Law Reform in Central and Eastern Europe: The 'Transplantation' of Secured Transactions Laws

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A. Introduction: Economies in Transition and the Challenge to the Law

One can never overestimate the impact of the formidable changes that have occurred over the past ten years or so in the countries known as the 'former Communist bloc'. They have no historical precedent. The most obvious feature of the transformation is its sheer scale: one after another, governments have fallen and countries have separated, sometimes in dramatic circumstances. The depth of these changes is actually even more remarkable: no area – political, social, economic, military, etc. – has been left unchanged. Part of the shift has also been the change – a sort of renaissance – in the relationship between Eastern and Western Europe. The current process of enlargement going on within the European Union (EU) is partly responsible for this, as the candidates for accession are mainly Central and Eastern European countries. However, the EU is not the only organization expanding towards the East: the Council of Europe has also recently admitted new members, as has the North Atlantic Treaty Organization (NATO).

It may not always appear so, but the opening of the former Socialist bloc is of direct relevance to lawyers, for two main reasons. First, all the countries of the region have committed themselves to the development of a market economy and of democracy. This has led to, broadly speaking, the privatization of state-owned enterprises, liberalization of the economy, establishment of multi-party democratic regimes and an increased respect for human rights. Clearly, such a substantial transformation requires the elaboration of new foundation texts such as a constitution and codes, as well as a body of statutes and regulations.[1] Secondly,

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[1] See Kirsten Storin Doty, 'Economic Legal Reforms as a Necessary Means for Eastern European Transition into the Twenty-First Century' (1999) 33 *The International Lawyer* 189; Jerzy Rajski, 'The Challenges of Adapting Law to Market Economies in Post-Communist Central European Countries' in Ziegel (ed.), *New Developments in International Commercial and Consumer Law* (Hart, Oxford, 1998) 383.

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and more importantly, reforms of this nature have a very profound impact on the foundations of the legal systems involved. Until the end of the 1980s, the states of Central and Eastern Europe and the Soviet Union were governed by the same Marxist ideology, which (despite their individual differences) shaped their legal systems:

> [T]he proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social order in which the very concept of state and law will disappear.[2]

Socialist legal systems defined a number of specific institutions, such as the concept of the division between private and state property (and sometimes also social property). They also did not allow private contract law to develop in the way we know it in the capitalist economies. That, in the view of the majority of comparative scholars, has justified the classification of these systems into a separate legal family – socialist law – next to the common law and civil law families.[3]

With the demise of the socialist ideology, the very concept of law and its role in society is being reformed. The objective is to establish what is usually referred to as 'the Rule of Law' or a 'Law governed State'.[4] The Rule of Law demands 'cultivation of a particular sensibility, a disposition to take law seriously, a concern with process and with following forms as much as with substantive results'.[5] Although it is not clear how such a concept can be brought in, depending as it does 'as much on the prevalence of a certain kind of temperament and spirit as it does on specific

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[2] René David and John E.C. Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens, 1985), p. 26. See also Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (London, 1978); Hugh Collins, *Marxism And Law* (Clarendon Press, Oxford, 1982); Christine Sypnowich, *The Concept of Socialist Law* (Oxford, 1990). See also developing the example of labour law Kathryn Hendley, *Trying to Make Law Matter – Legal Reform and Labour Law in the Soviet Union* (University of Michigan Press, 1996). Still, well before the demise of socialist ideology, processes of change were at work. See W. Butler, 'Perestroika and the Rule of Law' in Butler (ed.), *Russian Legal Theory* (Dartmouth, 1996), p. 417.

[3] See for example the most authoritative comparative law work, K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd edn, Clarendon Press, Oxford, 1992), p. 296. The third edition published in 1998 no longer refers to the family. Further, it must be recognized that comparative studies conducted in the West were too often founded on 'cultural prejudices and stereotypes' and often failed to comprehend Eastern European legal cultures in context. See Bogula Puchalska-Tych and Michael Salter, 'Comparing Legal Cultures of Eastern Europe: the Need for a Dialectical Analysis' (1996) 16 *Legal Studies* 157.

[4] See for example, Hendley, *supra* note 2, at p. 11; OECD, *Symposium on the Rule of Law and the Development of a Market Economy in the Russian Federation* (23–24 March, Paris, France, 1998) proceedings (available at <http://www.oecd.org//daf/corporate-affairs/governance/rule-of-law/issues.pdf>).

