# How Should the Legal Systems of Eastern Europe Be Classified Today?

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## I. Introduction

The classification of Eastern European legal systems has always been a challenge for comparatists. The rise and demise of socialism in the region complicated the picture even more. The recent developments have revealed what had already been suspected by several scholars: the traditional conceptual framework of legal families is in a profound crisis. How should legal systems of Eastern Europe be classified today, after the collapse of the socialist regimes? We try to answer this question in our article.

Before turning our attention towards the comparatists' different classifications of the formerly socialist countries of Eastern Europe, some remarks should be made about the taxonomic approach adopted by the authors of this article. Classification of legal systems can be both the starting point and the final goal of a comparative research study. If one decides to use it as a starting point, one does so because it makes it easier to understand the huge quantity of data that one has to deal with during one's work.[1] The grouping of the legal systems under analysis offers the comparatist some analytical parameters; in the case of Eastern Europe, for example, the distinction between East-Central Europe and Eastern Europe in a strict sense can be useful for comparative research. Although

[1] As John Hazard explains: "Classification is suggested only to facilitate study of otherwise unwieldy bodies of information. It is only a first step, after which the researcher is expected to explore the detail and determine variations on the model. In so doing, it will be evident that some variations result from the impact of a neighbouring contrasting system upon the historic base." See Hazard, John: *Book review of* Droit Comparé *by Éric Agostini*. (1990) 38 American Journal of Comparative Law 191, 192.

this distinction is mainly rooted in historical studies – for instance some historians, the Hungarian Jenő Szűcs,[2] or the Polish Piotr Wandycz[3] regarded East-Central Europe as a distinct historical region having certain unique socio-political features –, it should also be admitted that they can imply important lessons for comparative legal studies.

It is also important to note in passing that the result of a comparative study is often the modification of the classification used as a starting point, and in this case the new classification will be used as a starting point for a new comparative study. Therefore, it is better to consider classification as a means rather than as an objective.[4]

Furthermore, it must be borne in mind that a general classification of legal systems is not possible, but must be limited to a branch of law or to a particular field.[5] Comparatists have traditionally studied private law, but today classifications are used also in the field of public law. Especially thought-provoking are the words of Ugo Mattei:

"[C]onstitutional law is, at least at a textual level, political in origin and does not reveal much about the deep structure of legal systems. At the same time, procedure, capable of offering notable insights when analyzed in the context of the entire legal process, is increasingly the object of continuous, radical changes due to practical organizational needs."[6]

The experience of socialism turned out to be an interlude in the history of Eastern Europe. Since jurists under that system had to implement this theory for the first time, it gave them the possibility to work out new norms, even if they were intended to be transitional – part of the path towards Communism in which the state and the law ceased to exist, in conformity with the ideas of Karl Marx.[7] Socialist law indeed remained in force only for a limited period (a half century in East-Central Europe,

2 Cf. Szűcs, Jenő: *The Three Historical Regions of Europe*, in: Gessner, Volkmar – Hoeland, Armin – Varga, Csaba (eds): European Legal Cultures. Dartmouth, Aldershot, 1996, 14.

3 Cf. Wandycz, Piotr S.: *The Price of Freedom. A History of East Central Europe from the Middle Ages to the Present.* Routledge, London and New York, 1992.

4 See Varano, Vincenzo – Barsotti, Vittoria: *La tradizione giuridica occidentale*. Giappichelli, Torino, 2006, at 34. According to the authors every classification is inevitably imperfect and relative, so bearing an instrumental and temporary value, and is bound by the goal proposed by the comparatist scholar.

5 For a further discussion see Zweigert, Konrad - Kötz, Hein: *Introduction to Comparative Law*. Clarendon Press, Oxford, 1998. 63–73; Ancel, Marc: *Le comparatiste devant les systèmes (ou »familles«) de droit*, in: Bernstein, Herbert – Drobnig, Ulrich – Kötz, Hein (eds): Festschrift für Konrad Zweigert. J. C. B. Mohr, Tübingen, 1981, 355.

6 See Mattei, Ugo: *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, (1997) 45 American Journal of Comparative Law 5., 18.

7 See David, René: *Two Conceptions of Social Order*. (1983) 52 University of Cincinnati Law Review 136, 141.

some decades more in the Soviet Union), but for reasons completely different from the intentions of its creators. Even though, after the fall of the Iron Curtain, Eastern European countries aimed at erasing every trace of the old regime, this historical period still left its mark on their legal systems.[8] This circumstance certainly does not help the work of the comparatist, who tries to place the Eastern European legal systems in one of the classical legal families. It is not possible anymore to homogenise the region, relying upon a uniform political system such as government; codes and constitutions now differ considerably and follow different models, sometimes even non-European models.

## II. Classifications and re-classifications of Eastern European legal systems

The experience of socialism definitely facilitated the work of the comparatists, creating as it did a seemingly homogeneous area classifiable as a 'socialist legal family'. So a new comparative discipline was born in the West, called Sovietology,[9] which focused on the study of the Soviet Union (due to its prominent position in international relations) and dealt with the satellite countries only marginally. The majority of comparatists joined the separatist thesis, which applied a tripartition of the Western legal tradition into civil law/common law/socialist law, but there were also some other scholars who continued to consider the legal systems of socialist countries as a subgroup of the civil law family.[10] Furthermore, certain comparatists of the socialist world also tried to make a distinction between Soviet Law and the legal systems of socialist East-Central European countries, mostly due to historical and economic reasons.[11] So, schol-

[8] See more in: Jakab, András: *Surviving Socialist Legal Concepts and Methods*, in: Jakab, András – Takács, Péter – Tatham, Allan F.: The Transformation of the Hungarian Legal Order 1985-2005. Kluwer Law International, Alphen aan den Rijn, 2007, 606.

[9] The most eminent scholars of this discipline were John Hazard, Ferdinand J. M. Feldbrugge and Harold J. Berman.

[10] See Ferreri, Franco: *Quale posto spetta al diritto dei paesi ex-socialisti?* 1992 (No. 3) Sociologia del diritto 77. The essay of Ferreri is entitled 'Where to place the law of formerly socialist countries?', but nonetheless it does not offer a new classification (which in 1992, obviously, would have been too difficult). However, the author gives a general retrospective outline of classifications of Eastern European legal orders. Another retrospective article is Quigley, John: *Socialist Law and the Civil Law Tradition*, (1989) 37 American Journal of Comparative Law 781.

[11] Cf. Péteri, Zoltán: *Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and East-European Law*, (1987) 61 Tulane Law Review 1397; Eörsi, Gyula: *Com-*

ars of the 'other side' were also aware of the existing differences within the general Soviet model.

Most of the taxonomic studies that examined Eastern Europe were completed in the 1990s, as a result of the high interest in the regime change and the reforms introduced after the breakdown of the socialist regime. The interest seems to have been lost in the first decade of this century. Only some of the recent handbooks of comparative law tackle in depth the problem of the re-classification of the legal systems of formerly socialist countries.[12] The more time passes, the greater the need for a new classification. But before explaining our proposal for re-classification, let's see how other scholars have addressed the problem. The classifications of Eastern European countries used by comparatists in the last two decades can be grouped into five categories:

### *1. No deviation from civil law*

For some comparatists, the formerly socialist countries of Eastern Europe have never left the civil law family. These scholars did not join the separatist thesis during the socialist era. One of them, Mario Losano, in 1978 justified his choice by explaining that in these legal systems the principle source of positive law is the abstract and general norm enacted by the competent authority, which collect these norms in codes, in the same way as other civil law systems do. According to Losano, the real difference between Soviet law and other continental European legal systems was not the form but the content.[13] It is interesting to see that another comparatist, Alessandro Pizzorusso, reached exactly the opposite conclusion. He considers the different content of socialist law sufficient to justify the establishment of a separate legal family, and states that socialist law distinguishes itself from the other two legal families (i.e., civil law and common

*parative Civil (Private) Law*. Akadémiai Kiadó, Budapest, 1979, 203.

