Ukrainian Private Law and the European Area of Justice

Edited by
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and RAINER KULMS

Max-Planck-Institut für ausländisches und internationales Privatrecht

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Mohr Siebeck

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The Implementation of the EU *Acquis* in Ukraine

Lessons from Legal Transplants

Eugenia Kurzynsky-Singer

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I. Introduction

The Europeanisation of Ukrainian private law is determined by the Association Agreement between the EU and Ukraine,[1] which was concluded in 2014 and obliges Ukraine to an extensive approximation of national legislation to European requirements[2] with the aim of achieving the economic integration of Ukraine into the EU internal market.[3]

This obligation reflects the idea that market integration is not possible without an approximation of legal standards.[4] Therefore, the aim of the obligation to implement the EU *acquis* as settled in the Association Agreement is to create in the Ukraine similar market conditions as in the EU and to promote the Europeanisation of Ukrainian law. Insofar, this process is part of a

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[1] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3. (further referred to as: AA).

[2] See *Basedow,* EU Private Law in Ukraine – The Impact of the Association Agreement, pp. 3 ff. (in this book).

[3] Article 1 para. 2 (d) AA.

[4] *Van der Loo,* The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, Leiden and Boston 2016, p. 181.

value-based Europeanisation of the entire Ukrainian society. In terms of specific values, the preamble and Articles 2 and 3 of the Association Agreement enumerate especially respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, human dignity and a commitment to the principles of a free market economy. In this sense, the creation of similar market conditions presupposes a change of the entire legal and institutional environment. The Europeanisation of private law, which will be addressed in this paper, is only a part of this process.

II. Lessons from legal transplants

1. *Provisions of the acquis communautaire as legal transplants*

According to the Association Agreement, the Europeanisation of Ukrainian private law should proceed by means of reception,[5] which is a process of individual rules, institutions or even whole areas of law being borrowed by one legal system from another.[6] So far, the Association Agreement obliges Ukraine to implement diverse European legal acts into its national legal system, especially diverse EU directives which have to be transposed into Ukrainian law.[7]

Such a borrowing of legal provisions or legal ideas, a notion which is addressed in a huge amount of research articles as so-called *legal transplants,* is a well-known phenomenon. The historical archetype of a reception process is held to be the reception of Roman law in Europe.[8] In the present era, the reception of American corporate law provisions in German law offers an example of successful legal transplants.[9] The main example however – and the most interesting in the present context – is the ongoing approximation of the legal systems of European countries as a result of the efforts of the European Union to create the European Single Market.[10]

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[5] See *Petrov/Van Elsuwege,* What does the Association Agreement mean for Ukraine, the EU and its Member States, available at <https://www.researchgate.net/publication/303078233>.

[6] *Rehm,* Reception, in: Basedow/Zimmermann/Hopt (eds.), The Max Planck Encyclopedia of European Private Law, vol. II, Oxford 2012, pp. 1415–1420.

[7] See, for example, Articles 124, 363, 387, 417, 424 and 474 AA.

[8] *Watson,* Legal Transplants – An Approach to Comparative Law, Athens 1993, pp. 31 ff.

[9] *Fleischer,* Legal Transplants im deutschen Aktienrecht, NZG 2004, pp. 1129 ff.

[10] See, for example, *Basedow,* Grundlagen des europäischen Privatrechts, JuS 2004, pp. 89–96; *Klamert,* What We Talk About When We Talk About Harmonisation, Cambridge Yearbook of European Legal Studies 17 (2015), pp. 360–379.

However, it has also been observed that in many cases of legal transplants there is a gap between the formal law on the books and the law in action.[11] Legal transplants have even been held to be impossible because of the cognitive dimension of the law, which causes the original rule to necessarily undergo a change while being implemented in another legal system.[12] In any case, the modern research on legal transplants proves that the reception of legal provisions does not necessarily create in the borrowing legal system a rule which would be identical to the rule the borrowed provision creates in the original jurisdiction.[13] Especially in developing and transition countries, the reception process is a complicated and often ineffective one.[14] The recent research on legal transplants, especially regarding transition countries, questions in particular the assumption that legal harmonisation will result automatically in an improvement of legal institutions.[15]

Indeed, the European integration of Ukraine faces problems which are typical of the legal environment encountered in a transition country. In particular, there are difficulties in the formation of the institutions that would meet European standards, such as an independent and well-educated judiciary, the rule of law, good governance and a low level of corruption. Without a doubt, these conditions influence the legal standards the Ukrainian market can offer its participants. However, these institutional problems are, in my opinion, not the only obstacle for the approximation of Ukrainian law – and especially the substantive private law – to European standards.