[5] Schlesinger, Baade, Herzog and Wise, *Comparative Law* (6th edn, Foundation Press, 1998), p 313.

institutional arrangements',[6] the idea of the Rule of Law has a profound impact not only on a country's legal system but on its society as a whole. It is thus of great interest to legal scholars to study how these processes take place in the former Soviet bloc:

> The fact that the socialist legal system has ceased to be the object of comparative inquiry and that it has instead become the object of historical comparison research, and the fact that sovietology has become extinct, however, does not mean that the former socialist countries do not form, at least temporarily, a geopolitical or legal-geographical unit. The laws of all of these countries have by necessity changed. (...) The result of this rewriting of the laws has been a certain temporary, though not short-lived similarity among the post-socialist countries. The similarity, in turn, forms a new subject of comparative law, ie, the method of transformation or substitution of socialist law by new law.[7]

The study of transformation, or transition, must be given adequate attention in academic research. It is important to monitor the changes taking place in a rediscovered Europe: if these are not properly understood, there is a danger that the assistance which the West has endeavoured to provide will be inadequate. Understanding the way the legal systems of economies in transition develop will also enable us to learn important lessons about our own legal system. Back in 1985, David and Brierley wrote:

> A major challenge today is to assure the co-existence of socialist and non-socialist countries. It is thus important that we in the West understand the socialist countries' attitude to their law. But an understanding of their efforts to create a new social organisation according to ideas and using techniques different from our own is also of interest in its own right – the study of socialist law enables us to adopt a new critical stance in regard to our own law.[8]

This remains true more than ever in today's world, where socialist law has almost disappeared from the map. If a transition is taking place, one has to reflect on *where* the process should lead to, as well as *the means* of reaching it. Consequently this article will reflect on these two crucial questions, using the reform of secured transactions law in Poland as an example.

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[6] Ibid.

[7] Viktor Knapp, 'Comparative Law and the Fall of Communism' (1995) 2 *Parker School Journal of East European Law* 525, at 532.

[8] David and Brierley, *supra* note 2, at p. 157.

B. Western Transplants: Success and Failure

The transformation of socialist law has been taking place in all the countries of the region, with the support of many international governmental and non-governmental organizations.[9] On the whole, the development of new legal environments fostering the market economy has been done by importing Western concepts and institutions, or, to use a more technical term, by transplanting Western legal rules. The notion of transplantation is not a new one: the seminal work on the subject was carried out by Alan Watson in the 1970s.[10] His theory basically states that the growth of law can be principally explained by the transplantation of legal rules from one jurisdiction to another. However this theory of transplantation has subsequently been challenged.[11] This paper will avoid an involvement with that debate, which may in fact be founded more on terminology than substance. What is indisputable is that for the legal systems of Central and Eastern Europe, *transplantation is a reality*. Because transition economies cannot afford and do not wish to go through the same process of slow and tentative development as the developed economies did in the past in order to achieve their modern legal and regulatory structures, they must, to a large extent, import them. A great deal of financial support has been – and still is – made available specifically for this purpose.[12] Teams of Western legal advisers have been sent to the countries concerned to help design and draft laws and regulations, using existing statutes as templates. In providing this assistance, Western countries have sometimes given the impression of competing with each other for the strongest influence over the former Soviet block. Economic power, historical tradition, culture and friendship are some of the reasons which have been put forward as arguments to secure a position as an adviser. Swifter acceptance to the EU has also encouraged countries in Central and Eastern Europe to bring their own legal systems into line with EU regulations and directives. As a result, laws based on Western models have been widely adopted.

Not surprisingly, this process has not been without difficulties. Indeed, in the same year as the first edition of Watson's book, Professor Otto Kahn-Freund had

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[9] See Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 *American Journal of Comparative Law* 93, for details of these programmes.

[10] Alan Watson, *Legal Transplants: an Approach to Comparative Law* (2nd edn, University of Georgia Press, Athens, 1993).

[11] See for example Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111. For a more moderate view on Watson's work, see William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489.

[12] See for example, K.V.S.K. Nathan, 'Commercial Law Reform in the Russian Federation' (2000) 25 *Amicus Curiae, Journal of the Society for Advanced Legal Studies* p. 19, March.

already warned about the delicacy that transplantation requires.[13] In a very 'elementary and intuitive'[14] approach, the great comparatist stated that the very idea of transplantation implied the risk of rejection and wondered whether 'these questions of adjustment and rejection arise in the situation we are interested here, the transplantation or transfer of foreign institutions'.[15] Clearly, there are forces that resist transplantation, or at least make it more likely that it will be rejected. Kahn-Freund saw the *political factor* as predominant and listed three of its essential features: the gulf between the communist and non-communist world, the evolution of forms of democracy (such as presidential type and parliamentary type) and the increased role played by organized interests in the founding and maintenance of legal institutions.