12 It is worth noting that the community of comparatists lost three of their greats during the period of democratic transition in Eastern Europe. René David passed away in May 1990, and Rudolf Schlesinger and Konrad Zweigert in 1996, so they could not evaluate the regime change and the development of Eastern European legal systems.

13 See the first edition of the handbook of Losano, Mario G.: *I grandi sistemi giuridici: introduzione ai diritti europei ed extraeuropei.* Einaudi, Torino, 1978, 117-118. The author maintains this approach also in the more recent edition of 2000: see Losano, Mario G.: *I grandi sistemi giuridici*. Einaudi, Torino, 2000, 159-163. Another example of this approach is Ferreri 1992.

law) not because of the techniques it employs, but because of how the law is conceived and what role is given to it.[14]

### *2. Return to civil law*

Many authors state, instead, that formerly socialist countries, or some of them, have returned to their roots of civil law. Hubert Izdebski uses the concept of a 'common Central European legal tradition', and states that some of these countries suddenly 'found themselves' in Central Europe again; but he does not specify which countries.[15] The handbook of Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe, published in 1994, divides the 'socialist legal tradition' into three sub-groups (the Central and Eastern European, the Chinese and Southeast Asian, and developing countries), and asserts that the first "has abandoned socialist law and returned to its civil law roots".[16] According to the authors, "in 1993 the Central and Eastern European sub-group within socialist law left the socialist law orbit and reunited with the continental European civil law system", but they do not offer an explanation for the choice of that date.[17] Radical changes were made to the third edition of this handbook, which was published in 2006. Two of the three authors were replaced, and they decided to eliminate the entire chapter dedicated to the rise and fall of the socialist legal tradition that appeared in the 1994 edition. The new version simply abstains from addressing Eastern Europe and does not contain any analysis of formerly socialist countries.[18]

Mark Van Hoecke and Mark Warrington in a co-authored article write that "today nobody denies that most Central and Eastern European

[14] See Pizzorusso, Alessandro: *Sistemi giuridici comparati*. Giuffré, Milano, 1998, 80.

[15] See Izdebski, Hubert: *General Survey of Developments in Eastern Europe in the Field of Civil Law*, in: Ginsburgs, George – Barry, Donald B. – Simons, William B. (eds.): The Revival of Private Law in Central and Eastern Europe. Nijhoff, Dordrecht, 1996, 3. However, later on he adds that the Czech Republic, Hungary and Poland "display a clear tendency to establish overt 'capitalist' institutions in both politics and the economy" (see: ibid. 5).

[16] See Glendon, Mary A. – Gordon, Michael W. – Osakwe, Christopher: *Comparative Legal Traditions: Texts, Materials, and Cases on the Civil and Common Law Traditions.* West, St. Paul, Minn., 1994, 396.

[17] Idem, 401. The choice of year 1993 is probably due to the fact that the handbook was written between 1993 and 1994, and the authors believed that the democratic transition in Central and Eastern Europe had been already concluded.

[18] See Glendon, Mary A. – Carozza, Paolo G. – Picker, Colin B.: *Comparative Legal Traditions: Texts, Materials and Cases on Western Law*. West, St. Paul, Minn., 2007. Together with the chapter on the socialist legal tradition and also the chapter on Community law was eliminated from this new edition.

private law systems belong to the same Roman law tradition as the other European legal systems", but again without specifying which countries they mean. Their essay adopts a critical approach towards classifications, and points out that the changes that occurred in Central and Eastern Europe, rather than simplifying the comparative work, have challenged our traditional conceptual framework of 'legal families in the world'. The authors explain:

"At first sight comparative law seemed to have become rather more simple. At a second glance, however, it was somewhat embarrassing to see how a pure *political* change, directly affecting only public law, could make a private law family disappear at once. In a more critical approach, one had to ask whether it did not mean that something was wrong with the traditional legal family classification as such. (…) If this common legal tradition had been interrupted for (barely) a few decades, it is not because private law changed fundamentally, but because traditional areas of private law were taken over by public law during that period."[19]

To cite another example, in a recent handbook of Michael Reiner only one sentence is dedicated to the formerly socialist countries, and it affirms that as a result of political transformation and legislation bound by continental principles, these countries have to be ascribed to the Romanist legal family.[20]

Among Italian comparatists, Rodolfo Sacco and Antonio Gambaro dedicate a separate chapter to the law of formerly socialist countries already in the first edition of their well-known handbook entitled *Sistemi giuridici comparati,*[21] published for the first time in 1996. They extend their analysis in the following edition published in 2002,[22] and leave it unaltered in the last edition of 2008.[23] Sacco and Gambaro divide Eastern Europe into three areas: countries which have always been clearly European (giving the example of the Czech Republic), countries which imported a European legal system, but do not have a comparable legal tradition (cit-

[19] See Van Hoecke, Mark – Warrington, Mark: *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, (1998) 47 International and Comparative Law Quarterly 495, 499. Emphasis in the original.

[20] See Rainer, Michael: *Corso di sistemi giuridici comparati*. Giappichelli, Torino, 2004, 50.

[21] See Gambaro, Antonio – Sacco, Rodolfo: *Sistemi giuridici comparati*. UTET, Torino, 1996, 456-460.

[22] See Gambaro, Antonio – Sacco, Rodolfo: *Sistemi giuridici comparati*. UTET, Torino, 2002, 461-469.

[23] See Gambaro, Antonio – Sacco, Rodolfo: *Sistemi giuridici comparati*. UTET, Torino, 2008, 333-339.

ing the example of Russia), and countries of non-European culture (the former Soviet Union's Muslim republics).[24]

### *3. A unique and separate group?*

Thirdly, there are scholars who think that formerly socialist countries for the time being form a separate group. Among them we can find the editors of the last two editions of Rudolph Schlesinger's casebook, who writes that Eastern European countries are "constructing a new legal system which, in the end, may well be classifiable, purely and simply, as civil law"; but for the moment they "still form a distinct group, differentiated by the common problems they face in connection with the transition from central planning to a market economy and to a system in which law is perceived as imposing effective restraints on the exercise of power."[25] The editors base their position on an essay written in 1995 by Viktor Knapp, a Czech scholar who points out that the disappearance of the socialist system did not bring the establishment of a new legal family, since the previously unifying feature did not exist anymore, but according to Knapp this does not mean that the formerly socialist countries do not form, at least temporarily, a geopolitical unity.[26]

In this group of comparatists we can include also the English scholar Peter de Cruz, who still considers the return of the formerly socialist countries to their civil law roots as uncertain. In his words:

"[I]t is arguable that many former socialist countries will return to their civil law roots, but if they retain some of their former ideology, or are 'converted' to capitalism and adopt Western-style laws, they will certainly become 'hybrid systems' of law. If it is a combination of civil and quasi-military law, this will not conform to the classical notion of a hybrid system because, although the traditional conception of a hybrid legal system is one in which more than one legal system co-exists, this usually refers

[24] See Gambaro – Sacco 2008, 335.

