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LEGAL CHANGE AND THE ROLE OF THE SCHOLAR: SCRATCHING BENEATH THE SURFACE OF COMPARATIVE TAXONOMIES[1]

Abstract

Both the classical theory of legal families and its more modern articulations place East European jurisdictions in the same box because they give precedence to their common socialist experience. Not only do they serve as distorting mirrors propelling stereotypes, but also they close off promising avenues of comparative research because of the politically tainted pre-understanding(s) of legal systems which they impose. This article argues that legal change is frequently facilitated by small groups of individuals who are often scholars. By paying closer attention to their role and incentives as well as the networks to which they belonged, we may see traditional categories realign and gain a more in-depth understanding of the patterns of legal change – namely, the intricate ways in which law evolves – and uncover little-known but important relationships between legal systems which comparative taxonomies either ignore or fail to explain. The article illustrates its argument by zooming in on the role of three scholars – Lyuben Dikov, Filippo Vassalli, and Karl Llewellyn – who may hold the key to explaining interesting, but unexpected similarities between Bulgarian, Italian, and US law.

[1] Special thanks should be given to Lucinda Miller and Jan Rudnicki for their precious comments and suggestions on an earlier draft; A version of this article was presented at the Annual Conference of the Irish Society of Comparative Law held at NUI Galway in May 2016.

KEYWORDS

role of the scholar, legal change, patterns of legal change, comparative taxonomies, legal families, legal history, socialist law, Bulgarian Law of Obligations and Contracts, Italian Civil Code, Uniform Commercial Code, Lyuben Dikov, Filippo Vassalli, Karl Llewellyn

SŁOWA KLUCZOWE

rola naukowca, zmiany prawne, wzorce zmian prawnych, taksonomie porównawcze, rodziny prawne, historia prawa, prawo socjalistyczne, bułgarskie prawo zobowiązań i umów, włoski kodeks cywilny, jeditionolity kodeks handlowy, Lyuben Dikov, Filippo Vassalli, Karl Llewellyn

INTRODUCTION

Taxonomy is often viewed as "a means to enrich our comparative understanding of legal systems".[2] Contemporary treatises on comparative law usually include a section on "…classification where the big legal families or legal systems of the world are with varying volume descriptively introduced".[3] Research manuals in the field habitually discuss the implications and uses of nomenclature.[4] To this end, Professor Jaakko Husa has summarised the advantages of groupings as follows:

> Legal families clarify the chaos of understanding an unfamiliar world by means of pre-structuring or offering specific "pre-understanding"… With the aid of legal families, comparatists can comprehend through analysis a legal system that they encounter for the first time or with which they are completely unfamiliar.[5]

The prevailing taxonomy which continues to haunt not only the teaching of comparative law, but also research in the discipline is the theory of legal fami-

[2] Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 American Journal of Comparative Law 5, 8.

[3] Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015) 283.

[4] See, for instance, Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Reinhard Zimmermann and Mathias Reimann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 442-474; Esin Örücü, 'A General View of "Legal Families" and of "Mixing Systems"' in Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook* (Hart Publishing 2007) 169-189.

[5] Jaakko Husa, 'Legal Families and Research in Comparative Law' (2001) 3 Global Jurist Advances 1, 4.

lies, which is primarily associated with the writings of René David, on the one hand, and Konrad Zweigert and Hein Kötz, on the other.[6] The theory of legal families, which flourished during the Cold War, is a conceptual device which is used to group jurisdictions together based on presumed similarities.[7] David divided legal systems into the Romano-Germanic, the Common Law, the Socialist Law, and the Religious Law.[8] Zweigert and Kötz categorised legal systems as Romanistic, Germanic, Common Law, Nordic, Socialist, Far Eastern, and Hindu.[9] In other words, during the Cold War, East European jurisdictions found themselves together in the same socialist box because these authors seem to have given precedence to the role of ideology.

After the end of the Cold War, the classical theory of legal families started losing appeal. A new generation of Western comparative lawyers put forward diverse new taxonomies. For example, Mattei developed his 'three patterns of law' scheme which includes the rule of professional law, the rule of political law, and the rule of traditional law.[10] Sadly, instead of treating the Cold War as an occasion to dispel stereotypes and correct some Western misconceptions, many East European scholars continued to propel them. 'How Should the Legal Systems of Eastern Europe Be Classified Today?', asked Kelemen and Fekete a few years ago.[11] While their work has merits in summarising and analysing various typologies that both East and West European academics have advanced, their query seems to be a classic example of a 'loaded question'[12] – why should we assume that East European systems belong together in the same group today just because they experienced socialism, to begin with? Notwithstanding the fact that socialist ideology permeated different countries to a different degree, especially the satellite states of the Soviet Union, is it not simplistic to assume that the legal cultures that developed prior to the Cold War completely drowned during socialism?