2. Legal transplants in transition countries

The observation of legal transplants, especially in transition countries, gives evidence that the implementation of a foreign legal provision or legal institution into national legislation can produce a wide range of outcomes. Georgian law provides in this regard very interesting examples. Georgia, as well as Ukraine, is a country which is orientated towards the European Union and is aiming at a Europeanisation of private law, including the implementation of

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[11] *Berkowitz/Pistor/Richard,* The Transplant Effect, Am. J. Comp. L. 51 (2003), pp. 163–203 (177).

[12] *Legrand,* The Impossibility of "Legal Transplants", Maastricht Journal of European and Comparative Law 4 (1997), pp. 111–124 (120).

[13] An example is offered by the family law of Turkey. See *Fögen/Teubner,* Rechtstransfer, Rechtsgeschichte 7 (2005), pp. 38–45 (42); *Aslan,* Rückfahrkarte – Das schweizerische Zivilgesetzbuch in der Türkei, Zeitschrift für Rechtsgeschichte 7 (2005), pp. 33–37.

[14] *Knieper,* Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht, RabelsZ 72 (2008), pp. 88–113.

[15] *Pistor,* The Standardization of Law and its Effect on Developing Economies, Am. J. Comp. L. 50 (2002), pp. 97–130.

the EU *acquis* as well as a fundamental reform of its civil code.[16] It should be mentioned that the Georgian Civil Code was elaborated in cooperation with German scholars and is based on the German Civil Code, the BGB, making many (although not all) provisions legal transplants as well.[17] The selected case studies on Georgian law, which were conducted in the course of a project on legal transplants at the MPI,[18] showed, inter alia, that legal transplants could be ignored by the legal order, as seems to be the case in Georgia in regards to consumer law[19] and private international law.[20] The borrowed provisions could, further, be changed in the course of their interpretation, which was the case for some provisions of property law,[21] or in the course of their interaction with other provisions of the national legislation. However, an effective transplant, which produced rules very similar to the original ones, could also be identified.[22] A further possible outcome which could occur in the course of the implementation of the EU *acquis* would be a situation in which a previous rule of national legislation was replaced by a provision which is less appropriate for meeting the regulatory need at issue. In such a case the transplant is not just ineffective but harmful. In addition, a legal transplant can develop into a legal irritant which conflicts with the recipient legal order and influences the legal or even social discourse.[23]

Summing up, it should be understood that the outcome of a legal transplant can vary widely. It can be effective, i.e. "accepted", by the recipient legal

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[16] *Chanturia,* Die Europäisierung des georgischen Rechts – bloßer Wunsch oder große Herausforderung?, RabelsZ 74 (2010), pp. 154–181.

[17] *Chanturia,* Das neue Zivilgesetzbuch Georgiens: Verhältnis zum deutschen Bürgerlichen Gesetzbuch, in: Basedow/Drobnig/Ellger/Hopt/Kötz/Kulms/Mestmäcker (eds.), Aufbruch nach Europa, Tübingen 2001, pp. 893–904, 896; *idem,* Recht und Transformation, RabelsZ 72 (2008), pp. 114–135.

[18] The results were published in: *Kurzynsky-Singer (ed.),* Transformation durch Rezeption?, Tübingen 2014. Information on the project is available at <http://www.mpipriv.de/de/pub/forschung/auslaendisches_recht/russland_und_weitere_gus/stipendienprogramm_.cfm>.

[19] *Giorgishvili,* Das georgische Verbraucherrecht, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 219–288.

[20] *Vashakidze,* Kodifikation des Internationalen Privatrechts in Georgien, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 289–330.

[21] *Kurzynsky-Singer/Zarandia,* Rezeption des deutschen Sachenrechts in Georgien, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 107–138.

[22] *Tsertsvadze,* The New Georgian Arbitration Law in Practice, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 139–218.

