LEGAL CULTURE AND LEGAL TRANSPLANTS CROATIAN NATIONAL REPORT

Marko BARETIĆ*
Saša NIKŠIĆ**

I. *Legal models as a whole*. 1. Historical perspective. 2. Post-modernist perspective. II. *Specific instruments or legal mechanisms*. Historical perspective. III. *Conclusions*.

I. LEGAL MODELS AS A WHOLE

1. *Historical perspective*

A. *Are there any legal models that have been received by your country in the periods before those mentioned? Which ones and within what period?*

The Republic of Croatia became an independent state on 8th of October 1991 on the basis of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25th of June 1991,[1] and the Decision of the Croatian Parliament of 8th of October 1991.[2] For a long time before 1991, Croatia was not an independent state and during that period foreign law was implemented in Croatia. Foreign legal models were also received voluntarily in the periods when Croatia lacked independence but had legislative autonomy, and finally after independence.

The first well documented case of the reception of foreign influences in Croatian law occurred in the year 1514 (the first period according to the questionnaire). Because of the fact that Croatia in that time was, in a geopolitical sense, connected to Hungary there was a common legal source of private law – Tripartitum.[3] Tripartitum was a collection of customary laws drafted by the Hungarian lawyer Werböczy. Even though Werböczy explicitly stated that Tripartitum had its origin in both Roman and Canonistic law, it represented mainly Hungarian and Croatian customary law. Tripartitum was not a clear case of the reception of foreign law in

* Assistant Professor, Faculty of Law, University of Zagreb, Croatia
** Assistant Professor, Faculty of Law, University of Zagreb, Croatia
1 Official Gazette of the Republic of Croatia (*Narodne novine*; hereinafter: NN) num. 31/91.
2 NN 53/91.
3 For a long time political relations between Croatia and Hungary from 1102 to 1527 were regarded as as personal union, whereby the Hungarian King was also the King of Croatia. However, existence and validity of the treaty that served as a legal basis of personal union (*Pacta Conventa*) is today considered as controversial. It is possible that the personal union came into existence as a factual relation without explicit legal basis.

Croatia, despite the fact that it was drafted by a Hungarian lawyer and that Hungary was a "senior partner" in political relations with Croatia in those times. According to Croatian legal scholars, Tripartitum had at least equal shares of Croatian and Hungarian customary elements.[4] Tripartitum was "in force" in Croatia until 1852/53,[5] and it had no importance for the further development of Croatian private law.

The reception of foreign law in Croatia, which is far more relevant for Croatian contemporary private law, began in the 19th century (the second period according to the questionnaire). In those days Croatia was part of the Habsburg monarchy without legislative autonomy, and in 1852/53, the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch; hereinafter: ABGB) was enacted in parts of today's Croatia (ABGB was adopted in 1811 and originally came into force in 1812).[6] After reforms in 1866-1868, Croatia acquired a significant degree of autonomy, among other legislative autonomy. From that moment ABGB was kept in force as a Croatian General Civil Code (Opći građanski zakonik; hereinafter OGZ).[7] It is interesting to note that Hungary, which also got legislative autonomy in the same time, reverted back to Tripartitum,[8] and similar proposals were advocated in Croatia. However, the idea that the Austrian ABGB should stay in force as the Croatian OGZ eventually prevailed for practical reasons.[9] The ABGB was, in comparison to Tripartitum, more suitable to the economic and social environment. Certain parts of Croatia (Istria, Dalmatia) did not have legislative autonomy after reforms from 1866 to 1868. Consequently, the Austrian ABGB and its revisions of 1914-1916 did affect legislation in those regions directly, while in other parts of Croatia the original ABGB was still in force (not the OGZ). The other parts of Croatia which broke legislative ties to Austria did not accept mentioned revisions of the ABGB officially. However, revised version of the ABGB which was never enacted in the rest of Croatia was applied by courts in accordance with the

---

[4] Gavella, N., et al., *Hrvatsko građanskopravno uređenje i kontinental-noeuropski pravni krug* (*Croatian Civil Law Order and Legal Families of Continental Europe*), Zagreb, 1994, p. 13.

[5] Dabinović, A., *Hrvatska državna i pravna povijest* (*Croatia's State and Legal History*), Zagreb, 1940, p. 343.

[6] ABGB belongs to great codifications of private law adopted in the 19th century. However, ABGB did not have the success of serving as a role model for numerous foreign legislators as French Code Civil or German BGB (see Zweigert, K., Kötz, H., An Introduction to Comparative Law, Clarendon Press, Oxford, 1998, p. 166).

[7] Gavella, N., *op. cit.*, pp. 16-17.

[8] This was also true for parts of modern Croatia, which in those days belonged to Hungary (Međimurje, Baranja). See Petrak, M., "Rimsko pravo kao pozitivno pravo u Republici Hrvatskoj (*Roman Law as a Positive Law in Republic of Croatia*)", *Hrvatska pravna revija*, 10/2006, p. 8.