> [T]he degree to which any rule (...) or any institution (...) can be transplanted (...) still depends to some extent on geographical and sociological factors (...), but especially in the developed and industrialised world to a very greatly diminished extent. The question is in may cases no longer how deeply it is embedded, how deep are its roots in the soil of the country, but who has planted the roots and who cultivates the garden. Or on a non-metaphorical language: how closely it is linked with the foreign power structure, whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in part and parcel of its constitutional and administrative law.[16]

Twenty-five years on, his words have a particular resonance. Although the first political feature that Kahn-Freund identified (i.e., whether or not the state is communist) no longer exists in Eastern Europe, transplantation remains a risky operation, as experience on the ground will show.

C. Experience on the Ground

Particularly in its early stages, the 'transplantation' of laws which have been successful elsewhere in Central and Eastern Europe have been met with mixed success. It has quickly become apparent that it is not enough simply to copy codes

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[13] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.
[14] Ibid. at 6.
[15] Ibid.
[16] Ibid. at 12–13.

and statutes, as two authors who have participated in the process have pointed out.[17] In their view, there are two levels of legal reform. The first concerns the 'founding block' of laws that a market economy needs in order to organize basic relationships, such as ownership, contract and company law. Beyond these fundamental laws, however, there is also a need for a complex system of regulation of economic activities (e.g., competition, social protection, consumer protection, labour law, etc.). Whereas the transplantation of the 'founding block' may depend on the recipient country's legal culture and tradition and the degrees of similarity of these factors to those of the importer country, economic laws are rooted in social and economic philosophies and policies which have developed independently from the country's legal tradition. Modern regimes of social and economic regulation differ considerably, regardless of the legal family to which the country is generally thought to belong.[18] As a matter of fact, the US and English legal systems, generally seen as typical examples of the 'common law family', differ significantly in their respective insolvency and secured transactions laws, to name only two examples.

> The effectiveness of law in the economic and social reality of a nation is usually intimately linked to the institutional set-up of government and economic organisations and the shape and focus of social and economic forces and their interaction.[19]

Moreover, the success of regulatory systems requires an institutional setting and procedures by which to achieve satisfactory compliance through direct sanctioning (judicial or administrative). It also needs an adequate business culture which will use them as a bargaining lever.[20] Thus the real issue for economies in transition seeking foreign models is from where to copy their policy models:

> The focus should, therefore, be on a competition between different policies, reflecting a different view of regulation of economic activities and the role of the State in the economic process.[21]

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[17] See Thomas W. Waelde and James L. Gunderson, 'Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?' (1994) 43 *International and Comparative Law Quarterly* 345. See also Ajani, *supra* note 9.

[18] And even the effort to harmonize laws do not seem to completely eliminate the differences: 'Even within the European Community, legal harmonization by directives leads sometimes to quite differing results – and this in spite of corrective factors such as the common jurisdiction of the European Court and the doctrine of direct effect': Waelde and Gunderson, *supra* note 17, at 368.

[19] Ibid. at 370.

[20] See on this theme John L. Taylor and François April, 'Fostering Investment Law in Transitional Economies: A Case for Refocusing Institutional Reform' (1997) 4 *Parker School Journal of East European Law* 1. See also Philip M. Nichols, 'A Legal Theory of Emerging Economies' (1999) 39 *Virginia Journal of International Law* 229.

[21] Waelde and Gunderson, *supra* note 17, at 37.

These empirical conclusions are very close to Kahn-Freund's theoretical views on the success of transplantation. The process may fail because of political resistance stemming from the ideologies of exporter and recipient countries,[22] their respective political and administrative structures and policies (or the structure and policy the recipient aspires to adopt) and/or the organized interested groups' position. Transplantation is thus a very complex and integrated process. It requires the Western advisor to be an expert in the field in his own jurisdiction, but also of importance – and arguably more so – is that he is knowledgeable about the economic and social conditions of the recipient country and prepared to help the government to establish its policies. Clearly humility, moderation and patience are required.[23] The 'jet-plane' consultant is of little or no help. Moreover, only time will show whether the newly adopted law based on the foreign model functions effectively or will be rejected.