Because of the temptation to group former-communist states together, other East European scholars have fallen into the trap of inductive reasoning. Uzelac, for instance, was tempted to sketch 'fundamental features' of the socialist system

[6] René David, *Les grands systèmes de droit contemporains* (Dalloz 1964); Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr Siebeck 1969).

[7] David's initial taxonomy was solely based on ideology. Subsequently, he added other criteria such as legal techniques. Zweigert and Kötz built their classification on ideology, history, legal sources, etc.

[8] David (n 6).

[9] Zweigert and Kötz (n 6).

[10] Mattei (n 1) 5.

[11] Katalin Kelemen and Balazs Fekete, 'How Should the Legal Systems of Eastern Europe be Classified Today?' (International Conference for the 10th Anniversary of the Institute of Comparative Law, Potsdam, 2014).

[12] According to the Collins Dictionary, a 'loaded question' is a 'a question containing a hidden trap or implication'.

based on the Yugoslav experience because, in his view, it was "*safe* to assume that the features of the socialist legal tradition that [he identified] in… former Yugoslavia are rooted even deeper in the other jurisdictions".[13] Assuming that the features that one finds in one's own legal system exist elsewhere, without substantive research into the laws and practices of these legal systems, is already a dangerous endeavour. One example of 'fundamental features' that Uzelac identified was judges' developing strategies to avoid final adjudication.[14] The role of politics in adjudication in Bulgaria, a former-communist country which neighboured Yugoslavia, cannot be denied. However, in Bulgaria, I could not ascertain the phenomenon of endless ping-pong between the first instance and the appeal courts that Uzelac was concerned about and found so characteristic of former-socialist legal systems.

By using Bulgarian law as a gateway, this article argues that to gain a meaningful comparative understanding of legal systems, one seems better off scratching beneath the surface of comparative taxonomies and avoiding the inductive generalisations that they encourage because of the 'pre-understanding(s)' that they impose. Indeed, "speculation… is a rather poor substitute for actual knowledge".[15] While typologies may be helpful, especially to those who begin their journey in comparative law, they may also serve as distorting mirrors propelling stereotypes and biasing research. They may exaggerate, deform, or completely downplay some features of legal systems.

We often forget, for instance, that legal change is induced by individuals, usually scholars, or small groups of individuals – irrespective of the political regime and the dominant ideology to which they have to bow, these people have their own views on how the law should develop. By paying closer attention to the role of these scholars, we may gain a more in-depth understanding of the patterns of legal change – namely, the intricate ways in which law evolves in a particular direction – and uncover little-known but important relationships between legal systems which comparative taxonomies either ignore or fail to explain.

First, this article briefly outlines a paradox which I exposed through earlier work and which comparative taxonomies would struggle to rationalise – namely, that the Bulgarian Law of Obligations and Contracts (LOC) of 1950, which is still in force today, was inspired by the Italian Civil Code (ICC) of 1942. Then, it considers why this enigma was left unnoticed for so long. After that, it demonstrates how examining the biographies and opinions of three scholars may provide insights into the development of the law and expose barely visible, but interesting relationships between three legal systems, which, according to mainstream

[13] Alan Uzelac, 'Survival of the Third Legal Tradition?' (2010) 49 Supreme Court Law Review (2d) 377, 381 (emphasis mine).

[14] *Ibid* 383-387.

[15] Michele Graziadei, 'Comparative Law, Legal History, and the Holistic Approach to Legal Cultures' (1999) 7 Zeitschrift für Europäisches Privatrecht 531, 535.

comparative taxonomies, have little in common – Bulgaria, Italy, and the United States (US).[16]

1. A PARADOX

In prior work, I have described my long, tumultuous journey of looking for answers to simple questions pertaining to the current Bulgarian LOC – who wrote it and where was it inspired from?[17] Due to years of censorship and communist propaganda, contemporary Bulgarian scholarship spreads myths that the LOC is an original Bulgarian creation following classical Romano-Germanic solutions. Through archival and comparative research, however, I have demonstrated that the LOC is a creative compilation which is heavily based on the relevant sections on obligations (Book IV) of the ICC of 1942.[18] The communist drafters seem to have worked with the original, 'fascist' version of the Italian code.