[9] Gavella, N., *op. cit.*, pp. 15-19.

theory of so-called "the most modern law",[10] and this practice was continued even after World War I, when the Habsburg Monarchy fell apart, and Croatia became a part of the new state (Yugoslavia).

During the first period and after obtaining legislative autonomy, Croatian private law belonged to, so-called, dualistic legal systems, meaning that general civil law, on the one hand, and commercial law on the other hand, were governed by two separate legal sources. A dualistic system was introduced in Croatia in 1875 when the Commercial code had been enacted (and was retained for more then one century, until in 1978 the monistic system was introduced). The Commercial code of 1875 was drafted under the influence of the Austrian General Commercial Code of 1862 (Allgemeines Handelsgesetzbuch; hereinafter: AHGB) which, in itself, was basically the German General Commercial Code of 1861 (Allgemeines Deutsches Handelsgesetzbuch).[11] The enactment of the Commercial code in 1875 and accepting of the dualistic system is a strong argument in favor of the opinion that Croatian private law in that period belonged to the Germanic legal family. This is so because the Germanic influence (both Austrian and German) on Croatian private law can be clearly observed, not only in respect of particular legislative instrument, but also regarding the system of private law. Naturally, the dualistic model was not an exclusive feature of the Germanic legal family. *The French Code de commerce* was, in this respect, the first and initiated codification of commercial law.[12] However, Croatia's dualistic system was developed under Germanic influence. *The French Code de commerce* was for a brief period of time, in force in one part of Croatia during Napoleon's conquest in the beginning of 19th century, but was not maintained until after the French withdrew from Croatia. It was only after the German and Austrian Commercial Codes that Croatia enacted its own Commercial Code.

In the period between the end of World War I and 1989 (the third period according to the questionnaire) Croatia was part of former Yugoslavia (between 1918 and 1941 as the Kingdom of Serbs, Croatians and Slovenians and the Kingdom of Yugoslavia, and after 1945 as a part of socialistic state Yugoslavia). Legal order based on the OGZ started to dissolve after 1945 when socialistic ideology had its impact on the different aspects of life including the law and particularly on private law. Yugoslavia after 1945 and the introduction of socialistic ideology also abolished parliamentary democracy and switched from market economy to a state planned economy.

---

[10] Stipković, Z., *Zakon o osnovnim vlasničkopravnim odnosima s izvatkom iz OGZ (o služnostima) i Zakonom o zadužbinama (Law on Basic Property Law Relations with OGZ Excerpts (On Servitudes) and Trust Law)*, Zagreb, 1991, p. 5

[11] Vrbanić, F., *Trgovački zakon* (*Commercial Code*), Zagreb, 1892, pp. V-VI.

[12] *Ibidem*, p. 3.

This meant that in the political and legal sense, there was no continuity between Yugoslavia before World War II and after the war.

Socialistic Yugoslavia was a federal state with a rather complicated division of jurisdictions between the federal state and the republics (Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Slovenia and Macedonia). This is one of the reasons why legislation in the field of private law was significantly delayed. The other reason was more of an ideological nature. The mere title "civil code" was not preferred by the socialistic government. However, apart from a certain deviation from well established concepts of private law (most notably in the field of property law) through the whole period of socialism, Croatian law (in those days not an independent state, but with certain competences in the legislative process) was still under the influence of legal orders from Western Europe. First of all, the OGZ was still in force, though not as a law in the strict sense of the word. Because of the fact that the transition to socialistic legal system could not be achieved in a short period of time, according to the Ineffectiveness of Legislation Enacted Prior to 6th of April 1941 Act, it was possible to apply legislation which was in force before 6th of April 1941 (e.g. OGZ) if certain conditions were met. This was possible in the field of property law, law of obligations and inheritance law. The situation was different regarding family law which is traditionally part of civil law, and was, until 1945, regulated by the OGZ (Croatian version of the ABGB). However, after 1945 and adoption of a socialistic political system, family law started to evolve in a separate legal discipline (with an emphasis on public law). Therefore the OGZ (abr. for General Civil Code) was not applicable anymore in the field of family law.[13] There were also other examples of traditional parts of private law which developed into a separate legal discipline. During the socialist period, the legal relationship between employee and employer was not governed by general contract law even though employee and employer, as a principle, concluded labor contract. From that time on, civil law in Croatia consisted of property law, law of obligations and inheritance law. Private law as a notion during socialism was not in use, and the term "patrimonial law" was accepted instead.[14]

---

[13] Gliha, I., *Überblick der Gesetzgebung Kroatiens im Bereich des Schuld-, Sachen- und Erbrecht,* (*Overview of the legislature of Croatia in the areas of the laws of obligations, property and inheritance*), Zeitschrift für Rechtsvergleichung (1993), p. 117.

[14] Similar development regarding exclusion of family law and labor law, but also regarding terminology occurred in other socialistic countries (see Manko, R., "The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective", *http://home.medewerker.uva.nl/r.t.manko/bestanden/Legal_Culture_Enlargement.pdf*, web page accessed on 8th of December 2009).