[25] See Schlesinger, Rudolph B. *et al.*: *Comparative Law: Cases, Texts, Materials.* Foundation Press, New York, 1998, 286. This part of the casebook was updated by Edward M. Wise. The same approach is kept in the recent edition: see Mattei, Ugo A. – Ruskola, Teemu – Gidi, Antonio: *Schlesinger's Comparative Law*. Foundation Press, New York, 2009, 261-262.

[26] See Knapp, Viktor: *Comparative Law and the Fall of Communism*, (1995) 2 Parker School Journal of East European Law 525.

to a system in which both common law and civil law types of law can be found, but which operate in different contexts and spheres."[27]

An Italian comparatist, Gianmaria Ajani, defined the group 'post-socialist model', placing it in the wider and more flexible area of the Western legal tradition,[28] "where the geographic and cultural limits that have traditionally been used in order to classify national legal systems into «legal families» no longer matter".[29] Despite this, Ajani leaves open the question of whether, and to what extent, the socialist period (which in many cases corresponded to the period of unification of law at the national level after centuries of particularism and pluralism of sources of law) left an imprint on the law of Eastern Europe in the form of a 'layer'.[30] Therefore we can maybe speak about a 'socialist substratum', in the same way as Rodolfo Sacco, in an illuminating essay published in the 1960s, considered the presence of a 'Romanist substratum' in the law of these countries during the socialist period.[31]

A completely different approach is adopted by Ugo Mattei, who proposed a new and innovative classification of legal systems in the 1990s, based on the role of the law as perceived in the Weberian sense, that is to say as a tool of social organisation. Mattei explains:

"The simple idea behind it – not completely new in comparative circles – is that in all societies there are three main sources of social norms or social incentives which affect an individual's behavior: politics, law, and philosophical or religious tradition (hereon I will use the term «tradition» to refer to both). […] Legal systems may be classified in a tripartite scheme according to the source of the social behaviour that plays the leading role in them. A basic epistemological assumption of this paper is

27 See De Cruz, Peter: *Comparative Law in a Changing World*. Routledge-Cavendish, Abingdon, 2007, 186.

28 See Ajani, Gianmaria: *Il modello post-socialista*. Giappichelli, Torino, 2008.

29 See Ajani, Gianmaria: *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, (1995) 43 American Journal of Comparative Law 93, 95. Ajani explains moreover that "[i]n the 45 (or 70) years that elapsed between the beginning and the end of the socialist experiment, the major distinctions have been blurred, not only among civil law systems, such as French and German, but between them and the common law."

30 See Ajani, Gianmaria: *Diritto dell'Europa oriental*. UTET, Torino, 1996, 14. However, Ajani makes a distinction between East-Central Europe and the former republics of the Soviet Union, arguing that the legal systems of the latter remain highly homogeneous, as they are pervaded by the central Soviet model. Ibid. 10.

31 See Sacco, Rodolfo: *Il sustrato romanistico del diritto civile dei paesi socialisti*, (1969/I) Rivista di Diritto Civile 115.

that not only law in the Western sense, but also politics and tradition *are patterns of law*."[32]

So Mattei's taxonomy wishes to adapt Max Weber's tripartition to the needs of comparative law.[33] He underlines that in each legal system all three patterns can be seen in play and, consequently, they can be grouped into families according to the hegemony of one certain pattern. But the hegemonic pattern is not the only one present in the legal system, and occasionally the other two non-hegemonic patterns will determine certain legal outcomes in an unofficial, cryptic way.[34]

In this new and original taxonomy proposed by Mattei, the majority of Eastern European countries are in the pattern of the 'rule of political law', with the possible exception of Poland, Hungary and the Czech Republic, where "socialist law had to face a highly sophisticated civilian legal heritage and whose impact has been therefore less deep."[35] Regardless, Mattei does not justify this statement, and why are Slovenia and the Baltic states excluded from the "possible exceptions". The explanation may be found in a footnote of the paper, in which the author explains that some of his choices are "based mostly on intuition and sensibility rather than on measuring devices unavailable at this point."[36] Furthermore, the 'rule of political law' pattern is divided into two subsystems: the 'law of transition' group including the formerly socialist countries (excluding the above-mentioned 'possible exceptions') and the 'law of development' group, which can in turn be divided into African law and Latin American studies.[37] This classification is shared by two other Italian professors, Gianmaria Ajani[38] and Giuseppe Portale[39], who adopt it in their handbooks.

In the triangle proposed by Mattei, the three apexes consist of law, politics and tradition, while economy is not considered to be a principal source of social norms. As regards socialist legal systems, we can observe that the Marxist ideology gives primacy to economic relations over politi-

32 See Mattei 1997, 12-13. Emphasis in the original.
33 Ibid. 18.
34 Ibid. 14.
35 Ibid. 30.
36 He continues: "[T]he actual content of the taxonomy and the choices I make are aimed mostly to clarify my taxonomy and I am not particularly fond of any one of the dubious ones that I have entered." Ibid. 17, note 52.
37 Ibid. 41.
38 See Ajani, Gianmaria: *Sistemi giuridici comparati: lezioni e materiali*. Giappichelli, Torino, 2005, 16-17.
39 See Portale, Giuseppe B.: *Lezioni di diritto privato comparato*. Giappichelli, Torino 2001, 31.

cal and legal relations in society. In practice, however, it is beyond doubt that it was politics that had primacy.

### *4. No reference to the question*

Lastly, there are scholars who, explicitly or not, refrain from taking sides. In the preface to the tenth edition of René David's treatise, published in 1992, Camille Jauffret-Spinosi writes that, since 1989, new but still uncertain perspectives have been appearing in Eastern Europe; it is still impossible to say today how the political regime of these countries will be tomorrow, what kind of economic structure will be established, and when it will happen.[40] David himself wrote a few pages about the historical events that marked the end of the 1980s, and concluded that these events were too recent to enable the prediction of what would happen later.[41]

Other famous authors who refrain from taking a position are Konrad Zweigert and Hein Kötz. It is interesting to follow the changes made to their handbook in this regard. In the preface (written by Kötz in May 1991) to the Italian translation of the second edition, we can read that the complete elimination of the chapter on the socialist legal systems seemed "too radical" a choice, and that it was not yet at all certain if the choice for democracy and market economy had been definitive in these countries.[42] In the third edition published in 1998, however, this chapter was removed. The explanation can be found in the preface, written in September 1995: "The 'socialist legal family' is dead and buried, and although it will take a long time to erase the traces of more than forty years of total subjection to political ideology, it seemed right to discard the chapters on socialist law."[43] But the authors did not include references to Eastern European countries in the remaining chapters. They limited themselves to observing that "the socialist legal family is dead and buried", proving their Eurocentric approach. Indeed, if we consider the legal systems of the world, socialist law is not dead and buried at all, since it still survives on in other continents (see, for example, the Chinese legal system).

40 See David, René – Jauffret-Spinosi, Camille: *Les grands systémes des droit contemporains*. Dalloz-Sirey, Paris, 1992.

41 Sections concerning the regime change in Eastern Europe can be found also in other parts of the treatise: ibid. n. 134, n. 148-152, n. 165.