Many provisions were copied verbatim or almost verbatim – those infused with fascist ideology were cosmetically infused with communist ideology.[19] An illustration is provided by Article 1322 of the original 1942 ICC which stipulated:

> Parties are free to determine the content of the contract within the limits imposed by law and by corporate rules…

Article 9 of the original 1950 LOC stated:

> Parties may freely determine the content of their agreement as long as it does not contravene the law, the people's economic plan, and the rules of socialist coexistence.

For clarity, it should also be noted that 'corporate' in this context refers to Italian corporatism, the ideology that dominated fascist thought in Italy. One can quickly see that the drafting work here was almost mechanical – the 'corporate rules' were replaced with 'the rules of socialist coexistence'.

The close relationship between the LOC and the ICC is a paradox for multiple reasons. First, while Italian and Bulgarian law are closely related, the classical theory of legal families placed them in different families – respectively, the Romanistic and the Socialist groups. Second, a country claiming to develop communist legislation post-1944 sought inspiration in the jurisdiction of a rival ide-

[16] The classical theory of legal families places them in three distinct groups – Socialist Law, Romanistic Law, and Anglo-Saxon Law.

[17] Radosveta Vassileva, 'Shattering Myths: The Curious History of the Bulgarian Law of Obligations' (2019) 82 Studia Iuridica 309-27.

[18] *Ibid.*

[19] For concrete examples, see Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Intersentia 2022) 46-47, 54-55, 62, 64-65, 67, 70-71, 77-79, 82, 85, 88, 100, 103, 114-115, 131-132, 143.

ology (fascism). Third, with minor amendments, both the LOC and the ICC are still in force today and purport to cater to the needs of a market economy. Yet, Bulgarian and Italian law are still placed in different groups by modern comparative taxonomies.

2. DELVING INTO THE PARADOX: STUBBORN POLITICAL TAINTS

Understanding why the striking similarity between the LOC and Book IV of the ICC went unnoticed for so long may provide food for thought about how politicised comparative taxonomies may be. Yet, it is also an occasion to consider how under-researched patterns of legal change are.

2.1 THE POWER OF PROPAGANDA

As argued in earlier work, Bulgaria's Communist Party deliberately lied about the origin and authorship of the LOC – it claimed that it was inspired by the Soviet Civil Code of 1922 and attributed the drafting to a collaboration between experts and representatives of the working class.[20] Not only did Bulgarian communist scholarship propagate this legend, but also it demonstrated commitment to stressing how different socialist law was from the civil laws of Western jurisdictions. Bulgarian authors dismissively referred to Western civil law as 'bourgeois law' to make the divide between West European and East European laws appear more profound.

Academics maintained that socialist civil law and bourgeois law were built on completely different premises.[21] Considering the striking similarities between the Bulgarian and the Italian law of obligations, nonetheless, this view is partly misleading. Bulgaria's socialist law of obligations was not *built* on different premises – rather, the same rules, which existed in Italy, were *applied* vis-à-vis different premises (socialist ideology) and in a different context. This does not make the rules themselves socialist in nature all the more that many of them are technical – for instance, one can hardly see politics behind the rule that in case of non-performance, the promisee can demand specific performance (Article 79 of the LOC).

[20] Vassileva (n 17).

[21] Vitali Tadjer, *Civil Law of People's Republic of Bulgaria: General Part. Section 1* (Nauka i izkustvo 1972) 31.

Meanwhile, many Western authors took claims by scholars from socialist countries about the uniqueness of socialist law at face value. Some authors began questioning such claims relatively late – one of them is Quigley who argued that socialist law had distinctive features, but it was still part of the continental tradition.[22] Furthermore, the fact that leading authorities in the Cold War era, such as Zweigert and Kötz, encouraged scholars to compare either mother legal systems with other mother systems or mother legal systems with their daughters[23] put an additional halt to substantive research that would have exposed connections, such as the Bulgarian-Italian one.

Overall, the agenda of the Bulgarian Communist Party and its faithful socialist scholars to present socialist law as fundamentally different, coupled with the willingness of Western scholars to see socialist law as profoundly different because of the clashes between political ideologies, helped hide the relationship between the Bulgarian and the Italian law of obligations for decades. In itself, this shows how politicised comparative taxonomies are – not only do they offer biased 'pre-understandings', but also they taint research.

2.2 BEYOND POLITICAL TAINTS

In addition to seeking the reasons why the paradox outlined above remained unnoticed for so long, it seems important to analyse why the drafters of the LOC chose to work with the ICC to begin with. While it is difficult to give a definite answer, one may pinpoint different factors that could have underpinned this development.