[23] The effect of legal irritants was first described by *Teubner,* Legal Irritants, Good Faith in British Law or How Unifying Law Ends up in New Divergences, Modern Law Review 61 (1998), pp. 11–32. An example of such an effect is given in *Kurzynsky-Singer/Pankevich,* Freiheitliche Dispositionsmaxime und sowjetischer Paternalismus im russischen Zivilprozessrecht: Wechselwirkung verschiedener Bestandteile einer Transformationsrechtsordnung, ZEuP 2012, pp. 7–22.

order, so that the transplant interacts with the legal order's other elements in the desired way and produces a rule similar to the rule which was produced by the transplanted provision in the original jurisdiction. However, the legal transplant can also be "rejected" by the recipient legal order or interact with it in one of the described ways, producing a rather unpredictable outcome.

3. *Explanatory model*

The empirical data on legal transplants in transition countries indicates that the most effective transplants, i.e. those most easily accepted by the recipient legal order, are transplants which solely develop the existing regulations and not ones that intend to initiate radical changes[24] or that create a regulation for a tabula rasa.[25] In the project which was referred to above, this observation was supported in particular by a case study on rights of minors in Uzbekistan. The implementation of the United Nations Convention on the Rights of the Child (1989)[26] in Uzbek family law was shown to be an effective transplant. This outcome could be explained by the fact that the implemented provisions did not conflict with basic values of Uzbek family law, which are rooted in Soviet family law and already correlated with the values of the Convention.[27]

By contrast, the greater the differences between the values and structural peculiarities transported by a legal transplant and those of the recipient legal order, the lesser the effectiveness of the transplant. A good example here is the failure in the attempt to implement trusts into Russian law, an effort which was undertaken in the 1990s.[28]

To explain this effect it is important to focus on law as a cultural complexion with a social dimension. A comparative researcher should be aware of the fact that legal provisions do not exist in a contextual vacuum. In the original legal order the transplanted legal provision has been a subject to interpretation and legal discourse which have been deeply influenced by factors inher-

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[24] For an example see *Djuraeva,* Personal Non-property Rights of Minors in Uzbekistan, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 361–394.

[25] For an example see *Tsertsvadze,* The New Georgian Arbitration Law in Practice, supra n. 22.

[26] See the English text of the UN Convention at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

[27] *Kurzynsky-Singer,* Wirkungsweise der legal transplants bei den Reformen des Zivilrechts, in: idem (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 3–38 (26).

[28] Ukaz Prezidenta RF ot 24 dekabrja 1994, Nr. 2296 "O doveritel'noj sobstvennosti (traste)" [Decree of the President of the Russian Federation of 24.12.1994, No. 2296 "On trusts"]. See in detail: *Doždev,* Meždunarodnaja model' trasta i unitarnaja koncepcija prava sobstvennosti [The international model of trusts and the notion of unitary ownership], in: Chazova (ed.), Žizn' i rabota Avgusta Rubanova [Life and Work of Avgust Rubanov], Moscow 2006, p. 282.

ent to the original legal order, such as the interaction with other provisions, legal methodology, values immanent to the society and the social structure. Not all of these factors are obvious, due to the fact that every legal system contains a great amount of implicit knowledge and understanding, what has been termed *cryptotypes.*[29] This silent dimension of law[30] has an enormous effect on the application of a legal provision and its impact on the legal system as whole. After being transplanted into another legal environment the legal provision will be influenced by the corresponding elements of the recipient legal order, including its silent dimension. Therefore the efficiency of the legal transplant depends on the similarity between the original and the recipient legal order. An effective legal transplant is easily possible if the origin and recipient legal order have much in common, especially if they share the same values and legal approaches. Conversely, the reception is likely to be ineffective if the legal transplant conflicts with the values of the recipient legal order.

This approach can also explain the legal irritant effect.[31] If values which are immanent to the transplanted legal provision in the original legal order differ so much from the values of the recipient legal order that they cannot simply be integrated by an interpretation of this provision, a conflict between different elements of the recipient legal order arises and initiates friction in legal and social discourse.

For these reasons, the key to understanding and predicting the outcome of a reception should be an analysis of the relationship between the legal transplant and the recipient legal order.

III. The common core of European private law and the diversity of legal cultures

Considering the provisions of EU *acquis* as being legal transplants for the Ukrainian legal order leads to a question: what requirements should the Ukrainian legal order fulfil to enable an effective implementation of these provisions? In other words, what are the specific characteristics of the legal orders of the European countries which enable an emergence of the *acquis communautaire?*

However, the most eye-catching detail of the European area of justice is the enormous diversity of legal cultures. Comparative legal research points to

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[29] *Sacco,* Legal Formants: A Dynamic Approach to Comparative Law, Am. J. Comp. L. 39 (1991), pp. 1–34 and pp. 343–401 (386).