42 See Zweigert, Konrad - Kötz, Hein: *Introduzione al diritto comparato*. Giuffré, Milano, 1992. VII-VIII.

43 See Zweigert – Kötz 1998, V.

Among Italian scholars, Elisabetta Silvestri writes, in a chapter on comparative civil procedure, that it is right to ask if it still makes sense to consider formerly socialist countries as an autonomous legal family or whether it is better to regard them as legal systems that "flew back to the channel of civil law." Silvestri then decides to consider formerly socialist countries separately for practical reasons, and to leave to others the job of determining whether Eastern European legal systems still form an autonomous legal family or not.[44]

Many of the authors who choose to leave open the question of re-classification keep the chapter on socialist legal systems in their books – even in the more recent editions – and simply transform them in the past tense by adding a brief historical update.

### *5. Observations and comments*

This descriptive outline of the different approaches adopted by legal scholars concerning a possible re-classification of Eastern European legal systems provokes at least three observations. The first of these relates to the few scholars who make a concrete proposal of re-classification; there is no one who makes an attempt to place every single Eastern European country in the suggested new taxonomy, but all limit themselves to cite some examples. This confirms what we stated beforehand relating to the fragmented nature of Eastern Europe and to the linguistic difficulties that in all likelihood discourage scholars from a comprehensive study of the region.

The second observation concerns terminology. Some comparatists use the term 'former socialist',[45] while others write about 'post-socialist' countries. It is obvious that the first points to a detachment from the past, while the latter lays emphasis on continuity with it. Careful readers may have noticed that Gianmaria Ajani changed the terminology in the last edition of his handbook entitled *Il modello post-socialista*, and started to use the term 'post-Soviet' instead of 'post-socialist' without justifying this change in any part of the book.[46] His intention may have been to point out the specificity of Eastern European socialism in comparison with other experiences of socialism. The authors of this essay favour the term 'for-

[44] See Denti, Vittorio (ed.): *La giustizia civile. Lezioni introduttive*. Il Mulino, Bologna, 2004, 45.

[45] We chose to use the expression 'formerly socialist' instead of 'former socialist' for grammatical reasons. 'Former' is an adjective, while here an adverb should be used.

[46] See Ajani 2008, 3.

merly socialist', since these countries are united not by what they are today, but by what they were in the past. This is even truer since democratic transition can be considered as concluded in several countries of Eastern Europe (in particular the ones which are now members of the European Union). Therefore, it may not be correct anymore to refer to 'post-socialist' or 'post-Soviet' countries, but it is better to use simply the geographical denominations: Eastern Europe, East-Central Europe, Central Europe, etc.

Finally, it must also be pointed out that these classification approaches properly showed their own internal limits. Their conceptual framework is mostly based on broad legal questions (ie. the relationship of socialist civil law and Western civilian heritage), generalisations of legal theory (ie. the political nature and function of law in socialist legal systems) and general historical studies (ie. the nature and the main features of the political transition after 1989). Furthermore, they frequently miss the in-depth study of these legal systems and they are also rather negligent toward the new ways of research emerging in the last twenty years. Therefore, we believe that certain new points should be integrated into the research, and in doing so, we hope that we can contribute to a better understanding of the reality of East-Central European legal systems.

## III. New ways in the study of East-Central European legal systems

It cannot be denied that nowadays' comparative law has changed considerably. Important scholars argue that comparative law doctrine should include more cultural elements in order to be able to cope with the recent scientific challenges. They advocate various new approaches, from the study of the deep structures of legal systems[47] to the research of professional and unprofessional attitudes toward law[48] as a societal phenomenon. These new perspectives might be excessive and ambitious, but it can hardly be denied that today's comparative law needs new impetuses.

In our view – even if we do not claim the label of 'cultural comparatists' – at least three different fields of study can be fruitfully applied in order to acquire a more refined picture of these legal systems. Firstly,

[47] Cf. Legrand, Pierre: *European Legal Systems are not Converging*, (1996) 45 International & Comparative Law Quarterly 52.

[48] Cf. Nelken, David: *Disclosing/Invoking Legal Culture: An introduction*, (1995) 4 Social and Legal Studies 435.

a socio-political analysis of the regional history may help in the understanding of the special historical influences considerably shaping the legal landscape of East-Central Europe during the centuries. Secondly, the so-called 'law and emotions' perspective also seems to be able to provide important insights into the main motives of the last twenty years' regional legal development. Lastly, the study of such basic problems of sociology of law as the citizens' attitude toward law in a regional perspective is also important to get a more nuanced picture about these legal systems. Interestingly, one should also admit that these aspects have generally been out of the scope of traditional comparative law discussions thus far. However, the study of these features may lead us towards more refined conclusions about the place of these legal systems on the legal map of the world then the earlier approaches.

### *1. A preliminary remark: the influence of Western law in the region following 1989 and its limits*

It is a broadly shared scholarly view that the region of East-Central Europe has been strongly influenced by Western legal models from the years of the political transition which started in 1989. The formerly socialist countries incorporated many Western legal institutions into their legal systems during a relatively brief, formative period.[49] Certain key components of this 'legal transition' – for instance: constitutional courts providing strong constitutional review of legislative acts;[50] human rights as international and constitutional standards,[51] ombudspersons and equality bodies devoted to anti-discrimination issues[52] – flourished in the region due to European integration aspirations and various legal assistance activities of the nineties.[53] Thus, Western legal thinking comprehensively shaped these

[49] Cf. Mádl, Ferenc: *State and Economy in Transformation. Revolution by Law in the Central and Eastern European Countries*. J.C.B. Mohr – Martinus Nijhoff, Tübingen – Dordrecht, 2000, 8-9. (International Encyclopedia of Comparative Law, XVII/23).

[50] Schwartz, Herman: *The New East European Constitutional Courts*, (1991-1992) 13 Michigan Journal of International Law 741.; Verdussen, Marc (ed.): *La justice constitutionnelle en Europe Centrale*. Bruylant, Bruxelles, 1997.

[51] Sajó, András: *Rights in Post-Communism*, in: Sajó, András (ed.): Western Rights? Post-Communist Application. Kluwer Law International, The Hague, 1996, 139.

[52] Moon, Gay: Enforcement Bodies, in: Schiek, Dagmar – Waddington, Lisa – Bell, Mark: Cases, Materials, and Text on National, Supranational and International Non-Discrimination Law. Hart Publishing, Oxford, 2007, 871.

[53] For instance, Ajani argues that birth and modernisation of the antitrust law in the region occurred under the strong influence of the EC antitrust model. Ajani, Gianmaria: *Law and*

legal systems whereby many new institutions and instruments arrived from these countries to the earlier socialist legal systems. This importation process also had its natural limits. Both the historical setting of the region and its macro-sociological features were able to hinder the normal functioning of these Western institutions since they were parts of a different socio-historical background. They have formed such regional peculiarities that could even impede the real reception thereby compromising not only the legal reconstruction of the region but the entire transition process which started following 1989. Consequently, the study of these factors has a vital importance if one wants to have a detailed picture of the region capable of challenging the existing vague commonplaces.

### *2. Socio-political history as an interdisciplinary starting point*

The first aspect worthy of being studied is the historical past of formerly socialist countries. It can be easily recognised that the countries of East-Central Europe have such a socio-political past that shares certain common features.[54] This historical heritage, or special historical setting, could have had a serious impact on their legal development in the last centuries, so it may even justify their common or unitary approach in comparative law.[55]

A prominent Hungarian historian, Jenő Szűcs, asserted in the early Eighties, that the most dominant historical experience of the region of East-Central Europe[56] is a continuous drift between the influences coming from the West (*Mundus Occidentalis*) and from the East (*Mundus Orientalis*). In order to better understand his theory, it is worthwhile summarising the main lines and special features thereof. Szűcs submits that the newly emerged Bohemian, Polish and Hungarian kingdoms – beside the Eastern borders of the early medieval Western Europe in the 10th and 11th century – swiftly started the creation of socio-political systems following the Western patterns of social and political organisation. This fast

*Economic Reform in Eastern Europe. The Transition from Plan Market during the Formative Years of 1989-1994*. J.C.B. Mohr – Martinus Nijhoff, Tübingen – Dordrecht, 2006, 14-15. (International Encyclopedia of Comparative Law, XVII/3).