D. The Reform of Secured Transactions Law and the Western Models[24]

The subject of secured transactions is particularly topical because it was identified at an early stage of transition as an important element of a modern economy:

> The absence of a legal framework for secured transactions seriously impedes lending activity: whether it be a farmer who needs to borrow money to buy a tractor an enterprise which needs credit from its supplier or the promoters of a power plant who need to finance a major new project, the inability to obtain valuable security over the debtor's assets is likely to discourage potential providers of credit.[25]

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[22] This factor is unlikely to be of great importance now that Eastern Europe is committed to embracing democracy and the market. However, it may still play an important role for Russia which is more inclined to find 'a third way'.

[23] Ibid.

[24] The following analysis is based on research conducted by the author with Professor Gerard McCormack. The findings have been published in various journals. See 'International Influences and the New Polish Law on Secured Transactions: Harmonisation, Unification or What?' (with G. McCormack) in Andenas and Nakajima (eds), *Transnational (Corporate) Finance and the Challenge to the Law* (Kluwer, forthcoming); 'The EBRD Model Law on Secured Transactions: Comparison and Convergence' (with G. McCormack) (1999) 3 *Company Financial and Insolvency Law Review* 65–83; 'Secured Transactions in Countries in Transition (The Case of Poland): From Model to Assessment' (with G. McCormack) [1999] *European Business Law Review* 1–11.

[25] D. Fairgrieve, Secured Transactions Project, EBRD, 'Reforming Secured Transactions Laws in Central and Eastern Europe' [1998] *European Business Law Review* 254. See also Roy Goode, 'The Changing Nature of Security Rights' in Andenas and Norton (eds), *Emerging Markets and Secured Transactions* (Kluwer, 1998), p. 1.

As a result, most of the economies in transition have undertaken to reform their secured transactions laws (sometimes referred to as 'pledge law'). For example, in 1996 Bulgaria and Poland both adopted similar laws on registered pledge and pledge registration. Revised mortgage provisions in the Hungarian Civil Code came into force in May 1997[26] and in October 1997, the Ukraine Parliament introduced important amendments to the 1992 Law on Pledges.[27] The European Bank for Reconstruction and Development (EBRD) Secured Transactions Project[28] also reported in 1998 on its involvement in projects supporting the development of secured transactions laws in Azerbaijan, Kyrgyzstan, Latvia, Moldova, the Russian Federation, the Slovak Republic, Romania and Tajikistan.[29]

Secured transactions law is also a very good illustration of the dilemmas of transplantation because of the existence of readily exportable models. In effect, a Model Law drafted by the EBRD is available to recipient countries.[30] The EBRD has addressed the question of secured transactions from the very early stages of its existence, having been established in 1991 in order to assist the former Communist states of Eastern Europe and the Soviet Union with the transition to the market economy. In 1992, the Secured Transactions Project was established within the Office of the General Counsel, leading in 1994 to the production of the Model Law on Secured Transactions.[31] The Model Law is said to be based on a comparative survey of secured transactions laws in Europe and worldwide.[32] It draws from both common law and civil law systems as the principle that guided its drafting was to produce a text *compatible* with the civil law concepts upon which many Central and Eastern European legal systems are based, while at the same time drawing on common law systems since they 'have developed many useful solutions to accommodate modern financing techniques'.[33] The Model Law consists of 35

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[26] See International Briefings, 'Hungary' [1997] *International Financial Law Review* 50; Attila Harmathy and Eotvos Lorand, 'The Hungarian Law of Credit Security in Property' [1998] *European Business Law Review* 395. Provisions on mortgage and pledge are generally found in the Civil Code but separate statutes can also be adopted as has been the case in Poland.

[27] See International Briefings, 'Ukraine' [1998] *Butterworths Journal of International Banking and Financial Law* 67.

[28] See text to notes 30 et seq.

[29] See Fairgrieve, *supra* note 25.

[30] John L. Simpson and Jan-Hendrik M. Rover, 'An Introduction to the European Bank's Model Law on Secured Transactions' in Norton and Andenas (eds), *Emerging Financial Markets and the Role of International Financial Organisations* (Kluwer, 1996), p. 165. For the text of the Model Law, see <http://www.ebrd.com/english/st.htm>.

[31] *Model Law on Secured Transactions* (European Bank for Reconstruction and Development, 1994).

[32] The Advisory Board comprised academics and practitioners from diverse parts of the globe including Western and Eastern Europe (France, Great Britain, Spain, Czech Republic, the Netherlands, Germany, Italy, Hungary, Belgium, Poland,) but also Canada, Australia, Russia, Japan and the US.