[30] *Graziadei,* Legal Transplants and the Frontiers of Legal Knowledge, Theoretical Inquiries in Law 10 (2009), pp. 723–743 (735).

[31] See supra.

the differences in structure and approach as well as to the differences between rules.[32] These differences challenge the attempts to state the principles of European private law or even to unify it, be it in the form of a Draft Common Frame of Reference, Principles of European Contract Law, a Common European Sales Law or a codification of European private law.[33]

On the other hand, these differences should not be exaggerated. Especially for contract law it has been held that it differs "more in the formulations and techniques than in results", including a wide concern as to how the law should be.[34] According to *Reinhard Zimmermann,* the fragmentation of the European civilian tradition generally "appear[s] to be, much more often than not, historically contingent rather than determined by cultural traditions".[35]

Actually, the continental European legal orders share a long common legal development. Initially, Roman law had constituted the foundation of the *ius commune* prevailing in medieval and early modern Europe.[36] Then, in the epoch of the Enlightenment, this foundation was enriched with principles of natural reason,[37] which constituted values that are still immanent to the European legal orders.[38] The revolutions of 19th century followed, removing the old feudal structures and promoting ideas of democracy, liberalism and independent national states. As the consequence of this development, some of the older codifications of private law established essential principles characterizing the private law of the European countries until today. Under such basic principles, one should name the freedoms of contract and of testation, the recognition of private property and equality before the law.[39] In this sense, the European legal orders share the same basic values. This common core of European private law is additionally backed by the similarity of economic and social conditions in the EU.

For a European legal scholar, this common core of the legal culture is likely to be so obvious as to not require an exact definition of its significant criteria. The common values and basics already exist and do not need to be discussed in the course of the unification debate. The Association Agreement seems to presuppose that Ukrainian private law already shares this common core of European private law. However, it seems worth questioning this presupposition.

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[32] *Lando,* Culture and Contract Laws, ERCL 2007, pp. 1–20 (10).

[33] See, for example, *v. Bar,* Privatrecht europäisch denken, JZ 2014, pp. 473–528 with further references.

[34] *Lando,* Culture and Contract Laws, ERCL 2007, pp. 1–20 (17).

[35] *R. Zimmermann,* Codification, ERCL 2012, pp. 367 – 399 (380).

[36] *R. Zimmermann,* Europa und das römische Recht, AcP 202 (2002), pp. 243–316.

[37] *R. Zimmermann,* Codification, ERCL 2012, pp. 367–399 (376).

[38] See in detail: *Auer,* Der privatrechtliche Diskurs der Moderne, Tübingen 2014, pp. 13–45.

[39] *R. Zimmermann,* Codification, ERCL 2012, pp. 367–399 (390).

IV. Ukrainian private law as a European legal order?

1. Development of Ukrainian private law

The development of Ukrainian private law differs significantly from the European model. Like the private law of most of the CIS countries, Ukrainian private law has to a great extent developed from Soviet civil law. Insofar, the modern private law of Ukraine has been deeply influenced by its Soviet heritage. However, as a part of the Soviet legal tradition, it is also rooted in the legal tradition of European, especially German, civil law.[40] These roots go back to the law of the pre-revolutionary Russian Empire, in particular to the pre-revolutionary draft of the civil code which, while never enacted, nevertheless influenced the civil codes of the Soviet republics.[41] However, despite the semantic similarity that existed between individual civil code provisions of Soviet republics and civil code provisions of Western European countries, Soviet civil law was not a part of the European legal tradition. The initial core of private law in Soviet legislation was overwritten by Soviet ideology, which deeply influenced the legal tradition and in particular legal methodology.[42] The above-mentioned basic values and principles of western European private law – such as freedom of contract, recognition of private property and independence between public and private domains – contradicted Soviet ideology and were not inherent to Soviet private law.

After the collapse of the Soviet Union, Ukraine, as well as other successor states, initiated reforms to adopt its legislation to the requirements of the market economy, which imbued the civil law with a liberal approach.[43] These reforms changed the legislation significantly, but they could not completely replace the previous legal doctrine that was rooted in Soviet law. In fact, the liberal ideas and approaches can be expected to complement the legal discourse,[44] competing with the old Soviet approach but not building the basic values and principles of contemporary Ukrainian law.