54 *Cf.* Sedlar, Jean W.: *East-Central Europe in the Middle Ages, 1000-1500*. University of Washington Press, Seattle – London, 1994.

55 *Cf.* Zweigert – Kötz 1998, 68-69.

56 About the concept of East-Central Europe in general see Szűcs 1996, 14-48. About the historical units of Europe and the other options see Davies, Norman: *Europe: A History*. Harper Perennial, New York, 1998.

and fundamentally centrally led process was twofold: it regarded Christianity as an official state religion as well as relying upon the Western socio-political society organising practices. Among others these kingdoms made serious efforts to create a system of vassalage; their political thinkers stressed the moral obligation of the rulers; and they theoretically accepted the separation of 'society' (*civilis societas*) and 'state' (*corpus politicum*).[57]

Due to all these efforts, the outlines of Western styled societies gained solid contour in the region; for instance the formation of nobility and bourgeoisie as well as the unification of the different positions of villeinage were finished at the end of the 14th century. These Western patterns were also deformed to a certain extent, as a part of them remained unambiguously incomplete, another part were even slightly overdeveloped compared to the general Western tendencies.[58] Contrary to all these deformities influencing the socio-political development – and these peculiarities may be regarded as regional features – it could be asserted that such kingdoms emerged outside the borders of "traditional" Western Europe that essentially adhered to the Western socio-political model. So, the historical room of Europe was considerably widened; and Western Europe, as a socio-political phenomenon, more or less successfully integrated these kingdoms in the second half of the 14th century.

The growth crisis of the 15th century was answered with an expansive colonisation by the West – among other things it laid down the fundamentals of the world market –, but, surprisingly, it triggered qualitatively different reactions in East-Central Europe, namely the introduction of the so-called second villeinage which means that the status of villains hopelessly paralyzed for centuries was absolutely contrary to the on-going social tendencies of Western Europe. Western societies aimed the dissociation and abolition of obligations emanating from villeinage in order to create a free labour force necessary for the rapid development of the early forms of agrarian capitalism in this age. Thus, the so-called second villeinage showed the appearance of another model of social development, the Eastern one trying to subordinate society to state as it was expressively proved by the actions of Eastern political leaders (e.g. the Grand-Princes of Moscow and the Tsars of Russia). This manifest Eastern socio-political influence determined the entire development of the region for centuries.

[57] See Szűcs 1996, 31-35.

[58] Szűcs argues that, for example, the development of cities was obviously incomplete in a Western sense, while the rate of nobility compared to the entire society significantly exceeded the general Western rate (every 20th or 25th person in Hungary was a noble in the late Medieval ages, but this rate was only 1 to 100 in France). Ibid. 34.

The impact of these tendencies and the dissolution of the already existing and functioning Western structures were just accelerated by the wars related to the intensive expansion of the Ottoman Empire.

Because of these centuries-long wars the Hungarian kingdom almost disappeared and its 'ruins' were finally attached to the Habsburg Empire (the Ottoman troops occupied Buda, the capital of the kingdom, in 1541 and it was liberated under Habsburg flags in 1686). Further, the processes of European politics being considerably determined by the evolving Ottoman expansion also led to the Habsburg takeover of Bohemia (the Battle of White Mountain in 1620 and the constitution of 1627) and the territorial division of Poland that happened three times in a relatively brief period (1772, 1793, and 1795).

It is obvious that the opportunities for the former, Western-styled social development narrowed significantly since neither the destructive socio-economic effects of the frequent wars, nor the status-conservative ambitions of the emerging regional 'enlightened' absolutisms were favorable to continue this development. The events of the first half of the 19th century emblematically proved that the connection of the region to the main tendencies of the modern Western European socio-political development did not disappear at all. Moreover, the reception of this line of thought found a very valuable ally in the representatives of the liberal-nationalist nobility. The prior 1848 cultural developments, due to the modern East-Central European nations were born, turned obviously toward the West of the interest of the region. It could even have meant that the Western orientation might have replaced the former centralist and paternalist attitude which was strictly coupled to the practice of enlightened absolutism. Even though the goals of the thinkers of this Reform era were not realised in a political sense – the revolutions failed and none of these nations reached their political independence in the terms of constitutional law – the whole region developed in harmony to the main socio-economic and political features of the West and tried to modernise itself on the basis of the Western patterns.[59]

This development was broken by the outbreak of World War I and gained a fundamentally new direction due to the effects of the political agreements ending World War II (the summits of Jalta and Potsdam). Following a transitional period from 1945 to 1948/1949 the Soviet Union successfully consolidated its dominant position in the region and begun the introduction of an entirely new – and fundamentally different from

[59] Ibid. 47-48.

the modern East-Central European traditions – socio-political system. This process was strongly helped by the assistance of the local Communist governments. This model, again, was based on the idea of governmental intervention in the private sphere as well as on the negation of Western democratic political traditions. Although this emerging new socialist establishment almost completely changed the economic structure – for instance: it introduced the various forms of state and society ownership, it set up the so-called planned economy system – and disrupted the former democratic political system, the Western patterns did not totally disappear in the region. From the end of the Sixties, during the softening of the socialist systems, they obliquely reappeared in the framework of certain economic or political reforms.[60] This survival of Western patterns in the shadow of socialist transformation[61] could partially explain why the transition process was so fast in the region, and why the main aims of this process – democracy, political pluralism, rule-of-law, respect of human rights, and creation of a market economy – showed an unambiguous return to the Western model.[62]

In conclusion, socio-political history may teach us that in the countries of East-Central Europe socio-political and legal models cannot be found as purely as it would be the case in Western or Eastern Europe. Here, various models of Western or Eastern origin have always been mixed with each other depending on the dominant political setting of the region. So, comparatists must always be aware of this fact, and, therefore, they should be very careful when studying legal questions of the region. Moreover, easy and simple answers, if any, can only be accepted with a very special caution.[63]

### *3. The role of historical emotions*

It sounds a bit unusual, even today, that emotions and sentiments can have an impact on legal cultures, but, contrary to all counterarguments based on the rationality of law, they cannot obviously be disregarded. 'Law and

60 For a detailed analysis see Eörsi, Gyula – Harmathy, Attila (eds.): *Law and Economic Reform in Socialist Countries*. Akadémiai Kiadó, Budapest, 1971.

61 Cf. Ajani 2006, 5-6.

62 For a general discussion of the early transition process see Goldman, Minton F.: *Revolution and Change in Central and Eastern Europe*. M. E. Sharpe, Armonk, N.Y., 1997, 21-52.