First, the original version of the 1942 ICC reflected the strong accent on the productivity of the enterprise, economic solidarity, and the superior interest of the nation, which were features of the Italian fascist notion of contract.[24] These values of the Italian code must have appealed to LOC's authors who were drafting a law that had to be compliant with communist ideology. In fact, in retrospect, one can draw parallels between fascist and communist views on commerce, which may explain some similarities in contractual values and the role that was attributed to contract: a) in communism, the economy is planned; similarly, in fascism, there are production targets; b) fascism claims to promote economic solidarity and equality similarly to communism; c) in both ideologies, the interests of the state is more important than the interests of individuals. That is why, with regard

[22] John Quigley, 'Socialist Law and the Civil Tradition' (1989) 37 American Journal of Comparative Law 781, 808.

[23] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edition, Clarendon Press 1998) 41.

[24] Pier Giuseppe Monateri and Alessandro Somma, 'The Fascist Theory of Contract: A Comparative and Historical Inquiry into the Darker Side of Contract Law' (2009) Cardozo Electronic Law Bulletin 1, 10, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1347692.

to the ideological provisions, all the drafters had to do was to alter the terminology to pretend compliance with socialist ideology – they did not have to alter the function of these rules.

Second, Italy and Bulgaria engaged in vibrant intellectual dialogue prior to communism – clearly, this important cultural connection could not disappear overnight. Since the re-establishment of the Bulgarian State in 1878, Italy was among the jurisdictions that Bulgarian jurists looked into for inspiration.[25] The first Bulgarian LOC of 1892 closely followed the section on obligations of the 1865 ICC. Italian literature was translated into Bulgarian. Italian professors were invited for guest lectures in Bulgaria. In fact, one of the leading Bulgarian scholars in private and commercial law, Lyuben Dikov, published an article on the merits of the 1942 ICC.[26] There are serious grounds to believe that the Bulgarian 1950 LOC was drafted by members of his intellectual circle – Ivan Apostolov, Aleksander Kozhuharov and Lyuben Vassilev. It is known that Apostolov was fluent in Italian, so they could have worked with ICC's original version.[27]

Third, from a contemporary perspective, one may argue that Apostolov, Kozhuharov, and Vassilev's over-reliance on the ICC was a hidden form of rebellion. The drafters were not eager to develop heavily ideologised law. With regard to the ICC, Merryman had stressed:

> The more substantial part of the governmental program of revision was not Fascist in origin. It consisted of a desire to reform the private law in the interests of increased national production, more adequate distribution of wealth, and greater social justice, all to be achieved through expansion of the role of the state. This was not a purely Italian tendency…[28]

Indeed, because the heavily ideological provisions in the ICC were relatively few, it was not difficult to defascise the code after the fall of Benito Mussolini from power. That is why, the ICC has persisted for so long. This sheds light on why the LOC was quickly decommunised after the fall of the Berlin Wall, too – Bulgaria is one of the few former-communist countries that has not seen a major overhaul of its law of obligations post-1989.

2.3 UNDER-RESEARCHED PATTERNS OF LEGAL CHANGE

The hidden connection between Bulgarian and Italian law is also an occasion to contemplate the extent to which the patterns of legal change are under-re-

[25] On the history of Bulgarian law in the period 1878-1944, see Vassileva (n 19) 43-49.

[26] Lyuben Dikov, 'The New Italian Civil Code' (1942) 37 Annuaire de l'Université de Sofia 57.

[27] Vassileva (n 19) 54.

[28] John Henry Merryman, 'The Italian Style II: Law' (1966) 18 Stanford Law Review 396, 412-413.

searched. In turn, this gap in knowledge hampers our understanding of law development. In his article titled 'Patterns of Legal Change', Mitchell argues:

> We too often make crude assumptions based on limited evidence, which are shown to be mistaken when a wider range of primary sources is considered. These primary sources – such as law reform committee papers, judges' notebooks, and correspondence – show that the way in which legal change comes about is far more complex, subtle, and unpredictable than the official sources would have us believe.[29]

Mitchell further contends:

> Changing law is fundamentally a collaborative activity, which involves a multiplicity of interactions both instantaneous and long term between individuals, institutions, and texts. It is an activity that creatively exploits the tension between formality and informality, and between different systems of discourse. In other words, to get a full picture of the patterns of legal change, we need to imagine networks of communications and interactions between individuals and institutions, extending over time, which create both the conditions for, and the content of, the legal change that we are trying to make sense of.[30]

Of course, one should appreciate that Mitchell is writing about the patterns of legal change in the context of law development in the UK where transparency about the legislative and the adjudicative process are held in high regard. In countries like Bulgaria which have experienced a totalitarian regime, censorship and propaganda have created an environment in which one cannot trust primary sources, especially those from communism.[31] Needless to say, judicial notebooks are not accessible.