One decade after switching to the socialistic system, a new Succession Act was enacted (1955). This piece of legislation was developed under the influence of Swiss law (Zivilgesetzbuch; hereinafter: ZGB) while retaining certain elements from the OGZ. The most important feature of the Succession Act of 1955 was the introduction of *ipso iure*, the acquisition of inheritance, and the abandoning of *hereditas iacens*, which was typical for Austrian law (procedural law aspects of inheritance law).[15] Though it is strange, at first glance, that the socialistic state adopted these capitalistic regulations, this was in accordance with the socialistic legal philosophy that succession law, as a part of the private law, does not posses an ideological nature, but it rather replicates the legal relations which already exist. Theoreticians of socialism believed that if socialistic societies have been successful in abolishing private property then succession law would not interfere with socialistic ideology. Hence, there were no particular efforts to reform inheritance law in accordance with socialistic ideology.

Consequently, property law was the focus of socialistic reforms. However, when the Basic Property Law Relations Act was adopted, it was still in accordance with the property law of Germanic legal families. For example, this Act introduced in Croatian property law the concept of objective possession (i.e. possession legally relevant without *animus posidendi*), taking over from the German Civil Code (Bürgerliches Gesetzbuch; hereinafter: BGB). The introduction of elements of the German property law was possible despite the socialistic ideology because of the legal dualism between private property and public property. The Basic Property Law Relations Act was only regulating private property, and issues of public property were dealt with in a separate legislation.

In certain socialistic legal orders, the law of obligations was also tailored to suit socialistic concepts. However, this was not case in Croatia (between 1945 and 1991 republic in federal Yugoslavia). In the absence of legislative development in the field of contract law, the Federal Commercial Chamber adopted the General Usages Governing Sale of Goods (hereinafter: General Usages) in 1956, which, apart from the codification of trade usages, contained numerous provisions which were basically a substitute for the new law of obligations.[16] These provisions were not drafted, as one would expect, in accordance with socialistic legal philosophy but had traditional private law legal orders as role models. The General Usages adopted numerous provisions of the Swiss Obligationenrecht (hereinafter:

---

[15] Kreč, M. and Pavić, Đ., *Komentar Zakona o nasljeđivanju* (*Commentary of Inheritance Law*), Zagreb, 1964, p. 438.

[16] Barbić, J., "Primjena običaja u hrvatskom trgovačkom pravu (*Application of Customs in Croatian Commercial law*)", *Aktualnosti hrvatskog zakonodavstva i pravne prakse*, Godišnjak 12, 2005, pp. 89-91.

OR) and jurisprudence of Austria and Germany.[17] It took more then 30 years to adopt the first codification law of obligations after World War II. In 1978, the federal Civil Obligations Act (Zakon o obveznim odnosima; hereinafter: COA) came into force, which was developed under the strong influence of the Swiss OR and, to a certain extent, the French Code Civil.[18]

The influence of Swiss law can be observed on several different levels. The COA took over the idea of "Code unique" from Swiss private law, meaning that all transactions, irrespective of the status of contracting parties, should be, as a principle, governed by the same legal source, unlike the dualistic approach adopted in German, Austrian and French law.[19] Single source logic (monistic system) was adopted in the first half of the 20th century in Switzerland and Italian *Codice civile* (1942).[20] The Monistic system, introduced by the COA, is still accepted in private law in Croatia.[21][22] The Swiss influence on the COA can also be recognized in the linguistic style – articles of the COA are divided into subparagraphs, and in principle, one subparagraph consists of one sentence.[23] In this way, the text of the Act was kept as clear and as simple as possible. The Swiss OR departed from the methodological approach of the German BGB and relyed on a more practical approach. The COA followed the style of the OR and did not regulate the general notion of legal transaction (Rechtsgeschäft) in detail, and instead it focused on contracts (as a specific type of legal transaction) as the most important legal instrument in business transactions. The COA has also prescribed liability for every level of fault (intention and negligence), the same as the Swiss OR.[24] The practical approach of the OR was regarded as an important virtue of Swiss private law and the decisive reason as to why it served as a role model for the COA. The Swiss OR could have been the role

---

17 Goldštajn, A., (red.), *Obvezno pravo* (*Law of Obligations*), Zagreb, 1979, p. 10.

18 The COA was drafted by a group of legal experts. If one could single out one contributor who had a particular influence on the COA it would be Konstantinović, M., who wrote the *Draft of Act on Obligations and Contracts*, Beograd, 1969.

19 Kramer, E. A., Der Stil schweizerischen Privatrechtskodifikation – ein Mödel für Europa?, Rabel Zeitschrift für ausländisches und internationeles Privatrecht, Band 72, 2008, Heft 4 Oktober, p. 781.

20 In post-modern development of law (according to questionnaire period after 1989) in Europe, the new Russian Civil Code and thenew Dutch Civil Code also belong to monistic systems.