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[40] *Avenarius,* Das russische Seminar für römisches Recht in Berlin (1887–1896), ZEuP 1998, pp. 893–908.

[41] For a detailed discussion see *Reich,* Sozialismus und Zivilrecht, Frankfurt/Main 1972, pp. 147, 155; *Novickaja,* Neizvestnye stranicy istorii sozdanija Graždanskogo Kodeksa RSFSR 1922 [The unknown pages behind the creation of the Civil Code of RSFSR], SGiP 1990, No. 10, pp. 112 ff.

[42] See, for example, *Brunner,* Was ist sozialistisch am "sozialistischen Recht", in: Hofmann/Meyer-Cording/Wiedemann (eds.), Festschrift für Klemens Pleyer zum 65. Geburtstag, München 1986, pp. 187–205.

[43] See Article 3 Civil Code of Ukraine.

[44] *Majdanyk,* Rozvytok privatnoho prava Ukraïny [Development of the private law in the Ukraine], Kiïv 2016, p. 24.

2. *Coexistence of the Civil Code and the Economic Code*

The coexistence of contradictory and competing approaches, doctrines and ideas is characteristic to some degree of all successor countries of the Soviet Union. In Ukraine, it emerges even at the level of private law legislation, where the Civil Code and the Economic Code coexist. Such coexistence is highly controversial not only in Ukraine. An Entrepreneurial Code was recently adopted in Kazakhstan,[45] where it was very strictly opposed by many scholars.[46] It is remarkable that the most discussed point concerning the economic code in Ukrainian legal literature, as well as in the Kazakhstani debate, is not so much the content of the regulations but far more the legislative technique of a separate economic code. The problems that are mostly stressed are the conflicts between the norms of the Civil Code and the Economic Code.[47] Yet the significance of the Ukrainian Economic Code goes far beyond this. The Civil Code and the Economic Code represent two different models for the further legal development of Ukrainian private law. The Civil Code stands to a greater extent for a European path in the development of private law as its roots trace back to the pre-revolutionary draft of the Civil Code of the Russian Empire. It adopts many instruments of market economy regulation, these being similar to the regulations of the European countries. By contrast, the Economic Code, which pursuant to its Article 1 applies to business relationships in the course of economic activity, is a product of Soviet legal theory[48] and therefore contains many more relics of Soviet legal thinking.

The most notable of such relics is undoubtedly the possibility to create state and municipal unitary enterprises. The peculiarity of this legal institution consists in the fact that these entities do not own their assets, which remain in state ownership. Rather, the state enterprises hold a right of operative management or a right of economic jurisdiction in such assets, which allows them to conduct business activity.[49] This legal institution, which is common

[45] Predprinimatl'skij kodeks Kazachstana [Entrepreneurial Code of Kazakhstan], No 375-V, 29 October 2015, available at <https://online.zakon.kz/Document/?doc_id=38259854>.

[46] See for example *Sulejmenov (ed.),* Predprinematel'skij kodeks kak instrument razvala pravovoj sistemy Kazachstana [The Entrepreneurial Code as a means of demolishing the legal order of Kazakhstan], Almaaty 2011.

[47] See *Majdanyk,* Development of Ukrainian Private Law in the Context of its Europeanization, pp. 143, 150 ff. (in this book).

[48] On the history of the economic law see *Ioffe,* O chozjajstvennom prave [On economic law], reprinted in: Sulejmenov (ed.), Predprinematel'skij kodeks kak instrument razvala pravovoj sistemy Kazachstana, supra n. 46, pp. 61–99.

[49] See *Majdanyk,* Development of Ukrainian Private Law in the Context of its Europeanization, pp. 143, 156 ff. (in this book).

for other CIS countries as well,[50] was inherited from Soviet law, where it reflected the tension between ideological parameters and the needs of the economy. The communist ideology was premised on state ownership of the means of production, yet the economy demanded that enterprises be provided with a legal capacity allowing them to operate the assets in their control. This concept survived the collapse of the Soviet Union. However, now it is supposed to operate under conditions of a market economy.