[33] Ibid.

articles accompanied by a very detailed article-by-article commentary, plus a schedule consisting of a model charging instrument and registration statement.

The EBRD Model Law is not the only model law which has been made available to the countries of the former Communist bloc. The United States Uniform Commercial Code (UCC), in particular Article 9 thereof which deals with collateral law, also exercises an important influence. This is particularly the case because the UCC has served as a model in North America, having been adopted by all 50 American states[34] and later serving as a model for the Canadian provinces, most of whom have adopted its provisions with slight individual modifications.[35] Thus the UCC has functioned as 'a major and readily available resource for an effort to harmonize the law of secured transactions globally'.[36]

Finally, the American Bar Association (ABA) through its Central Eastern European Law Initiative (CEELI)[37] produced in March 1997 an extensive 'Concept Paper on Secured Transactions'. This document analysed the background to the drafting of a new statute on secured transactions, identified the various public policy choices and priorities and highlighted the different options available to policy-makers.[38] In particular, in Section III 'Selecting a Collateral Law Model', the authors mentioned the EBRD Model law, the UCC together with the Canadian experience of adopting the UCC and the commercial codes of France, Germany and Italy.[39]

There is only so much that foreign models can do:

> Model Laws for local drafters to study are of great importance, but without the local traditions and legal context being taken into consideration, something as

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[34] See on the recent amendments to Article 9, *Symposium on Revised UCC, Article 9*, Steven L. Harris & Charles W. Mooney Jr (eds) 74 (1999) Chicago Kent Law Review.

[35] See Michael Bridge, Roderick Macdonald, Ralph Simmons and Catherine Walsh, 'Formalism, Functionalism and Understanding the Law of Secured Transactions' (1999) 44 *McGill Law Journal* 567.

[36] Elizabeth A. Summers, 'Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe' (1997) 23 *Revue of Central and Eastern European Law* 177, quoting Don Wallace Jr's lecture given in Dubrovnik, September 1996 'International Initiatives to Harmonize the Law of Secured Transactions'. The specific advantage put forward in favour of Art. 9 as opposed to the EBRD Model Law was that the latter was untested. See also Harry C. Sigman, 'The Case for Worldwide Reform of the Law Governing Secured Transactions in Movable Property' in Ziegel (ed.), *New Developments in International Commercial and Consumer Law* (Hart, Oxford, 1998), p. 229.

[37] See its web site <http://www.abanet.org/ceeli>. CEELI's legal assistance programmes began in 1990. Much of its work has focused on educating local legal professionals about the commercial concepts embodied in the new laws and economic systems being developed.

[38] Available on-line at <http://www.abanet.org/ceeli/papers>. In addition to the concept paper provided on request to the Bosnian government, CEELI provided a legal assessment of the Estonian draft law on secured transactions in 1992.

[39] Section IV.

> complicated as a secured transactions law, affecting the banking law, civil code, bankruptcy law and court execution procedures, could not be expected to function properly.[40]

As will be shown here, the role of developed economies in the reform process has been very active and has led to some interesting results.

E. The 1996 Polish Law on Registered Pledge

The Polish law on pledge is a particularly useful example of the effect of transplantation in the region. Poland started working on the subject of secured transactions as early as 1990. Early attempts to purely import collateral laws proved unworkable: for example, an early draft prepared in England was rejected by the government because it was not fully compatible with Polish law. Instead, the government instructed the Ministry of Justice to establish a Civil Law Reform Commission, which included a small working group devoted to the question of secured transactions. A Western advising organization, the Institutional Reform and the Informal Sector Central Europe (IRIS), assisted the Working Group. IRIS had been launched in 1990 with initial funding from the US Agency for International Development (USAID) to help to promote reforms of property and contract rights as well as good government in general.[41] IRIS Central Europe had already been particularly active in the area of secured transactions. In 1995, it conducted a study of the status of collateral law with reference to movable property in 14 countries of the region.[42] In Poland, between 1990 and 1997 IRIS, through the American Commercial Law expert Professor John A. Spanogle, provided regular input to the Working Group.[43] The US UCC Article 9 was presented, as well as the EBRD Model Law. Individual legal systems were also brought to the attention of the Polish legislator when relevant.