21 Klarić, P., Vedriš, M., *Gradansko pravo (Civil Law),* Zagreb, 2008, p. 13.

22 The status of contracting parties is still relevant in the number of areas regardless of the monistic system (e. g. the jurisdiction of commercial courts, customs and course of dealings as a legal sources, different time-limits etc). See Goldštajn, A., *Privredno ugovorno pravo* (*Commercial contract law*), 3rd edition, Informator, Zagreb, 1980, pp. 4 and 24. Regardless of the fact that since 1978 Croatia belongs to monistic systems general contract law and commercial law are traditionally taught separately during university education.

23 Kramer, E. A., *op. cit.*, pp. 776 and 777.

24 Schwenzer, I., *Schweizerisches Obligationenrecht Allgemeiner Teil*, Stämpfli Verlag AG Bern, 2003, p. 125.

model for the COA because of another reason. Even though there are very few common features of socialistic Yugoslavia and Switzerland, both of them shared rather complex division of powers between federal and cantonal / republic authorities. In the case of socialistic Yugoslavia, the federal government had competence only to regulate the general part of the law of obligations and specific contracts. For that reason civil law liability was regulated within the general part of the COA.

French law also served as a model for the COA. Unlike Swiss law, the COA adopted *la cause* as a condition of validity of contract, which is typical for French law. The COA also introduced the general clause in tort law (hurt no one – *neminem laedere* principle), as well as a general rule prohibiting the abuse of rights without references to the principle of good faith[25] (principle of good faith existed as a separate provision). The COA did not make a strict distinction between wrongfulness and fault, and, in this respect, again revealed their French origin and departed from Swiss, Austrian and German law.[26]

B. *If yes, what was the outcome? Did they replace existing models? If this is the case, which ones and in what periods?*

New legal models adopted in private law of Croatia were sooner or later accepted, despite resistance in certain legal or political circles. Opposition to foreign models was, in a few cases, of political background, such as, in 1868 when it was proposed that the ABGB should be abandoned after Croatia obtained a certain degree of legislative autonomy, simply because it was Austrian law which was imposed on Croatia. Later cases of the reception of foreign law were opposed much more by legal practitioners who were not so enthusiastic to adapt the new legislation for practical reasons. On some occasions legal scholars also objected to the import of certain models, but not because of the fact that they were foreign, they simply preferred another model (again foreign in most of the cases).

In some cases new models led to abolishment of old models. The OGZ (Croatian version of Austrian ABGB) completely replaced the Tripartitum in 1852/53, and, unlike Hungary which afterwards abandoned the Austrian ABGB (in Hungary ABGB was in a force only for the short period of time), Tripartitum was never reintroduced into Croatian private law.

---

[25] Manko, R., *op. cit.*, p. 532.

[26] Markesinis, B. S. , *Unberath, H., The German Law of Torts – A Comparative Treatise*, Oxford and Portland, Oregon, Hart Publishing, 2002, p. 79.; Stipković, Z., *Protupravnost kao pretpostavka odgovornosti za štetu* (*Wrongfulnes as a Condition of Civil Law Liability*), Zagreb, 1991, p. 84.

After the COA came into force it replaced the OGZ and the Commercial Code. However, the OGZ was not completely abandoned, because of the fact that the COA did not regulate two contracts – donation and commodatum.[27] Furthermore, the OGZ was still to be applied in disputes regarding relations which had emerged before the COA came into force. It should also be mentioned that the OGZ, although informally, still bears relevance, due to the fact that generations of lawyers educated before 1978 are still active.

C. *What were the driving forces of legal reception*?

The driving forces behind legal reception were not always of the same nature. Behind the adoption of Tripartitum and the ABGB was more or less a political factor – the fact that Croatia was politically subordinate to Hungary and Austria. This was sometimes a consequence of political struggle via family ties of nobility and sometimes forgeries of legal and political documents. However, this was by no means a violent process (criterion mentioned in questionnaire). In the case of Tripartitum, there was not even the element of political pressure, because Tripartitum did not receive the king's seal and therefore was never officially in force (not even in Hungary). When the ABGB came into force in Croatia (1852/53) it was the consequence of absolutistic rule of Austria and the lack of legislative independence of Croatia. However, after regaining legislative independence in 1868, the ABGB was kept in force because of the prevailing opinion of the legal community that its quality exceeded Croatian customary law, which was in force before 1852/53.

The introduction of new private law legislation, which was, in many respects, the reception of foreign law, had its opposition even after 1945, mainly among practicing lawyers who were reluctant to abandon legal practice which had developed up to that moment. The main driving force behind the reception of foreign law, were legal scholars. The fact that legal scholars in a socialistic country found inspiration in legal orders of Western Europe is not so surprising if we take into the account that they studied, obtained their degrees and worked before the introduction of socialism. The reception of Western European law in a socialistic country was also the consequence of the specific political environment. Although former Yugoslavia kept a socialistic ideology till the end 1990/91, it broke ties in

[27] In common law the terminology *commodatum* is known as loan for use. Roman law and German private law make a difference between the borrowing of money or fungibles (lat. mutuum, ger. Darlehn) and the borrowing of a thing which has to be returned to the lender (lat. commodatum, ger. Leihe). If the contract of mutuum is concluded, the borrower has to return the same value or the same kind of thing. See Zimmermann, R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, Clarendon Press, 1996, pp. 188 and 189.