Yet, what Mitchell says may still be relevant to understanding why Bulgaria looked to the West rather than the East when drafting the LOC – legal change, such as the introduction of the 1950 LOC, did not merely occur because the communist regime asked a working committee to draft a new piece of legislation. It is indeed the output of complex interactions between individuals over time. These interactions seem to have been ignored either because of the disconnect between comparative law and legal history[32] or because scholarship is tempted to give precedence to an "ideologically predetermined position that dictates [its] conclusions".[33]

[29] Paul Mitchell, 'Patterns of Legal Change' (2012) 65 Current Legal Problems 177.

[30] *Ibid* 201.

[31] On the role of propaganda, see Vassileva (n 19) 54.

[32] See Graziadei (n 15).

[33] Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 University of Pennsylvania Law Review 1121.

3. ZOOMING IN ON THE ROLE OF THE SCHOLAR

One of the roles of the scholar, which is familiar in many legal systems, but which is often downplayed, is the drafting of legislation. Depending on the context, the role could either be direct or indirect. On the one hand, drafting committees may be composed of scholars. On the other hand, scholars may be invited to consult drafting committees, they may inspire drafters through their academic work, such as treatises and textbooks, etc. An obvious example is how the writings of Robert Joseph Pothier[34] influenced the drafting of the French Civil Code. The French Civil Code was drafted by a commission of four jurists – Tronchet, Bigot-Préameneau, Portalis, and Maleville.[35] Yet, the person who is often referred to as 'the father' of the code is indeed Pothier: it has been asserted that "there is relatively little in the [code] that was not acceptable to or even drawn from Pothier".[36]

In this light, it is important to note that scholars do not work in a vacuum – they are part of intellectual networks, they maintain workplace friendships, and they exchange ideas with others overtly or in secret. A recent article, for instance, reveals an interesting connection largely unknown to contemporary Bulgarian scholars – Aleksander Kozhuharov and Ivan Apostolov, who I suspect are among the drafters of the LOC, maintained friendships with the famous Italian Professor Rodolfo Sacco during communism.[37] Arguably, even in a totalitarian regime, the intricate relationship between the Bulgarian and the Italian legal culture, developed primarily after the Bulgarian Liberation of 1878, could not be completely suffocated.

Having the above in mind, it seems that by learning more about the backgrounds and intellectual interests of those who brought about or inspired legal change, one may gain a more in-depth understanding of the patterns of legal change. Moreover, what scholars say they do as legislators in explanatory memoranda, especially in a totalitarian regime, may not reveal their true incentives. One may need to look at more unlikely places and read between the lines.

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[34] Robert Joseph Pothier, *Traité des obligations* (Paris 1761).

[35] OF Robinson, TD Fergus, William M Gordon, *European Legal History* (3rd edition, Butterworths 2000) 264.

[36] *Ibid* 265.

[37] Vasil Gotsev, 'La diffusion du droit italien en Bulgarie' in *Annuario di diritto comparato e di studi legislative* (Edizioni scientifiche italiane 2014) 492.

4. A CASE STUDY: SCHOLARS OF THEIR TIME OR SCHOLARS WHO SHAPED THEIR TIME?

Below we take a closer look at three scholars who have exerted a palpable, long-lasting influence in their own jurisdictions – Lyuben Dikov, Filippo Vassalli, and Karl Llewellyn. These academics did not just leave an imprint on legal doctrine. Indirectly or directly, they influenced notable pieces of legislation – respectively, the Bulgarian 1950 LOC, the 1942 ICC, and the Uniform Commercial Code (UCC). The first draft of the latter was put forward in 1949.

Dikov is one of the most prominent Bulgarian scholars prior to communism who was advocating for various innovative reforms of Bulgarian private law – as highlighted above, the authors suspected of drafting the LOC are part of Dikov's intellectual circle.[38] Vassalli is considered one of the 'fathers' of the ICC.[39] By Vassalli's own admission, he had written two-thirds of the code.[40] Llewellyn is often referred to as the principal author of the UCC[41] – while the document is 'the product of teamwork', Llewellyn's substantial contributions to its planning and drafting are well known.[42]

As explained below, these scholars interacted with intellectual circles in close proximity. This may shed some light on why they had similar anxieties about the future of law, including the necessity to escape from liberal individualism. It should be briefly clarified that under the influence of this philosophical movement, freedom of contract had become the supreme value of French and English law in the 19th century. As mentioned above, Bulgaria's initial 1892 LOC followed closely the section on obligations in the 1865 ICC which, to a large extent, was a replica of the French Civil Code. The American common law was initially heavily influenced by the English common law.