The EBRD Model Law is based on the concept of a single security proprietary right in respect of all types of assets and rights. A 'charge' under the Model Law is a

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[40] IRIS, *The Polish Law of 6 December 1996 on the Registered Pledge and the Pledge Registry* (Annoted English Translation, 'Forward').

[41] See its web site http://www.inform.umd.edu/iris/present.html.

[42] 'A Survey of Asset-Based Lending in Central and Eastern Europe' (1995) *Butterworths Journal of International Banking and Financial Law*, Special Supplement, September. It also intervened in Albania, establishing a joint IRIS-Albania office in 1996 to help the country to develop a legislative initiative. In 1999, the Law on Securing Charges was adopted.

[43] Professor Spanogle published commentaries on the EBRD Model Law based on his experience as a consultant: see John Spanogle, 'A Functional Analysis of the EBRD Model Law on Secured Transactions' in *Emerging Markets and Secured Transactions*, *supra* note 25, p. 157.

property right and not a mere obligation and there are flexible definitions of the key concepts of 'debtor', 'secured debt' and 'charged property'. Publicity is also required through the means of registration in a register open to public inspection. A further feature is a broad right of enforcement: the charge-holder is endowed with the right to sell the charged property in whatever way he considers most appropriate. Finally, the parties to the loan transaction are given maximum flexibility to arrange their relationship in the manner that best suits their particular needs. These features also constitute the backbone of the US UCC, Article 9, albeit with substantial differences.

Whilst having access to these models, the Polish legislator made use of them in the reformed law, only to the extent that they suited the country's existing policies. The Polish Act on Registered Pledges and Register of Pledges was adopted on 6 December 1996 and came into force on 1 January 1998.[44] It was supported by every party, so there were no political barriers to its adoption.[45] Basically, the main innovation of the new Polish Act has been to create a new form of security interest, the registered pledge. Previously, the only security instruments that could have been taken over tangible movable property were a possessory pledge and a bank pledge as governed by Articles 306 to 326 of the Civil Code.[46] The traditional possessory pledge required a contract and the delivery of the subject property either to the creditor or to a third party as agreed upon by the parties.[47] The bank pledge, pursuant to Article 308 of the Civil Code, was a pledge over tangible movable assets such as stock, products finished or in production, equipment, machines and cars. It did not require dispossession of the debtor but was available only to *Polish* banks to secure a loan. In other words, only Polish banks and Polish subsidiaries of foreign banks were entitled to non-possessory pledges in return for the provision of credit.

In contrast, the new form of pledge introduced by the 1996 Act is widely available. The list of creditors who may benefit from a registered pledge covers virtually every entity which could possibly carry out commercial activity in Poland.[48] The only two requirements are the existence of a pledge agreement between the pledgor and the pledgee and the entry of the details of the security interest in a public register. The pledge agreement must include the names of the parties, the object of the pledge and either the amount of debt secured by the pledge, or the maximum amount of security

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[44] Dz. U. No. 149. s. 703, 1996. For the draft see (1994) 4 *Journal of International Banking Law* N–77. For the Act see (1997) 7 *Journal of International Banking Law* N–122

[45] See Summers, *supra* note 36.

[46] Karen Buschardt-Pisarczyk and Piotr Tomaszewski, 'A New Form of Securing Claims in Poland: The Registered Pledge' (1997) 10 *International Company and Commercial Law Review* 369.

[47] See Lech Choroszucha, 'Secured Transactions in Poland: Practicable Rules, Unworkable Montruosities and Pending Reforms' (1994) 17 *Hastings International and Comparative Law Review* 389.

[48] This is contrary to the position adopted by the Model Law: the security right here can apply to consumer transactions, the criteria being based on the identity of the creditor and not on the nature of the transaction.

if the secured debt is future or conditional and the amount is not determined at the time of the agreement. The pledge becomes effective at the moment when the pledged assets are acquired by the debtor. The order of priority of registered pledges depends on the date on which an application is filed.