1948 with the main socialistic legal order (USSR) and developed socialism *sui generis* (state planned economy, absence of democracy and the presence of political repression on the one hand, but with the possibility of traveling abroad and limited international trade with both West and East on the other hand). Western role models were acceptable as long as they did not interfere with the goals of socialistic ideology. For example, succession law, as explained earlier, but also the law of obligations, and to same extent property law of the West were not contrary to the prevailing socialistic ideology in Yugoslavia. Family law which is traditionally part of the private law was an exception and had developed in a different direction.

D. *What are the general identification elements of the received models: legislative, legal, or doctrinal?*

Received models were accepted via foreign legislation and legal doctrine. Foreign legal doctrine was accepted as a natural consequence of accepting foreign law, but also as a result of the fact that Croatian lawyers frequently studied abroad and/or used foreign legal literature. However, the influence of foreign legal doctrine diminished with time. In this respect, the role of foreign legal literature can not be separated from the issue of language. Croatia is a non-Germanic country. In the past, lawyers had excellent command of the German language, because Croatia was under Austrian rule, but after 1918, as knowledge of the German language diminished, German, Austrian and Swiss legal literature lost its previous importance.[28] In Croatia, French legal literature never had the same significance as Germanic legal literature, despite the fact that certain parts of the COA were of French origin.

On the other side, foreign case law was not so important, and was relevant only indirectly through legal literature. This was not something unique for the Croatian legal community, because in the 18th and 19th century in Europe, the role of case law was not so important as it is today. Only in the 20th century did case law become crucial for understanding the law, and this process was somewhat delayed in socialistic legal orders.[29]

---

[28] Austrian private law (ABGB) was not so widely accepted in foreign legal systems such as German or French law. Countries where it was accepted were not inhabited by a population of Germanic origin (Zweigert, K., Kötz, H., *op. cit.*, p. 166). This meant that after the collapse of the Austro-Hungarian monarchy in 1918, the use of the German language in everyday life or in official matters was minimized. Without the widespread knowledge of the German language, the fact that the ABGB was, in various forms, kept in force in newly established countries, does not led to a uniform application of law.

[29] Manko, R., *op. cit.*, p. 534.

E. *Are there specific recognizable elements of legal hybridization? Could you exemplify?*

The answer to a question on legal hybridization depends on the meaning of the notion itself. According to some opinions, every legal system is a mixture of different systems.[30] Others understand the notion of a mixed legal system in a much narrower way – as a mixture between common law and law of continental Europe. Croatian private law is a mixture of Swiss, Austrian and German with the addition of French law, and only traces of other legal systems. If we omit the period before the adoption of the ABGB in 1852/53 (the law which was in force before that time lost its relevance for today's Croatian private law), in the 19th century Croatia became a legal system of the Germanic legal family, and only in 1978, when the old COA was enacted, a sort of hybridization happened because of the reception of the French Code civil. The new COA kept most provisions of the old COA, but with some additional influences, apart from those mentioned earlier. This issue will be elaborated on below because the new COA was adopted in 2005 (the post-modernistic period according to the questionnaire).

Due to the aforementioned reasons, the opinion that Croatia belongs to, so-called, emerging jurisdictions (group 6) cannot be accepted.[31] This qualification is not acceptable because Croatia falls either into a group of Germanic legal orders (group 3) or into a mixed Franco-Latin/Germanic legal orders (group 4). The same is true for all legal systems mentioned in group 6 which are new independent states formed after the dissolution of Yugoslavia.[32] Bearing in mind that Croatian private law, along with other parts of former Yugoslavia, significantly relied on Austrian law (the ABGB, the OGZ or other version of the ABGB) until 1978, it could be argued that Croatia belongs to group 3, and after 1978, when Swiss law started to play a crucial role as a role model to group 4. It should be noted that leading comparative law scholars mention the fact that the ABGB was "exported" to Croatia, as well as to other neighbouring countries.[33]

F. *Psychological Approach. The reception was conscious or unconscious? Confessed or denied?*

The reception of foreign influences in the field of private law was more or less conscious. In the examples such as the reception of the ABGB,

---

[30] See Örücü, E., "What is a Mixed Legal System: Exclusion or Expansion?", *Electronic Journal of Comparative Law*, vol. 12.1, May 2008, *http:/www.ejcl.org*.

[31] Source of qualification: Rose, A. D., "The Challenges for Uniform Law in the Twenty-First Century", *Uniform Law Review – Revue de Droit Uniforme*, Vol. I, 1996-1, pp. 10, 25. (qualification was taken over from R. R. Wood).

[32] Curiously in a group of emerging jurisdiction two former republics of Yugoslavia and now independent states are omitted and are not mentioned in other groups either.