The intellectual anxieties of these scholars may explain why they advocated for the introduction of similar principles, parting ways with liberal individualism. In other words, there are some surprising but not accidental connections between Bulgarian, Italian, and US law, which often find themselves in different, supposedly unrelated groups in comparative taxonomies.

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[38] On the intellectual life in legal academia prior to communism and the subsequent purges, see Petko Venedikov, *Memories* (2nd edition, Sibi 2018).

[39] On his biography, see Giovanni Chiodi, 'Filippo Vassalli' in *Enciclopedia italiana di scienze, lettere ed arti. Il contributo italiano alla storia del pensiero – Diritto* (Treccani 2012) 563-567.

[40] *Ibid.*

[41] William Twining, *Karl Llewellyn and the Realist Movement* (2nd edition, Cambridge University Press 2012) 271.

[42] *Ibid* 300.

4.1. INTELLECTUAL MILIEUS IN CLOSE PROXIMITY

Dikov, Vassalli, and Llewellyn belonged to the same generation – they were born, respectively, in 1895, 1885, and 1893. Dikov was the key authority in commercial and civil law in Bulgaria in the 1920s and 1930s and even served as the Dean of the Law Faculty of Sofia University, the most important law faculty in Bulgaria. Vassalli was a leading authority in civil law who served as the Dean of the Law Faculty at 'La Sapienza' University in Rome, one of the best law faculties in Italy. Llewellyn is one of the fathers of American legal realism who taught at the Columbia Law School and, subsequently, at the University of Chicago Law School.

What is even more interesting, however, is that the three of them seem to have exchanged ideas with intellectual circles in close proximity. Dikov was well acquainted with German scholarly writing. He defended his PhD in law at the University of Göttingen in 1922.[43] He followed and analysed the developments in German law with great interest even after his return to Bulgaria.[44] Dikov also maintained a close relationship with Italian scholars – he published articles in *Rivista internazionale di filosofia del diritto*,[45] which was edited by Giorgio del Vecchio, a leading authority at 'La Sapienza' University in Rome.

In turn, in 1930 Vassalli was appointed as a professor at the University of Rome after an impressive career at other faculties.[46] He had actively been working on drafting Italian legislation since 1918.[47] As visible from the sources he cites in his work and as accounted by contemporary Italian scholarship, he was well acquainted with German literature.[48] It should be noted that Vassalli was involved in the work of the International Institute for the Unification of Law (UNIDROIT) in Rome.[49]

Llewellyn, on the other hand, was a visiting professor in Leipzig for two academic years – 1928-1929 and 1930-1931 during which he immersed himself in the writings of German scholars.[50] He befriended Ernst Rabel who invited him to

[43] *Das Institut des Strohmannes (die vorgeschobene Person) im bürgerlichen Rechte* (Doctoral Thesis, Göttingen 1922).

[44] See Lyuben Dikov and Julius Wilhelm Hedemann, *Die Neugestaltung des deutschen bürgerlichen Rechts* (Duncker & Humblot 1937); Lyuben Dikov, 'Die Abänderung von Verträgen den Richter' in *Hedemann-Festschrift* (Jena 1938).

[45] 'Il Diritto civile dell'avvenire' (1931) 11 Rivista internazionale di filosofia del diritto 153-180; 'Norma giuridica e volontà privata' (1934) 14 Rivista internazionale di filosofia del diritto 681-706.

[46] Chiodi, 'Filippo Vassalli' (n 39).

[47] *Ibid.*

[48] *Ibid.*

[49] See *Unification du Droit. Volume II* (Unidroit 1951) 41-56; *Unification du Droit. Volume III* (Unidroit 1954) 18.

[50] Michael Ansaldi, 'The German Llewellyn' (1992) 58 Brooklyn Law Review 705, 710-717.

a meeting of the UNIDROIT Institute in 1932 to discuss the project of creating common principles of international sales law.[51]

Mentioning these intellectual milieus seems important. Dikov, Vassalli, and Llewellyn were certainly confronted with different political realities in their own countries. However, as we will see below, they had an interest in similar topics and shared analogous concerns about the future of law. Maybe they were simply scholars of their time pondering similar issues? Or, maybe these intellectual exchanges paved the way for them to become scholars who shaped the time in their home jurisdiction?