63 The dangers of a simplistic approach regarding East-Central Europe are well explained and illustrated by G. H. Hodos. See Hodos, George H.: *The East-Central European Region. A Historical Outline*. Praeger Publisher, Westport – London, 1999, 133-146.

emotions' scholarship has created an extensive range of literature about this dimension of law in the last twenty years, and it has even emerged as a distinct field of study with its own unique research interests.[64] Hence, scholarship agrees that emotions can be found anywhere in law from criminal trials to family law issues.[65] In addition, one can even identify emotions in constitutional law since it is without doubt that, among others, fear is always an important motive in constitution-making. Modern constitutions, in general, can effectively provide guarantees against political oppression and disorder, so they are able to decrease the fear from unpredictable, future political events.[66]

Interestingly, the influence of emotions in the formation of legal cultures has generally been out of the scope of this line of thought thus far. Despite this, 'law and emotions' research cannot be excluded when studying features of legal cultures. For instance, sentiments – such as love, empathy, solidarity, modesty or even passion for justice – are also able to shape the substance of legal cultures, as the examples of medieval Christian law or Japanese law illustrate. Therefore, legal cultures as such, are worthy of an emotion-oriented analysis.[67] The outcome may offer a more detailed picture by highlighting certain important, but almost invisible cultural aspects. Obviously, the features discovered through it will always remain only an additional dimension, being able to complete the picture gained by the more usual ways of research.

64 About 'law and emotions' see Abrams, Kathryn – Keren, Hila: *Who's Afraid of Law and Emotions?* (2009-2010) 94 Minnesota Law Review 2033; Maroney, Terry A.: *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, (2006) 30 Law & Human Behavior 125.

65 Bandes, Susan A.: *Introduction*, in: Bandes, Susan A. (ed.): The Passions of Law. New York University Press, New York, 1999. 1.

66 Sajó, András: *Constitutional Sentiments*, (2006) 47 Acta Juridica Hungarica 1.

67 Few further examples: Harold J. Berman stresses that Christianity, having love and sanctity in its focus, significantly altered the Germanic folklaw to "more just and more humane", so to say it humanised it. Cf. Berman, Harold J.: *Law and Revolution. The Formation of the Western Legal Tradition*. Harvard University Press, Cambridge, Mass. 1999, 64-66. Lawrence Rosen argues that the central concept of Islamic legal culture is justice and it is "the most essential, if indeterminate, of virtues for Arabs". So, justice in Islam has obvious emotional dimensions, too, since virtues cannot solely operate on the grounds of reason. Cf. Rosen, Lawrence: *The Justice of Islam*. Oxford University Press, Oxford, 2000. 173. Chin Kim and Craig M. Lawson points out that one of the main reasons of the distinctiveness of Japanese legal culture is the fundamentally emotional-centered character of the people. Cf. Kim, Chin – Lawson, Craig M.: *The Law of the Subtle Mind: the Traditional Japanese Conception of Law*, (1979) 28 International and Comparative Law Quarterly 491, 497-498. The formulation and interpretation of certain penal law articles in Stalinist era was manifestly influenced by fear and hate toward "the enemies of the system". Cf. Solzhenitsyn, Aleksandr I.: *The Gulag Archipelago 1918-1956. An Experiment in Literary Investigation*. Harper & Row, New York, 1974, 60-68.

Another problem should also be discussed briefly. What are emotions? For an emotion-oriented analysis a certain definition, as a starting point, is indispensable. One should also face the complexity of this problem, since it can be approached from the aspect of psychology, biology, moral philosophy or even neurosciences.[68] An ordinary lawyer is obviously incompetent in these fields. In order to avoid the trap of dilettantism the focus of the whole question should be changed. Emotions are obviously related to the individual,[69] but one can also speak of collective emotions rooted in the public thinking of an era.[70] Since we are dealing with legal cultures, the study of this macro level of emotions, i.e. public emotions, will be adequate. Moreover, this macro study does not need such a refined tool as the above mentioned fields offer for the study of the individual, since this problem can be handled with the application of the historical method.[71] The most influential public emotions or sentiments dominating an era can be identified retrospectively by reviewing the expressions of the main trends of public thinking in various spheres of life. Media, literature, popular and high arts, for instance, and even law, can reveal so many telling points of the dominant public emotions.

In our region one should sharply differentiate between two waves of emotions having impact on post-socialist legal development at the very beginning. Firstly, a short-run perspective should be analyzed. This is related to the fall of the Iron Curtain and the start of political transition, i.e. the early 1990s. It is not too difficult to recognise that the significance of national sentiments drastically increased in the regional public thinking in these years. A large part of the public emotions in the last socialist decades were centred on the official socialist internationalism, therefore nationalist themes remained frozen. This situation radically changed and some scholars even talk about the presence of a strong ethno-nationalism or aggressive nationalism in the region,[72] but this labeling may exaggerate a certainly existing phenomenon. This impressive rise and broad spread of

[68] See Kagan, Jerome: *What is emotion? History, Measures and Meanings*. Yale University Press, New Haven, 2007, 1-54.

[69] Eric A. Posner offers a wide and comprehensive analysis of the role of emotions in the individual decision-making. Cf. Posner, Eric A.: *Law and Emotions*, (2000-2001) 89 Georgetown Law Journal 1977.

[70] See Sajó 2006, 2-3.

[71] One of the experts, Kagan explicitly accepts that emotions and their interpretations are culturally and historically influenced (see Kagan 2007, 47-49.). So, they can also be studied on a macro level through historical research.

[72] See Roth, Stephen. J.: *The Effect of Ethno-Nationalism on Citizens' Rights in the Former Communist Countries*, in: Sajó, András (ed.): Western Rights? Post-Communist Application. Kluwer Law International, The Hague, 1996. 273, 274-275; and Sajó 1996, 146-147.

national emotions – just think of the emergence of the Baltic States, the fast dissolution of Czechoslovakia and Yugoslavia and the birth of entirely new 'nation-states' – was one of the consequences of the imperialistic and internationalist policies of the Soviet Union. The nations of this region tried to re-establish and revitalise their national-historical identity following more than forty years of the pressure of a fundamentally ahistoric and oppressive culture.[73] These national sentiments have also been a real engine of formerly socialist legal developments. Among others, they led to the formation of such legal solutions which manifestly differ from the general Western patterns. Acts like the language and citizenship laws of the Baltic countries, openly discriminating against former USSR Russian inhabitants;[74] the 'status laws' in Slovakia, Romania, Hungary and Slovenia providing preferential treatment and protection for the co-national minorities living outside of these countries;[75] or the 'national responsibility clauses'[76] of the regional constitutions, are almost unknown in Western Europe. Thus, the rising national feelings significantly contributed to the

73 Cf. Wandycz, Piotr S.: *The Price of Freedom. A History of East Central Europe from the Middle Ages to the Present*. Routledge, London, 1992, 244-265.

74 A good example can be the case of Latvian Citizenship Law (22 July 1994), which excluded all persons from Latvian citizenship who came into the country following 1940 (Art 2 (1)), and this provision mostly effected the former Russian USSR inhabitants having a permanent residence in Latvia. In theory they could apply for naturalisation, however, it was de facto impossible because of the very demanding linguistic requirements (Art 12 (1) spec. 2., 3., 4.). At the end, the status of these Russian persons was settled by the Law on the Status of Former USSR Citizens who do not have the Citizenship of Latvia or any other State (1995). For the assessment of these problems see the report of Klaus Berchtold on the draft prepared for the Venice Commission see Berchtold, Klaus: *Report on the draft Law on Citizenship in Latvia* (1993), CDL(1993)005, http://www.venice.coe.int/docs/1993/CDL%281993%29005-e.asp (accessed 30.01.2012).

75 Halász, Iván – Majtényi, Balázs – Vizi, Balázs: A New Regime of Minority Protection? Preferential Treatment of Kin-Minorities under National and International Law', in: Kántor, Zoltán et al. (eds.): *The Hungarian Status Law: Nation Building and/or Minority Protection*. Slavic Research Center, Hokkaido University, Sapporo, 2004, 328.