[33] Zweigert, K., Kötz, H., *op. cit.*, p. 166.

the process was conscious because of the fact that Austrian private law was directly imposed on Croatia in 1852/53. When the ABGB as the OGZ stayed in force after reforms in 1866-1868, it was still a conscious reception, because the OGZ was still perceived as Austrian law. This also produced opposition against the ABGB/OGZ. However, the opinion prevailed that the ABGB/OGZ should be kept as Croatian law regardless of its origin and circumstances in which it was adopted (during the period in which Croatia did not have legislative autonomy).

Later receptions were still conscious but in a much more limited way. Scholars who were involved in legislative process, made references, in their books and articles, to foreign legal literature and legislation which enabled a wider audience to establish connections between national law and foreign influences. However, the level of consciousness of reception was, and certainly still is, lower among practitioners. This is the consequence of the fact that after the reception of the foreign law, separation of national law from the jurisdiction of origin usually follows for various reasons.[34] Such development is particularly emphasized if lawyers of the recipient country of receipt do not know the language of the country of origin, do not have the possibility to acquire foreign legal literature and case law, and also when the legal order of the country of origin as a whole is not compatible with the receiving country. If the latter is the case, practicing lawyers would not benefit from the fact that they are aware of the reception of foreign law, and consequently would not spend their resources on the reception of foreign law.

2. *Post-modernist perspective*

A. *Has there been a model that has been recently received by your country**?** If so, in which periods and what was the displaced model?*

The fall of the Berlin Wall in 1989 did not have direct impact on Croatian private law legislation. However, after the dissolution of former Yugoslavia, and after regaining independence in 1991, the Republic of Croatia started to reform its private law. Because of the fact that the core of private law legislation was generally in accordance with the civil law tradition, changes were gradual. Therefore, in 1991, private law regulations which were adopted previously as federal law legislation (the COA, the Basic Property Law Relations Act) were taken over as Croatian legislation. In 1997, the Basic Property Law Relations Act was set aside and the new Property Law Act was adopted.[35] Though the Basic Property Law Relations Act was in accordance with the main ideas of traditional property law, it had

[34] See Manko, R., *op. cit.*, p. 534.
[35] NN No 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08. i 38/09

a few important drawbacks. On the one hand, it really covered only the basics of property law, and therefore was considered insufficient for modern market economy relations. On the other hand, an important part of property law - land records -, was governed by the old Land Registry Act (again indirectly on the basis of the Act on Ineffectiveness of Legislation enacted prior to 6th of April 1941), which was adopted in Yugoslavia before World War II in 1930. Therefore, along with the new Property Law Act, Croatia also adopted the new Land Registry Act.[36] Both the Property Law Act and Land Registry Act were drafted under the strong influence of Austrian law, and led to the reintroduction of property law of the ABGB/OGZ in private law in Croatia. However, this does not mean that Croatian property law is an exact copy of Austrian property law. Certain elements of property law were modified, for example, a floating charge which was introduced by adopting the Act on Register of Judicial and Public Notary's Securities.[37] The new Property Law Act was amended several times, and the last amendment, which enabled nationals of European Union member states to acquire ownership of the real property without special permits, was conducted because of the process of accession of Croatia to the European Union.

The COA was also reformed in 2005, and on the 1st of January 2006, the new COA came into force.[38] Again, the Swiss influence can be recognized in the new COA. The new COA is still based on a monistic system of law of obligations. While retaining a monistic system of law of obligations, Croatia adopted the Company Law Act, which was amended on numerous occasions,[39] and also the Consumer Protection Act.[40] The law of obligations was reformed for several reasons. One of the reasons was the process of accession of Croatia to the European Union. This is another example of the influence of foreign law on Croatian law. The most important change, in comparison to the old COA, is the new definition of non-patrimonial damage. The old COA defined non-patrimonial damage (in the old COA the term immaterial damage was used) as causing pain or fear to another person (Art. 155). Such definition of non-patrimonial damage has excluded the possibility of awarding damages to natural persons if they did not suffer pain or fear, regardless of the seriousness of the damage (e.g. because they are/were in a coma), and it also prevented legal persons from seeking compensation for non-patrimonial damage. In order to enable the awarding of damages in such circumstances, the new COA defined non-patrimonial damage as an infringement of personality rights (Art. 1046).

---

[36] NN No 91/96, 68/98, 137/99, 114/01, 100/04, 107/07. i 152/08.
[37] NN No 121/05.
[38] NN No 35/05, 41/08.
[39] NN No 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09.
[40] NN No 79/07, 125/07, 79/09, 89/09.

Solving the problem of non-patrimonial damage by using the notion of personality rights in definition of non-patrimonial damage is another example of the reception of foreign law (again the Swiss OR).

Numerous provisions of the new COA were introduced in order to fulfil requirements for the accession of the Republic of Croatia to the European Union (directives are listed below in the chapter on specific instruments or legal mechanisms).

In the year 2003 the new Succession Act was adopted,[41] only slightly changed in comparison to the old Inheritance Law of 1955. In the beginning, the reform was envisaged as an opportunity to solve a problem which existed in the old Law, because it was mixture of Swiss and Austrian inheritance law, but eventually the new Law was just a revision regarding a few details in comparison to the old Law.