To prevent political speculations, it should be stressed that in totalitarian regimes scholars often bow to the regime to survive in their field – in both Bulgaria and Italy there were purges. However, academics may rebel in subtle ways. With regard to Vassalli, for instance, it is known that he resisted some aspects of the fascist ideology even when drafting the ICC – he completely denounced fascism afterwards.[52] The same phenomenon was observed in Bulgaria post-1989 – those who bowed to the communist regime and criticised 'bourgeois scholarship' quickly altered their views.[53]

4.2 SIMILAR ANXIETIES ABOUT THE FUTURE OF LAW

Dikov, Llewellyn, and Vassalli shared similar concerns about the direction which law development had to take, including the necessity to part ways with liberal individualism in view of a new reality of mass production. The three of them were keen on providing judges with more flexibility, so that they could advance the law in view of the concrete circumstances that they confronted.

4.2.1 CONTRACT AS PART OF A GREATER WHOLE

It is noteworthy that Dikov, Llewellyn, and Vassalli envisioned a contract as much more than an agreement/promise between parties – to this end, they studied the complex relationship between the whole (society), individuals, and contracts.

Dikov relied heavily on organic social theory, which views society as preceding the individual in stark contrast to the premises of liberal individualism, to criticise the French Civil Code whose rules on obligations Bulgaria had initially borrowed in the 1892 LOC through the 1865 ICC.[54] He argued that people were

[51] See Peter Winship, 'Karl Llewellyn in Rome' (1998) 3 Uniform Law Review 725-738.

[52] Chiodi (n 39).

[53] Vassileva (n 19) 50-51.

[54] See Lyuben Dikov, 'The Evolution of Contract' (1938) 33 Annuaire de l'Université de Sofia 437. See also Lyuben Dikov and Julius Wilhelm Hedemann, *Die Neugestaltung des deutschen bürgerlichen Rechts* (Duncker & Humblot 1937); Dikov, 'Die Abänderung von Verträgen den Richter' (n 44); See also Radosveta Vassileva, 'Contract Law and the Social Contract: Rethinking

dependent on each other just like the cells of an organism – thus contract was a legal relationship which could only exist within an organism and had to be beneficial for the entire organism (the whole).[55] When considering the relationship between law and morality in view of the French Civil Code and respectively the 1892 LOC, Dikov asserted:

> The liberal individualism of our… private law… proclaims… a formal equality and freedom of labour, which allow the economically stronger party to impose its will on those who are free not to agree only if they are ready to die of hunger… Our law, heavily influenced by 18th century philosophy, is incapable of soothing social tension… We need law which resolves social problems…[56]

In his work, he contended that the French Civil Code could not serve as 'a model for future civil law'[57] and that scholars had to think of a new model, which, for him, had to be based on organic social theory.[58]

Vassalli's criticism of liberal individualism was much subtler. In a famous essay,[59] he explicitly admitted that he would not waste time to 'attack' individualism. Yet, ironically, he did. He clarified that such an attack was not necessary because scholars like Duguit had already recommended a "deeper consideration for the social element, and above all, the problems affecting the working masses".[60] He also stressed that "social realities are transformed into judicial realities" which give 'character' to legal rules.[61] In a subsequent article dedicated to the motivation behind the 1942 ICC, he explicitly stated that one of the achievements of the document was to establish an 'organic link' between man and society, thus making a reference to organic social theory.[62]

Finally, Llewellyn shared Dikov's anxiety about the mismatch between the classical liberal individualist model of contract and a modern society characterised by industrialisation and new forms of relationships. He explored the connection between law and social sciences, including sociology, also with the purpose

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Law Reform in the Field of Contract Law from the Perspective of Social Contract Theory' (2016) 11-III Pravni život 267-286.

[55] Dikov, 'The Evolution of Contract' (n 54) 446.

[56] Lyuben Dikov, *Morality and Law* (Imprimerie de la Cour 1934) 15-16.

[57] Dikov, 'Il Diritto civile dell'avvenire' (n 45) 164.

[58] *Ibid* 160-180.

[59] Filippo Vassalli, 'Arte e vita nel diritto civile' in *Studi Giuridici. Vol. 2* (Foro Italiano 1939) 450.

[60] Vassalli, 'Arte e vita nel diritto civile' (n 59) 451; Duguit was part of a movement along with Gény and Gounot advocating for contractual solidarity. On the social values of French law, see Delphine Sassolas, 'Les valeurs sociales et le Code civil' in Geneviève Pignarre (ed), *Le droit des obligations d'un siècle à l'autre* (Institut Universitaire Varenne 2016) 109-121.

[61] Vassalli, 'Arte e vita nel diritto civile' (n 59) 443.