F. Rejection of the Single Security Interest Promoted by Western Models

However wide this pledge is, it still does not establish the principle promoted in the EBRD Model Law and Article 9, namely the concept of a single security interest that would apply to all secured transactions whatever their name and modalities. The possessory pledge and the assignment of rights by way of security remain in existence as valid legal forms alongside the new registered pledge, as does the leasing agreement, retention of title clauses, etc. Each of these existing devices has its own set of rules, with the registered pledge simply being added on. It can clearly be seen that in this case, transplantation of secured transactions model laws did not take place without a serious amendment to one of their key features, i.e., the uniformization of the secured transaction. The reasons for this must be found, following Kahn-Freund and Waelde and Gunderson, in the political factors linked to the enactment of the new Act, namely the resistance of the financial sector to a complete reform of the law of secured transactions. Completely reforming the existing system of security interests requires banks and other lenders to adapt their lending documents and methods overnight, and to introduce comprehensive staff training programmes. One must not forget that Poland was already involved in very extensive reforms in related areas, such as banking law, insolvency law, company law and so forth. The situation is similar to that in Australia where, despite the general support of the finance industry for the reform of Australian law to embrace the Article 9 model, there has been strong resistance from some of the major banks. This is probably because they have only just finished preparing virtually complete new sets of documentation and lending procedures in response to the new uniform Consumer Credit Code of 1997. As one commentator pointed out, 'the time is not propitious to talk to the banks about law reform!'[49] In order to avoid the need for such a drastic change, the Polish legislator chose to *add* a security instrument, the registered pledge, to the existing ones. Whilst this may minimize the need for procedural changes, it also carries the risk that most of the benefit of the reform will be lost if the instrument is not used as intended. This illustrates the important role played by organized interests in the success or failure of transplantation.

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[49] David E. Allan, 'Personal Property Security – Rip Van Winkle Awakes in the Antipodes' (1998) 8 *Journal of International Business Law* 1.

G. Rejection of the Self-Enforcement Means

Transplantation has also been resisted in terms of the enforcement of the pledge. The Model Law, Article 24.1, provides that 60 days after the delivery of an enforcement notice to the debtor, the charge-holder has the right to transfer title to the charged property by way of sale in order to have the proceeds of sale applied towards satisfaction of the secured debt. The idea here is to provide a quick and efficient means for the creditor to enforce his security and realize the property, without recourse to the courts. In contrast, Article 21 of the Polish 1996 Law on Registered Pledge reads that 'satisfaction of the creditor from the collateral shall be carried out in judicial enforcement proceedings unless specific provisions of this law provide otherwise'. The general rule is and remains enforcement by court as governed by the Polish Code of Civil Law Procedure. The 1996 Act, however, introduced some limited self-help concepts. First, it must be possible to provide in the pledge agreement for a sale of the pledged assets by public auction held by a bailiff or a public notary within 14 days from the date a request for such is made by the creditor (Article 24 paragraph 1). It would appear, however, that the provision is not yet in force because the necessary implementing regulations have not yet been promulgated. Secondly, Article 22 allows parties to satisfy claims without following the ordinary execution procedures, through the creditor contractually acquiring title to the pledged property. Such transfer of title is possible if the value of the assets had been specified in the pledge agreement,[50] or if the pledge had been taken over a commonly traded commodity or publicly traded securities and the Securities Commission consented to such an assignment. So this speedy means of enforcement requires the parties to stipulate to it in the pledge agreement. Clearly, out-of-court enforcement is to remain marginal under the new Polish provisions, unlike the scenario promoted in the Model Law.

Again, this demonstrates a policy choice made by the Polish legislator about self-help enforcement. Indeed, the concept of self-help enforcement is repugnant to many jurisdictions. Enforcement is understood to be the exclusive remit of state authorities, usually bailiffs, under the control of the courts. According to this position, allowing the creditor to realize his security interest over the collateral on his own could endanger the interests of the debtor and other creditors. Control by the courts provides an appropriate safeguard. Clearly, the Polish legislator has maintained this view over enforcement, leaving the courts in ultimate control. Further evidence of this can be found in the way in which registration is organized.

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[50] However, a possession order will still be needed to repossess the assets.

H. Registration and Perfection of the Pledge

The Model Law details the formalities for the creation and registration of charges. Clearly, the Registrar plays a pivotal role in the Model Law. A registration statement must be presented at the charges' registry within 30 days of the execution of the charging instrument. An unregistered charge is invalid not only against third parties but also between the parties. This provision has been seen as evidence of the influence on the Model Law of the tradition of 'notarization' in civil law jurisdictions. The registration of contracts continues to be a requirement for validity in most post-communist legal systems.[51] Under Article 9 of the US UCC, on the other hand, perfection by registering (filling) exclusively serves the goal of informing third parties. Thus, filing is unnecessary where possession of the subject-matter of the security is handed over to the creditor. In Poland, not surprisingly, creation and perfection of a registered pledge requires the drafting of a pledge agreement and its registration at the appropriate registry. Moreover, it was decided to give control over the Central Registry to the Minister of Justice, and to provide that registration be carried out through an application to a special registration section of a district commercial court, the '*sud rejestrowy*'.[52] The decision to make an entry into the registry is made by a single judge in closed session and the opinion is then delivered ex officio to the parties. The biggest problem, as might be expected, is that the newly established system is overloaded.[53] Nonetheless, this is further evidence that the system is strongly reliant on the judicial process, which is a far cry from the underlying philosophy behind both the Model Law and Article 9.