Specific areas of private law were also reformed. The Family Law Act was enacted in 1998[42] and was later repealed in 2003 by the new Family Law Act[43]. Intellectual property legislation was also significantly reformed and numerous new laws in this field were enacted: the Copyright Act,[44] the Patent Act,[45] the Industrial Design Act,[46] the Geographical Indications and the Appellations of Origin Act,[47] and the Protection of Topographies of Semiconductor Products Act.[48] The new intellectual property law was drafted, to a large extent, to implement various directives of the European Union in the process of Croatia's accession to the EU.

B. *What elements stand out in the received model?*

Reception of foreign law occurred on the level of legislation and legal doctrine. Legal terminology in this period was not new, and foreign case law still did not have any significant influence on Croatian legislators. It is interesting to note that despite all foreign law reception, Croatia has still not accepted the methodological fundament of all models mentioned until now – the codification of private law in a single legislative instrument – the Civil code. The current attitude of the Croatian legal community does not favour such an approach.

---

41 NN No 48/03, 163/03, 35/05.
42 NN No 162/98.
43 NN No 116/03, 17/04, 136/04, 107/07.
44 NN No 167/03, 79/07.
45 NN No 173/03, 87/05, 76/07, 30/09
46 NN No 173/03, 76/07, 30/09.
47 NN No 84/2008, 75/2009, 107/09.
48 NN No 173/03, 76/07, 30/09.

Reception of foreign law in this period did not change the basic elements of private law. It was mainly focused on particular instruments and legal mechanisms.

C. *What were the driving forces of legal reception*?

The driving force behind the reception in this period was the need to update the legal system which, during socialism, became obsolete. Foreign role models were almost the same as in the previous period. Because of the fact that, even during socialism, Western legal systems were imitated, legal transition was not revolutionary. As before, the important role belonged to legal scholars who were members of working groups for drafting new legislation.

D. *What are the general identification elements of the received models: legislative, legal or doctrinal*?

General identification elements of received models are legislative and doctrinal. Reception of foreign legislative models is the most important. Reception of foreign legal doctrine is the consequence of the reception of foreign legislation, while foreign doctrine is essential for the interpretation of foreign law.

E. *Are there specific recognizable elements of legal hybridization*? *Could you exemplify*?

Legal hybridization exists as in the previous period. The Croatian legal system received elements which additionally contributed to legal hybridization. For example, a floating charge which was introduced by adopting the Act on Register of Judicial and Public Notary's Securities, is the first case of legal reception from English law in Croatian law.[49]

F. *Psychological Approach. The reception was conscious or unconscious*? *Confessed or denied*?

The reception in this period is conscious and confessed. To the same extent, reception of foreign legal models ought to be proof of the fact that Croatia successfully accomplished a transition, both political and legal, from socialism to parliamentary democracy.

---

[49] See DIKA, M., *Generički odredene pokretne stvari kao predmet založnopravnog i fiducijarnog uredenja* (*Generically Determined Movable Assets as the Subject of Lien and Fiduciary Insurance*), Hrvatska pravna revija, 2 (2002) 4, p. 122.

II. SPECIFIC INSTRUMENTS OR LEGAL MECHANISMS

1. *Historical perspective*

A. - *Are there Institutions or legal mechanisms that have been received by your country in the periods before those indicated? Which ones and in which periods?*

In the period between 1945 and the fall of the Berlin Wall and in the period which is in the questionnaire qualified as post-modernistic, a number of specific instruments were introduced to Croatian law (between 1945 and 1991 as a part of Yugoslavia). Apart from the aforementioned Swiss and French role models, the COA also adopted parts of Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) of 1964.

The Republic of Croatia is also a contracting state of the UN Convention on International Sale of Goods (hereinafter: CISG) which came into force for the first time in Croatia on 1st of January 1988. At that time Croatia was a part of former Yugoslavia (federal republic). Yugoslavia had signed and ratified the CISG on 11th of April 1980 and 27th of March 1985 respectively.[50] Therefore Yugoslavia became one of the original eleven states in which the CISG came into force on 1st of January 1988. At the same time, when Croatia declared independence from Yugoslavia in 1991, Croatia also declared that international treaties, which were entered into or acceded to by the SFRY, would apply in the Republic of Croatia by virtue of the rules of international law on succession of states in respect of international treaties, if certain conditions were fulfilled. The succession of Croatia to the CISG followed in 1998,[51] and, according to that act of notification, the CISG came into force in respect of the Republic of Croatia on the 8th of October 1991. Therefore, in 1991 Croatia became a contracting state to the CISG for the second time, but this time as an independent state.

The Republic of Croatia is also a contracting party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights; ECHR). The ECHR has been in force in Croatia since 5th of November 1997.[52]

---

[50] See Službeni list Socijalističke Federativne Republike Jugoslavije – Međunarodni ugovori (Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties) No 10/1/84.
[51] Official Gazette of the Republic of Croatia – International Treaties (Narodne novine, Međunarodni ugovori; hereinafter NN MU) No 15/98.
[52] NN MU 18/97, 6/99, 8/99.