Further, the Economic Code contains strong ideological elements that contradict the ideas of a free market. The Economic Code stipulates the expectation that economic entities are supposed to carry out state policy in regards of the economy. Article 11 para. 1 EC obliges legal entities to take into consideration the state program on economic and societal development. As a sanction for contradicting this expectation, Article 11 para. 5 EC states, for example, that business entities which fail to take into account social interests – as reflected in governmental official materials on economic and social development – may not be granted the legal benefits and privileges associated with carrying out business activity. Such an unspecific obligation to promote state policy is a reflection of the Soviet legal theory which stipulated that the state, the state enterprises and the Soviet people have the same goals and no conflicts of interest.[51]

The differences between the Civil Code and the Economic Code in respect of the notion of contractual freedom establish further evidence of the conflict between different approaches in Ukrainian private law. The Economic Code is much more paternalistic, limiting the freedom of contract in business relations in ways that the Civil Code does not. For example, pursuant to Article 216 EC, it is not permitted in a business agreement to exclude or restrict the liability of a manufacturer or seller. The Civil Code, conversely, does not contain such a restriction. Pursuant to Article 614 Civil Code, a person that violates an obligation is liable, provided his guilt (intent or negligence) is established, unless otherwise stipulated by agreement or by law. By limiting contractual freedom in transactions falling under the Economic Code but allowing contractual freedom for transactions falling under the Civil Code, Ukrainian law creates relatively more protection for business entities transacting among themselves than for private parties who engage with entrepreneurs as consumers. This is, furthermore, in contradiction to the general scheme of European private law.

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[50] For example, in the Civil Code of the Russian Federation, the right of operative management and the right of economic jurisdiction are explicitly stated as rights in rem (Article 216 Civil Code).

[51] *Ioffe,* Sovetskoe graždanskoe pravo [Soviet Civil Law], quoted from: Izbrannye trudy [Selected Works], Vol. II, St. Petersburg 2004, p. 39. See also *Kurzynsky-Singer,* Wirkungsweise der legal transplants bei den Reformen des Zivilrechts, supra n. 27.

3. Approximation of Ukrainian law to European legal standards

Thus far, it has to be realised that a mechanical implementation of the EU *acquis* will not automatically approximate Ukrainian private law to the private law of the European Union and meet the goals of approximation obligation. The implementation of the *acquis* provisions in a legal environment which does not share at least the same values and basic concepts is likely to lead to a situation where these provisions prove an ineffective legal transplant.

The Europeanisation of Ukrainian private law in fact entails as a prerequisite its access to the common core of the private law of the European area of justice. In this sense, the approximation should comprise the above-discussed silent dimension of law, i.e. implicit knowledge and understanding as well as legal methodology and underlying values.

The methodology of such an approximation is far from obvious. As stated above, there is actually no consensus about which elements constitute the essential components of European private law's common core. Furthermore, the preceding discussion on the possibility of legal transplants indicates a close connection between the basic concepts of law and society. This "law as a mirror" theory has emerged in different contexts and epochs, and it was applied for example by *Montesquieu, Marx, Savigny* and, in the modern context, *Legrand.*[52] The general implication of this theory is the impossibility of achieving social engineering by legal reform and also the impossibility of rapidly accomplishing radical legal reform.

This implication has, however, been rather controversial until present. In particular, the discussion between *Savigny* and *Thibaut*[53] concerning the proposed codification of German civil law has often been referred to in recent times in the course of the debate on the unification of private law in the EU.[54] The experience from European codifications of the 19th century could, however, be a source of inspiration for the methodology of transforming post-Soviet legal orders. Most of these codifications were legal acts which documented and perpetuated the transformation of the respective societies from feudalism to capitalism. The main factor that contributed to the success of the national codifications has been identified as there being a manifestation of a tradition of legal scholarship; additionally, their preparation usually took a

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[52] For references see *Pankevich,* Phenomena of Legal Transplants Related to the Social Model of the Post-Soviet Countries, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 39–64 (42).

[53] *Thibaut,* Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland, Heidelberg 1814.

[54] See, for example, *R. Zimmermann,* Codification, ERCL 2012, pp. 367–399 (399); *Lando,* Principles of European Contract Law and Unidroit Principles, Rev. dr. unif. 2003, pp. 123–133 (129) with further references.

long time and codification was facilitated by the existence of a well-established and well-documented body of legal scholarship.[55]

Similar mechanisms could apply for the transformation of civil law in the post-Soviet area as well. In this sense, a change in the inherited approaches would require a value-based discussion, one which would see the civil law as an instrument to balance different interests and to enable the participants of the market to realise a self-determined protection of their interests. A very important part of this process is access to European legal discourse, something which is more important than any legislative reform.

[55] *R. Zimmermann,* Codification, ERCL 2012, pp. 367–399 (392 f.).