I. Conclusion: Towards a Better Understanding of the Legal Systems of the World Today

The example of the transplantation of secured transaction law in Poland yields interesting insights into the transition process and the role of Western assistance. The Polish legislator, helped by a team of foreign advisors, took the time (over five years) and effort to draft a law that, it was felt, would fit the existing legal system and meet the country's needs. This work goes well beyond the simple transfer of foreign legislation, although the Polish drafters have evidently taken these models into consideration. The system of registered pledge now in place is specific to Poland in

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[51] Summers, *supra* note 36.

[52] These special sections have only been created in the larger cities in Poland so far.

[53] Moreover, the transitory dispositions of the law provided that existing secured transactions (including, therefore, the bank pledge) should be registered before 30 June 1998 so as to remain in force. This, no doubt, has added to the backlog.

that it is integrated into the existing provisions for secured transactions but also the enforcement procedures and insolvency. This is a genuine adaptation of the model provisions into a different and unique environment.[54] Policy decisions were made in order to adapt them to the needs and orientation of the country. Indeed, IRIS undertook a large consultancy exercise to ensure professional and public support for the reform.[55] Although it is too early to know whether or not the transplant will be accepted, the first signs are encouraging: the number of registrations of this new form of pledge are already high, and the Central Registry is up and running. Time alone will tell whether the business community and foreign investors alike will adopt it for their secured transactions.

However, the transplantation of the Model Law was only partial, occurring to the extent that the policies underlying the legal provisions corresponded with the choices made by the recipient country and the wishes of interest groups in Poland. This 'pick-and-mix' exercise is fascinating for what it tells us about the future of the legal systems of countries in transition, and also the legal systems of the West. English law, for example, has a lot to learn about reform of the law of secured transactions. Basically, England and Wales lack a statutory system for determining priorities as linked to the date of registration: the system is complex and in some respects unclear. Fundamental reforms were put forward in 1989 by Professor Diamond in his report on Security Interests in Property, commissioned by the Department of Trade and Industry.[56] Yet these reforms have not come to pass, largely because of inertia and the comfort and familiarity of the status quo. Witnessing a state which is undergoing the process of reform can only be beneficial to the lawyer seeking to understand how his own legal system could be improved. Finally, since the transplantation of Western legal institutions and rules to former socialist countries is dependent on their economic policy and political climate, we must depart from the conventional *division* of legal families between common law and civil law (and before socialist law)

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[54] See for another example the concept of trust in Russia, where the simple transplant of the Anglo-American concept has been rejected in favour of 'a construct which is in effect *sui generis*, in order to accommodate a commercial arrangement peculiar to post-communism transition'. Elspeth Reid, 'The Law of Trusts in Russia' (1998) 24 *Review of Central and Eastern European Law* 43, at 56.

[55] A TV programme co-produced by IRIS and Polish TV Channel ONE was aired on prime-time evening TV on 6 June 1996. The programme, called 'How to Make Money out of Bankruptcy', dramatized the way in which the former provisions on secured transactions enabled dishonest businessmen to use the same collateral at numerous banks while moving it from one bankrupt company to another. The 45 minute drama was followed by a talk show in which Polish experts responded to questions by the host. An estimated two million persons watched the programme.

[56] Professor A.L. Diamond, *A Review of Security Interests in Property* (DTI, HMSO, London, 1989). The report recommended the adoption of a new law on security interests, based on the US UCC, Art. 9, to replace the multitude of different existing rules and the introduction of a comprehensive register of security interests to replace the existing register of company charges. The parallel with what took place in Poland is striking.

on which comparative law is currently based. Instead, we should recognize that the two families experience 'converging flows' between one another. 'New models, by which post-socialist law reforms are inspired are not *only* definable as continental models, since they are also models borrowed from the EU, the uniform law and the Anglo-American experience'.[57] This is a perhaps more profound reason why we should pay close attention to the legal reforms taking place in economies in transition, both during and after transplantation, as part of the construction of a new and genuine Pan-Europe.

[57] Ajani, *supra* note 9, at 116.