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### RECENSIONES Y RESEÑAS

**HAMZA, Gábor, *Wege der Entwicklung des Privatrechts in Europa. Römischrechtliche Grundlagen der Privatrechtsentwicklung in den deutschsprachigen Ländern und ihre Ausstrahlung auf Mittel- und Osteuropa* (Passau, Schenk Verlag, 2007), 264 pages** [ [Links](#) ]

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Professor Hamza's new *opus magnum*, following its three antecedents,<sup>1</sup> is unquestionably a great contribution to the reunification of European legal science ('European' is used here in a broader cultural and historical sense). It is expressly stated aim is to follow up the common historical roots of the private law related parts of the legal orders in Europe. Paradoxically but not incomprehensibly, its title suggests more diversities than similarities: the German word *Wege* (ways, directions) evokes the idea of several divergent departures from a common starting point in the reader's mind. It is exactly the effect Hamza aspired to. His intention is to reiterate over and over again the old known *locus communis* of every legal historian, that continental private legal orders are almost indiscernibly permeated with remnants of the ancient Roman legal system and that the recently desired *ius commune (privatum) Europaeum* is inconceivable without the conscious undertaking of this historical aspect of our European cultural identity. However, the drafting of this 'ghost story'<sup>2</sup> is not a long line of unbroken success. If we are honest,

misunderstandings and misinterpretations have always clouded and distorted the development of the description of private law in Europe.<sup>3</sup> As an example, one only needs to remind oneself of the concept of legal responsibility<sup>4</sup> or the tenacious and unreasonable vitality of the aedilician six months term of rescission in the case of latent defect.<sup>5</sup>

Avoiding these punctilious dogmatic details, it is the genealogical tree of Central and Eastern European legal orders which the author offers his readers. Hamza's story is simultaneously based on an intrinsically institutional, political and chronological approach.<sup>6</sup> He carefully guides the reader through the chaotic political relations which are characteristic of the newly formed states of this region. He also writes up a detailed summary of what the Germans would define as "außere Rechtsgeschichte" ("external history of law"), based on the terminology of Leibniz. For one who would like to analyse, compare or simply become familiar with the almost 'exotic' legal orders referred to in this book, it is essential reading. With its comprehensive bibliography it serves as an indispensable starting point for any further investigation. Hamza took the first, maybe the most cumbersome step toward this partially uncharted *terra incognita*: he composed relatively short, well-summarized 'land reports', which are followed by an in depth comparative analysis so as to gain a full understanding of the legal development in Central and Eastern Europe.

Professor Hamza infallibly maintains his position on Europe and its legal interactions. He places the German speaking countries at the core of his analysis: Germany, Switzerland and Austria with its former provinces.<sup>7</sup> He does this justifiably with the reasoning that this part of Europe can be considered as a satellite of the German private law traditions. This territorial choice can *prima facie* easily be criticized as it might be argued that it causes a fractional and distorted contextualisation of the material. However, if the German legal scholar Hans Hattenhauer may include the Turkish legal system under his own concept of Europe (which is, today, in political terms, easy to justify), the Hungarian legal scholar Gábor Hamza may also add his own contribution to the sometimes only partial mainstream (Western) European science of legal history.<sup>8</sup> His efforts draw attention to the lack of the change of paradigm in private law history, which happened long ago in the science of the comparative law, which freed itself from its own superior civilisation possessed Europe-mindedness in the 1950's.<sup>9</sup>

It is this new empirical material which makes Hamza's history-telling unique, as the first half of his book does not differ from the classic scheme of similar attempts.<sup>10</sup> He starts his descriptions with the fall of the Western Roman Empire and with the process and the structure of Justinian's codification as other legal historians would similarly begin a treatise on similar issues. In connection with the above mentioned codification there is an interesting excursion into an evaluation of the intellectual achievement of the Byzantine scholars. The question is still hotly debated as to whether the *Corpus Iuris Civilis* can be regarded as a codification or 'only' a compilation.<sup>11</sup> In the meantime, Hamza also looks into canon law, the development of which he follows up with the enactment of the new *Codex Iuris Canonici* in 1983. The first real surprise and structural deviation comes after the presentation of the flourishing period of Roman law in Italy, where he stops the usual circular exhibition of events, and fails to mention the *mos Gallicus*, or Dutch legal humanism, and only remains on the 'German' track.