On the basis of the Stabilisation and Association Agreement between the Republic of Croatia, on the one part, and the European Communities and their Member States, on the other part (hereinafter: Stabilisation and Association Agreement)[53] Croatia undertook the obligation to adopt its legal system to *acquis communautaire*. The fact that the old COA was, to some extent, adapted to the ULIS, ULF and CISG, only moderate intervention in the new COA was necessary to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.[54] The new COA also implemented the following directives:

- Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products[55]; Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products[56],

- Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents,[57]

- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours,[58]

- Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.[59]

Although the subject-matter of electronic commerce and electronic signatures is governed by *lex specialis* in Croatian law, certain elements of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures[60] and

---

[53] NN MU 14/01.
[54] Official Journal L 171, 7.7.1999, p. 12–16.
[55] Official Journal L 210, 7.8.1985, p. 29–33.
[56] Official Journal L 141, 4.6.1999, p. 20–21, corrigendum – Official Journal L 283, 6.11.1999, p. 20.
[57] Official Journal L 382, 31.12. 1986, p. 17-21., corrigendum – Official Journal L 189, 20.7.1988, p. 28.
[58] Official Journal L L 382, 31.12.1986, p. 17–21.
[59] Official Journal L 200, 8.8.2000, p. 35–38.
[60] Official Journal L 13, 19.1.2000, p. 12–20.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') were transposed through the COA.[61]

B. *If yes, what was the outcome? Did its adoption displace other institutions or legal mechanisms?*

International treaties, which became part of Croatian legal order in most cases, did not displace other institutions or legal mechanisms. The exception is the implementation of EU directives on the basis of the Stabilisation and Association Agreement. The impemented directives did alter particular legal institutions, which were in force until the moment of implementation.

C. *What were the driving forces of legal reception?*

The driving force behind the reception of foreign influences in this category was, to large extent, the achievement of certain political or economical aims. In order to become a member of the Council of Europe, the Republic of Croatia became a contracting party of the ECHR. The implementation of directives of the EU is, on the other hand, necessary in the process of accession of Republic of Croatia to the European Union.

Reception of particular instruments in some cases also led to the reception of certain teaching models in legal education. An example for such development is the CISG and the VIS moot court competition.

D. *What are the general identification elements of the received institutions or legal mechanisms: legislative, legal or doctrinal?*

In most cases the general identification element of the received instruments is legislative. However, in respect of some instruments, case law became more important then ever before. The best example for such development is the European Court for Human Rights (hereinafter: ECHR) and in the future, after Croatia's accession to the European Union, the European Court of Justice.

E. *Are there specific recognizable elements of legal hybridization? Could you exemplify?*

The increasing adoption of particular foreign and international instruments in combination with previous reception of foreign legal models definitely contributes to legal hybridization. However, a different issue has to

[61] Official Journal L 178, 17.7.2000, p. 1-16.

be emphasized in this context. By increasing the role of the case law (at this moment in particularly regarding the ECHR), Croatia becomes a mixed system in respect to legal methodology. In the past, the law was regarded as a system of abstract provisions which courts should apply in accordance with legal doctrine. The decisions of courts did not have legal power of precedents. While this is still true, the case law of the ECHR is frequently taken into account by Croatian national courts.

F. *Psychological Approach. The reception was conscious or unconscious? Confessed or denied?*

The answer to the question of consciousness of reception depends on the particular legal instrument. Generally speaking, the process of implementation of EU directives, particularly in the case of the reception of foreign law, has attracted the attention of lawyers. Other instruments are somehow neglected in this respect, and the level of consciousness is rather low (like for example in the case of the CISG).

G. *The drafting of model laws or legislative guidelines on the part of the International organizations (UNCITRAL, UNIDROIT, The Hague Conference) or regional ones (for example, in the area of the Americas; the International Conference of Private Law, (CIDIP), in the frame of the Organization of the American States (OAS).*

It was already mentioned that the COA adopted parts of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) of 1964. Another example in this category is the Croatian Arbitration Act[62] which, has relied, to the same extent, on the UNCITRAL Model Law on International Commercial Arbitration.

III. CONCLUSIONS

Even though Croatia regained its independence in 1991, the opinion of this national reporter is that its legal system cannot be qualified as an emerging jurisdiction. There are several reasons for this. First of all, since the middle of 19th century, private law in Croatia belonged to the Germanic legal family; more precisely, its private law was basically Austrian private law. The link to the private law of Western Europe was not broken even after 1945 when Croatia became part of socialistic Yugoslavia. The General Usages Governing Sale of Goods of 1956 were based on German and Swiss law, and parts of the COA of 1978 reveal its Swiss and French origin. This is also case in the respect of the new COA of 2005. The Succession Act of 1955

[62] NN 88/01.

had a Swiss and Austrian background, and the same is true for the revised version of the Succession Act of 2003. Croatia property law also has Germanic origins.

Croatian private law has also been under the significant influence of EU law over the last 10 years. This fact still did not become a decisive element in determining to which legal family a certain legal order belongs. European Union member states kept the position in their legal families which they had acquired before they became member states of the EU.