transfer of property rights after death. The guarantee of an indispossession share of the estate in favor of the surviving spouse or

\(^{60}\) See Albina Candian et al., _The Law of Property in Italy_, 1 _ITALIAN STUD. L._ 119 (1992).

\(^{61}\) See Cooter & Ulen, _supra_ note 45; see also Ugo Mattei, _La Proprieta’ Immobiliare_ (2d ed. 1994).

\(^{62}\) See Schlesinger et al., _supra_ note 7, at 685.
children is not only a more humane arrangement, it also lowers trans-
action costs within family relations.

II. Conclusion

The principal aim of this Paper has been to outline some propos-
als on how to restructure property laws in ex-Socialist countries in
light of comparative experience and the needs of economic efficiency.

Proposed reforms of property law in systems making the transi-
tion to market economies should be addressed within a broader per-
spective than the mere civil-law tradition. They should be able to take
advantage of the best solutions devised by property law systems
throughout the Western legal tradition without bias based on such no-
tions as tradition and prestige, but rather with the objective of maxi-
mizing economic efficiency. Of course, to do so would require a
massive comparative effort. Once such effort is undertaken, however,
Central and Eastern European countries will find themselves in the
enviable position of being able to codify private law without being
significantly affected by traditional transaction costs and lowering
those created by prestige. This "efficient codification" has the poten-
tial of making a real contribution to the development of European
private law.