It is in the last 120 pages of the book that he develops his own position. It is here that he devotes himself to the depiction of the legal development of a series of politically, geographically and also from a scientific point of view more peripheral countries from Hungary through Serbia and Montenegro to Armenia and Azerbaijan. Thus, Hamza's own conception of the history of private law in Europe differs markedly from similar attempts to assess the situation. Only a Central European Scholar could make use of his country's 'ferryboat' position between East and West in such an innovative way. The author was particularly observant in noticing that there is also some relevant historical experience beyond the Elbe.

Among the German satellites one of the main countries is Hungary, as the one-time Hungarian Kingdom ruled over a considerable part of the territory Hamza analyses in his book. Its influence is not to be underestimated even outside its borders as in the case of the so called *Tripartitum* from the year of 1514. It is important to note that Hungarian private law developed organically, even avoiding the incorporation of the Roman law. Frankly speaking, the term 'organic development' might be considered as an euphemism, looked at from another point of view it could be seen as an obstinate, deliberate way of avoiding the new challenges.<sup>12</sup> *A fortiori* is the achievement of some excellent Hungarian scholars in 20<sup>th</sup> century more impressive. Among others the internationally well-known Béni Grossschmid, Géza Marton and Gyorgy Diódsi have raised the science of the Hungarian private and Roman law to a European *niveau*.

In the following section we will focus on the less familiar private law orders. As stated above, this is the most unique and indeed the most important part of Hamza's work. It covers approximately twenty-five Central and Eastern European countries, including the Caucasian ones, and in such a way geographically the covered area stretches from Poland to Cyprus and from the Czech Republic to Azerbaijan.

From Polish legal history we can see how effectively a national movement can affect legal development. Polish courts, mostly made of noblemen, preferred their own local law (*ius terrestre*) to the glossed Roman law, which was perceived to be the law of the Emperors of the Holy Roman Empire (*ius*

*Caesareum*). In contrast, it is highly significant that the 3<sup>rd</sup> Lithuanian statute from 1588 introduced Roman law (named *ius Christianum*) as a subsidiary source of law.

In the former Czechoslovakia, in its early times, the Austrian and the Hungarian legal systems survived, especially the *Allgemeines Bürgerliches Gesetzbuch* from the year of 1811, which included similar institutes to Bohemian law, such as the land registration and the *hypotheca*. The Hungarian Commercial Code (*Kereskedelmi Tor-vénykönyv*, 1875) played a primary role in the commercial life of Slovakia up till the early sixties. The new Commercial Code (*Obchodny Zdkonik*) —which was introduced in 1992— is based on the purely dualistic principle and follows the so-called subjective approach, where regulation is built on the concept of business transactions not on the trader himself.

In the Balkans, due to the political impact of the Byzantine Realm, the Byzantine-Roman law (*ius Graeco-Romanum*) was what led and dominated legal development.

The Greek Civil Code from 1940 was influenced largely by the German *Bürgerliches Gesetzbuch*, but the remnants of the French *Code civil*, the Swiss *Obligationen-recht* and *Zivilgesetzbuch*, the *Projet franco-italien des Obligations et des Contrats* and Hungarian drafts can also be identified.

During the five centuries of Ottoman oppression, the jurisdiction of the Orthodox Church kept the Byzantine-Roman tradition alive in the former Bulgarian territories, as well as the harmonisation of the Islamic legal system with the secular 'western' legal principles which was also sought by the so-called *Medjelle*.

The first Serbian Private Law codes were already promulgated in 1834 and in 1844, in a very early time in comparison with the other countries of the region. The later code was structured after the Gaianian-Justinianic institutional system and shows the influence of the ABGB and of the doctrines of the jurisprudence of natural law.

The Private Law Code of Montenegro (1888) gained a substantial interest from all parts of Europe, being the first code which separated the material of family law and the law of succession from the law of things. Noticeably, an attachment of a collection of *regulae iuris* was also added to this pioneering work of law.

The legal development of the Danubian Principalities (Wallachia and Moldavia) was always shadowed by political dependency on neighbouring countries and almost always followed the legal ideal of the rulers or was its pure negation.

Regarding Romanian legal history, it is important to emphasize the simultaneous coexistence of legal orders in different parts of the country. The Romanian (in *Vechiul Regat*), Austrian (in Siebenbürgen) and Hungarian (in Transylvania) legal orders were both present.

In the federal system of the former Yugoslavia a general unification of the private law has never been seriously ventured.