76 These provisions usually declare various state obligations concerning those parts of the given nation that live outside the national borders. For ex.: Constitution of Romania: Art 7. "The State shall support the strengthening of links with the Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, with the observance of the legislation of the State whose citizens they are."; The Constitution of the Slovak Republic: Art 7a "The Slovak Republic promotes national awareness and cultural identity of Slovaks living abroad, supports their institutions intended to achieve this aim and their relations with the mother country."; The Constitution of the Republic of Slovenia: Art 5. "Slovenians not holding Slovenian citizenship shall enjoy special rights and privileges in Slovenia. The nature and extent of those rights and privileges shall be determined by statute." The Constitution of the Republic of Croatia: Art 10. "Parts of the Croatian nation in other states shall be guaranteed special concern and the protection by the Republic of Croatia."

emergence of certain unique legal measures trying to answer special regional challenges stemming from the recent past.

In addition, the long term role of emotions should also be assessed. The overwhelming majority of constitutional preambles contain some references to the century long historical fights for national independence.[77] These solemn sentences might be regarded just as declarations having no normative value, but, they are undeniably important expressions of public sentiment. They can be studied as important litmus papers, indicating the reappearance of historical emotions, as for instance the passion for independence. Furthermore, emotions embedded in these texts have strong repercussions for certain constitutional provisions.

The emotional nature of these century-long fights for independence strongly influenced those constitutional measures that made legally possible EU accession, that is, the so-called EU-clauses. The protection of the recently regained sovereignty against the supranationalistic claims of the European Union is unambiguous from the relevant provisions of East-Central European constitutions. In general, these articles that made possible the transfer of certain competences to the EU, i.e. open up the closed national legal system toward community law, have restrictive and minimalist wordings and they reflect strong sovereignty concerns.[78] For instance, the Hungarian constitution declares that "The Republic of Hungary may exercise competences […] in conjunction with the other member states […] to the extent that is necessary […]" in order to fulfill EU obligations.[79] The minimalist and sovereignty-focused nature of this provision can hardly be denied. Another good example is the EU-clause of the Czech constitution. It declares that 'certain powers […] may be transferred by treaty to an international organisation or institution' and if a constitutional act requires it, it must be approved by a referendum besides the tradition parliamentary way of ratification.[80] Thus, the decision of the political sphere is not enough in itself in such a vital question, but the

[77] For ex.: the Constitution of the Republic of Poland: "Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, […].; The Constitution of the Republic of Slovenia: "And, acknowledging that we Slovenians created our own national identity and attained our nationhood […] as a result of our historical and centuries-long struggle for the liberation of our people."; Constitution of the Republic of Lithuania: "The Lithuanian Nation […] having for centuries defended its freedom and independence, […]."

[78] Cf. Albi, Anneli: *Europe Articles in the Constitutions of Central and Eastern European Countries*, (2005) 42 Common Market Law Review 415-420; Sajó, András: *The Impacts of EU Accession on Post-communist Constitutionalism*, (2004) 45 Acta Juridica Hungarica 193, 197-198.

[79] The Constitution of the Hungarian Republic Art. 2/A.

[80] The Constitution of the Czech Republic Art. 10/a (1) and (2).

consent of the people is also required. One may conclude that two main public emotions strongly influenced these clauses: the intent to preserve national independence and the fear of losing it in the future.

One can determine from this 'law and emotions approach', that even the norm-level of East-Central European legal cultures could be influenced by short and long run public sentiments, and, indeed, it properly illustrates to what extent emotions can play a decisive role in the shaping of legal cultures. Here, emotions triggered the emergence of particular regional legal instruments and special constitutional measures.

### *4. Hidden or shadow cultures' in the attitudes towards law*

It can be accepted without reservation, that the citizens' attitudes towards law also have a crucial impact on the face of a given legal culture.[81] Compare the Japanese way of legal thinking to the general Western attitude. Far-Eastern people do not have too much confidence in the law in general, and they prefer non-legal ways, such as mediation, in conflict settlement.[82] On the contrary, law is the most frequently used way to solve problems and conflicts in the Western world. Obviously, this difference in attitudes decisively shaped the general functioning of legal cultures.

In the region of East-Central Europe, one can also find some interesting points, and these may indicate a certain deviation from the general Western model. These differences are coupled to 'the non-official cultures of law', so they are mostly invisible from the point of view of professional legal discourse. They are called 'hidden or shadow cultures' in the scholarly literature, since they cannot be evidently recognised on the surface of professional legal culture, but they need a more socially oriented research. Additionally, these 'hidden cultures' are mainly rooted in the socialist era when citizens had to develop certain special attitudes due to the pressure of official state policies, and, obviously, they were a way of social adjustment also.[83] Therefore, the heritage of socialist era still influences current legal cultures in Eastern-Central Europe because these 'hidden or shadow cultures' can create important socially based normative claims towards the legislator.

81 Nelken 1995, 435.

82 See in detail Kim – Lawson 1979.

83 Los, Maria: *Legitimation, State and Law in the Central European Return to Democracy*, in: Gessner, Volkmar – Hoeland, Armin – Varga, Csaba (eds.): European Legal Cultures. Dartmouth, Aldershot, 1996, 474-475.

As a primary example one can mention the widely spread 'culture of legal skepticism' in the region. It can empirically be proved, on the basis of the comparison of Western and former socialist data, that the public opinion shows a deep institutional skepticism.[84] The Eurobarometer surveys harshly illustrate this gap, between the old EU members and the new member states concerning institutional trust. For instance the overall average of trust in the legal systems in the EU was 47% in 2010.[85] This data was lower in most of the newly acceded countries from the Visegrad-group, the sole exception was Hungary in this regard.[86] In the Czech Republic 34%, in Poland 38%, and in Slovakia 32% of the population answered that they tend to trust in the legal system.[87] This gap is more apparent if one compares, for instance, the data of Germany, the Netherlands, and Luxembourg – each of them is one of the founding fathers of the EU – to those of the earlier three formerly socialist countries. In Germany 60%, the Netherlands 65%, and Luxembourg 60% of the citizens tended to trust in the legal system in the same year.[88] Thus, the general level of institutional trust seems to be significantly higher in these traditional Western countries.[89]

[84] Cf. Beers, Daniel J.: *Mass Attitudes toward the Law in Postcommunist Europe: Normative Support vs. Institutional Trust*. Prepared for delivery at the 2006 Annual Meeting of the American Political Science Association. 11. http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/5/1/2/5/pages151258/p151258-1.php (accessed 30.01.2012); see Los 1996, 475.

[85] See the Eurobarometer survey about the trust in the national legal system, 11/2010, http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=16,&startdate=2010.11&enddate=2010.11 (accessed 30.01.2012).

[86] Surprisingly, compared to the data of 2009 the institutional trust considerably increased in Hungary, form 41% to 53%. See the Eurobarometer survey about the trust in the national legal system, 11/2009-11/2010, http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=22,&startdate=2009.11&enddate=2010.11 (accessed 30.01.2012).

[87] See the Eurobarometer survey about the trust in the national legal system, 11/2010, http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=17,24,26,&startdate=2010.11&enddate=2010.11 (accessed 30.01.2012).

[88] See the Eurobarometer survey about the trust in the national legal system, 11/2010, http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=3,9,10,&startdate=2010.11&enddate=2010.11 (accessed 30.01.2012).