The Slovenian Law of Obligations (*Obligacijski Zakonik*) has recently been adopted following the country's new independence, thus the *Vienna Convention on the International Sale of Goods* (cisg) could also have been taken into account when drafting it. In the Croatian territories where Roman law once prevailed, Hungarian (*Tripartitum*), Austrian (abgb), and French (*droit maritime*) influences were noticeable. Interestingly, the old Roman maxim *superficies solo cedit* found its way into the new Property Law Code (*Zakon o vlasnistvu I drugim stvarnim pravima*) and applies without restraint.

Not surprisingly, in Bosnia and Herzegovina constitutional law is paid more attention to today than private law issues. However, according to a decision of the cabinet in 2001, legislative reform has already begun. In the Macedonian legal system the *lex commissoria* —which was forbidden by the former Yugoslavian regulation— was introduced again. This can be regarded as a sign of the reversal of the old Roman tradition.<sup>13</sup> The new Albanian Civil Code from 1994 is a synthesis of the German Pandectistic and the Italian legislation and jurisprudence.

Maybe the most fascinating moment happened in Turkish legal development, when in 1926 the Swiss Private Law Code (zgb) and the Law of Obligations (or) were admitted by the unequivocal vote of the Turkish National Assembly, as being the 'most modern, democratic and ideal' codification. Both the above mentioned legal sources were acknowledged in their French translation. This is an important detail, as the French formulation of Article 1 (3) of the ZGB, which identifies jurisprudence as a permissible tool in the case of legal lacuna, did not enable the Turkish courts to 'smuggle' back the old customary law into the new jurisdiction. In the German version customary law (*Gewohnheitsrecht*) is mentioned in the same place which would have contradicted the revolutionary efforts of Kemal Atatiirk, allowing for different interpretations.

The legal system of Cyprus is an interesting historical hybrid of Byzantine, Islamic, French and British legal institutes where the Law on Wills and Succession is regulated following the concept of the

*Personalitätsprinzip*, i.e. different legal solutions apply to different ethnical groups (Greeks, Muslims, British).

Interestingly, the concept that Russia is the legal successor of Byzantium originated from the monk Filofej (Philotheos) who lived in the first half of 16<sup>th</sup> century. It is also not widely known that a Russian Tsarist (Imperial) Roman Law Institute existed at the *Friedrich-Wilhelm-Universität* in Berlin from 1887, almost a decade long under the supervision of the German scholar, Heinrich Dernburg. Among his students there can be found Grimm, Pokrovskij and Petrazickij as the future leading personalities of Russian legal science.

From the intricacies of the Soviet legal order the separation of the family- and labour law from other parts of the private law are to be emphasised, all done in accordance with Marxist theory. The law of commerce was also double-sided. Instead of the traditional, liberal commercial laws the law of the strict, centralised social economy was enforced. The underlying idea beyond this structure was the concept of the sectional law (*djuhsektornojepravo*).

The first three parts (books) of the Russian Civil Code (1995-2002) differ -the fourth part (book) on intellectual property will be put into force on January 1, 2008— in several main aspects from the similar western *codices*. For example the private ownership of land is only partially recognised, the *tura in re aliena* are autonomous forms of ownership. In the financial sector a special kind of trust property, originating from the *Louisiana Civil Code*, is also acknowledged.

In Ukraine—as almost everywhere in Eastern Europe—the local law of Magdeburg (*Magdeburger Stadtrecht*) mediated the German solutions which were later overshadowed by the Soviet intrusions. Belarus experienced a similar development. An interesting case of legal history can be observed in Moldova (Bessarabia) as part of the country has questionable statehood. In Transnistria the legal order ante 1991 is still valid.

Despite the Russian supremacy up till 1918 the Baltic Territories were deeply influenced by the German Pandectistic whose impact expressly culminated in the *Liv-, Est- und Curländisches Privatrecht* (written in German) in 1864. These countries are currently seeking to modernize their private and commercial law following western examples (mainly the 1942 Italian *Código civile*, the French *Code Civil*, the German BGB, the Swiss OR, the new Dutch *Burgerlijk Wetboek* and the *Louisiana Civil Code*).

The Georgian Ruler, Vahtang VI in the early 18<sup>th</sup> century unified his country's customary law with the so-called *Liber Romanus Syriacus*. This may be the reason why the new Georgian Civil Code is a well-balanced and original synthesis of local laws, western legal ideas and Roman law. Its main curiosity is the Roman *fiducia* rooted legal institution, the trust.

Armenia (more accurately *Armenia maior*) used to be a provisional province of the Roman Empire and now seeks to revive its own western tradition. Despite these efforts Armenia has developed a totally independent, original structure for its Civil Code in 1998. This Civil Code has twelve parts. The Code contains in its last book the private international law related articles. The Azerbaijan Civil Code has maybe the longest general part in comparison to the other civil codes of the world containing such a part: it consists of 556 articles,<sup>14</sup> and contains, as well as the usual material, the law of things (*vesnije prava*), the general part of the law of obligations and the general rules on commercial companies.

As a conclusion, Hamza's new legal 'Baedeker' opens new ways to the understanding of the colourful landscape of our 'European' legal world and stimulates further research. It is essential for scholars for whom these legal orders were inaccessible because of language barriers, and finally it might be fascinating for every reader interested in legal history, civil law and comparative law.

## Notes

<sup>1</sup> The first of these antecedents is written in Hungarian: G. Hamza, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján*. [The Development of the European Private Law. The Formation of the Modern Legal Orders based on the Tradition of Roman Law], (Budapest 2002). Also see the first German version: G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn* (Budapest 2002). For a review of this volume see G. Deli/I. Hoffman/I. Siklósi, in: *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica XLIV* (2004), pp. 301-305. The recently published French edition: G. Hamza, *Le développement du droit privé européen* (Budapest 2005).

<sup>2</sup> P. Vinogradoff, *Roman Law in Medieval Europe* (Oxford 1929), p. vii.

<sup>3</sup> H. Honsell, *Das rechtshistorische Argument in der modernen Zivilrechtsdogmatik*, in: *Akten des 26 deutschen Rechtshistorikertages* (Frankfurt am Main 1987), p. 306.

- <sup>4</sup> The concept of 'responsibility' has its roots in Roman law (for instance, see the terms *teneri* and *praestare* in the sources of Roman law), but the term itself—as one of the greatest creations of the modern jurisprudence— was created by the French legal science in the XVIII. century. See A. Földi, *A másért való felel sség a római jogban* [Vicarious Liability in Roman Law], (Budapest 2004), pp. 38-83.
- <sup>5</sup> W. Kunkel/M. Schermaier, *Römische Rechtsgeschichte* (Köln-Weimar-Wien 2001<sup>13</sup>), p. 95. See to the terms of the *actio redhibitoria* and the general problem of aedilician product liability É. Jakab, *Stipulationes aediliciae* (Szeged, 1993) and *Praedicere und cavere beim Marktkauf*(München 1997).
- <sup>6</sup> On the controversial debate whether an intrinsic approach is possible at all, see O. Behrends, Franz Wieacker, en ZSS. 112 (1995), pp. 13-62.
- <sup>7</sup> On the problematic area of the selection of the jurisdictions to be analysed, see K. Zweigert/H. Kötz, *Introduction to Comparative Law* (Oxford, 1994), pp. 42-44.
- <sup>8</sup> A good example for how personal circumstances influence scientific behaviour is Zimmermann's monography, in which the author deals with the dogmatic features of the law of obligations only in the most significant legal orders (German, English etc.) and that in South Africa. See R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996<sup>3</sup>).
- <sup>9</sup> L. J. Constantinesco, *Rechtsvergleichung* 1. (Köln-Berlin-Bonn-München, 1971), pp. 159-202.
- <sup>10</sup> For instance H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (Heidelberg 2005<sup>10</sup>) and P. Stein, *Römisches Recht und Europa* (Frankfurt am Main, 1996).
- <sup>11</sup> The later view was already represented by Leibniz. See J. Macdonell, *Leibniz*, in: J. Macdonell/E. Manson (ed.), *Great Jurists of the World* (Boston, 1914. Reprinted New Jersey, 1997), pp. 283-304. To this question in general see H. Ankum, *La 'Codification de Justinien était-elle une véritable codification? en: Liber Amicorum J. Gilissen* (Antwerpen 1983).
- <sup>12</sup> K. Szladits, *A mai magyar magánjog vázlata* [The Outline of Hungarian Private Law Today] (Budapest, 1937), pp. 7-23.
- <sup>13</sup> See Th. Mayer-Maly, *Die Wiederkehr von Rechtsfiguren*, JZ. 26 (1971) 1-3.
- <sup>14</sup> For the sake of comparison, the General Part of the German BGB has only 240 paragraphs.



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