[89] Interestingly, within the old EU members – the EU 15 – one can also note a dividing line between the Northern and Southern countries. The citizens of Portugal, Spain, Italy and Greece have generally less confidence in the functioning of national legal systems then the other members. These data may be compared to the institutional trust level of the East-Central European countries, but few points should be borne in mind: (i.) the level of institutional trust is generally higher in these countries then in East-Central European ones, even though it does not reach the overall EU level; (ii.) these countries have never been under Soviet influence, so their citizens have no experience about the functioning of a socialist legal system; (iii.) the last years' economic crisis and its socio-political repercussions strongly touched upon the societies of these countries and – among other factors – it could also influence the trust in the legal system, just compare the post- and prior 2008 data. Cf. the Eurobarometer survey about

This could be a legacy of the socialist period, during which the governments and the political elites regularly misused the law for their political goals.[90] Basically, they regarded the law as a means to realise their special and ideologically biased group interests over the whole, not necessarily supportive, society. As a consequence, this caution and awareness of people towards the law will not disappear in one or two years following the beginning of the transition. Alternatively, it could also be a consequence of the general institutional performance in the years of the transition. A fundamental renewal of the whole system of administration of justice was simply impossible at the beginning of the Nineties, due to human resources and political reasons.[91] Therefore citizens experienced the continuation of former institutional attitudes and practices. This transitory phase and its bad consequences – for instance: disregard of the interest of the everyday people, the birth of politically motivated judgments, the low effectiveness of criminal investigation etc. – considerably weakened the trust in legal institutions.[92] In conclusion, citizens' attitudes toward legal institutions are not the most favorable compared to the general Western setting. People here tend to trust less in the legal system than citizens do in Western Europe. Whether this trust can be increased to a general EU level is a considerable challenge, but one should admit that this low level can seriously affect or even bias in certain cases, the functioning of the entire legal system.

Another special feature of these 'hidden cultures' is the attitudes related to the overemphasised welfare expectations. Because of the weaker performance of formerly socialist economies and the paternalist legacy of the socialist period there is a general attitude in the region which regards social security benefits as an expected solution to any kind of problems. People generally tend to establish their life expectations on social security benefits provided by the state than on their autonomous acts guaranteed by their fundamental rights. This however can also have serious repercussions on these legal systems. First of all, these social justice expectations

the trust in the national legal system, 11/2003–11/2010, http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=4,8,12,5,&startdate=2003.11&enddate=2010.11 (accessed 30.01.2012).

90 Varga, Csaba: *What is Needed to Have Law?* In: Varga, Csaba: Transition to Rule of Law. On the Democratic Transformation in Hungary. Tempus, Budapest, 1995, 50.

91 For a general discussion see Fleck Zoltán: *Jogintézmények átépítése (Bevezetés a közép-európai új demokráciák bírói jogalkalmazásának szociológiájába)* [Reconstruction of legal institutions (Introduction to the sociology of the administration of justice in the new democracies of Central Europe)], (2003) 1 Kontroll 28.

92 Ibid. 40-49; and Beers 2006, 11.

create a strong pressure on legislation concerning social and economic rights as well as social security law. Secondly, these also lead to a considerable dependency on state policies, and this can impede the formation of a legal culture based on civil autonomy. Therefore, these inherited welfare expectations also shape the content of these legal systems in a certain direction, as for instance an unusual broad interpretation of social rights.[93]

The earlier feature is strongly related to another regional peculiarity: the unstable and not completely developed 'rights culture'. For various reasons,[94] the ability of the 'rights revolution' to replace the culture of political privileges and state paternalism, rooted in the socialist era, has not yet been accomplished. On the norm level one can see a comprehensive development, since the ratification of international human rights documents and the reformulation of constitutional provisions have already happened since the beginning of the transitory period. The constitutions of the region fully endorsed human rights and an institutional framework comprising constitutional courts and ombudspersons also emerged. But, partly due to the socialist legacy, partly to the ambiguous nature of the transition process, one cannot talk about a perfect 'rights culture' in Western terms. Shortcomings of the economic systems, structural problems of the societies and the overrepresentation of the political sphere are all able to distort the formation of such legal cultures where rights are not only regarded as instruments in different hands, but autonomous legal claims having a sui generis value. The situation of rights, therefore, needs refinement and more development in these legal cultures to be compared to the general Western standard.[95]

## IV. Concluding remarks

What are the main lessons to be learned for legal theory and comparative law? First of all, if we regard the East-Central European legal systems as not only a simple set of legal rules but as complex legal cultures, their unique features cannot be denied from a comparative aspect. They seem

[93] Sajó, András: *How the Rule of Law Killed Hungarian Welfare Reform*, (1996) 5 East European Constitutional Review 31; see also Sajó 2004, 208-212.

[94] András Sajó lists six "interdependent factors": (i.) aggressive nationalism, (ii.) anti-minoritarian attitudes, (iii.) unstable state system, (iv.) the state is uninterested in "destroying" its former economic and cultural monopolies, (v.) the distortion of the emerging market economy, (vi.) the lack of trust in economic transactions. (see Sajó 1996, 146-151).

[95] For a detailed discussion see ibid. 156-157.

to be formally adhered to 'Western Law', since they have imported many significant, manifestly Western legal institutions in the last twenty years, and one can even assert that on the norm-level it is not really possible to find highly relevant and serious differences between the Western legal systems and the East-Central European ones. This considerable level of similarity can be very tempting to declare the general similarity of Western and East-Central European legal systems.[96] Despite this, the earlier analysed features also show that important differences exist mostly related to the non-norm layers of these legal cultures. These are not only of theoretical or sociological relevance but they are also able to influence the norm-level and the general functioning of these systems. There are many options. These unique features can distort the ordinary functioning of law as the so-called 'hidden cultures' do, or they can even be engines for the formation of peculiar regional legal solutions as the example of emotions pointed out. Therefore, the similarity of our legal cultures to the Western one should be regarded cautiously. From the aspect of pure norms it seems to be correct, but the non-norm elements can suggest slightly different conclusions.

Moreover, this may also indicate that comparative law strictly focusing on the functional similarity of legal rules, or concentrating on the simple comparison or juxtaposition of norms is inadequate for the comprehensive understanding of these legal systems. Layers of legal cultures – although they are very complex and sometimes controversial – should also play a prominent role in these studies. Therefore, the continued development of the classical theses of comparative law towards the integration of cultural elements should be continued, as the lessons arising from the study of East-Central European legal cultures teaches us.

As regards the classification of these legal systems, the main conclusion of this essay is that Eastern European legal systems are part of the civil law tradition, however they form an autonomous group since one can find important distinguishing features in the history and on the non-norm level of these legal cultures. Finally, a further distinction between

[96] There is a line of thought in the comparative law of the last sixty years arguing that Central and Eastern European legal systems do not essentially differ from the general Western patterns. This position is represented by such authors as for instance J. H. Merrymann or Tomasz Giaro in the recent times: Merryman, John H.: *The French Deviation*, (1996) 44 American Journal of Comparative Law 109, 118-119; and Giaro, Tomasz: *Legal Tradition of Eastern Europe. Its Rise and Demise*, (2011) 2 Comparative Law Review 1. For a general overview see Osakwe, Christopher: *The Greening of Socialist Law as an Academic Discipline*, (1986-1987) 51 Tulane Law Review 1257.

East-Central Europe and the rest of Eastern Europe is justified by several factors which we aimed to explain in this article.