[62] Filippo Vassalli, 'Motivi e caratteri della codificazione civile' in *Studi Giuridici. Volume III* (Giuffrè 1960) 615.

of defining the role of contract in society.[63] In 'What Price Contract? – An Essay in Perspective', an article published in the same year as Dikov's 'Il Diritto civile dell'avvenire' (cited above), Llewellyn highlights:

> Rules, technicalities, systematizations gain meaning… when their fragile beauty is seen – though imperfectly against the rich background of the Great Society.[64]

He further asserts:

> Contract is of course not outside of, but a part of, anything that can be denominated "society". The question is: what part does it play in the whole; and what effects flow from the part being played in that particular way.[65]

His account seems to end on a rather negative note – to him, the "realization of how far a law still built in the ideology of Adam Smith has been meshed into the new order of mass-production, mass-relationships" is "overwhelming".[66] Yet, contract lawyers hold the key to readjustment.[67]

4.2.2 THE ROLE OF THE JUDGE

Beyond the evolving relationship between society and contract law, Dikov, Vassalli, and Llewellyn were concerned about the nature of the rules of law and the essence of adjudication.

Dikov argued for an instrumental approach towards legal rules. He contended that if a given rule led to unsatisfactory results which were not known or were not well thought out by the legislator, the judge should have the freedom to adjust the rule.[68] He pondered the question of legal certainty, too. Dikov distinguished between static and dynamic certainty – in his view, the former implied that the law should be predictable while the latter suggested that judges should reach just outcomes. He contended that both types were necessary in a legal system and should not be seen in opposition.[69]

In a more subtle manner, Vassalli also advocated for flexibility and consideration of the facts:

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[63] See, for instance, Karl Llewellyn, 'What Price Contract? – An Essay in Perspective' (1931) 40 Yale Law Journal 704; Karl Llewellyn, 'Law and the Social Sciences—Especially Sociology' (1949) 62 Harvard Law Review 1286; Dikov, 'Il Diritto civile dell'avvenire' (n 45); Dikov, 'Norma giuridica e volontà privata' (n 44).

[64] Llewellyn, 'What Price Contract? – An Essay in Perspective' (n 63) 707.

[65] *Ibid* 716.

[66] *Ibid* 751.

[67] *Ibid.*

[68] Lyuben Dikov, 'The Essence of Adjudication' in *The Modification of Contracts by the Judge* (first published 1923, Feneya 2010) 144.

[69] See Lyuben Dikov, 'The Social Equilibrium. "Static" and "Dynamic" Law' (1939) 34 Annuaire de l'Université de Sofia 1-21.

> …a legal rule is not valuable by itself but for the literature and jurisprudence which promotes it: a civil code is just a point of departure for further development of [legal] thought.[70]

He was particularly opposed to explicitly stipulating general principles of civil law in the ICC:

> …the general principles of law go beyond the limits of a certain positive law… what matters is the recognition of their validity over time, space...[71]

Finally, Llewellyn was sceptical of legal formalism and advocated for a case-by-case approach[72] – an attitude towards adjudication, which broadly characterises the American legal realist movement.[73] He contended:

> We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet.[74]

Similarly to Dikov, he was also concerned about the 'illusion' of legal certainty:

> Rules guide, though they do not control, decision. The rule of the case or the code does lay its hand upon the future, though one finger or several may slip or shift position.[75]

Overall, in different contexts, the three scholars were frustrated by the straight jacket of legal rules and insisted on the necessity for just outcomes in view of the facts and the stage of development of society. This stance seems in line with the view that contract is part of a greater whole rather than a mere agreement between contracting parties.

4.3 ADVOCACY FOR SIMILAR PRINCIPLES AND RULES

Why would the personal backgrounds of scholars and the subject matter that they studied, including their criticism of liberal individualism, their calls to

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[70] Vassalli, 'Motivi e caratteri della codificazione civile' (n 62) 631.

[71] Vassalli, 'Arte e vita nel diritto civile' (n 59) 447.

[72] 'Overwhelming… is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies' in Llewellyn, 'What Price Contract? – An Essay in Perspective' (n 63) 751.

[73] See Kenneth Casebeer, 'Escape from Liberalism: Fact and Value in Karl Llewellyn' [1977] Duke Law Journal 671-703.

[74] Karl Llewellyn, *The Bramble Bush* (Oceana Publications 1951) 12.

[75] Karl Llewellyn, 'Law and the Modern Mind: A Symposium' (1931) 31 Columbia Law Review 82, 90.

reconsider the relationship between contract and society, and their reflections on the role of the judge, be relevant for this discussion?

Below we will see that Dikov, Llewellyn, and Vassalli seem to have promoted similar substantive changes in values, albeit to a different degree and in very different contexts, in the legislation of their jurisdictions. This is important because, prior to these paradigmatic shifts, US, Italian, and Bulgarian law had imbibed, albeit in different ways, the values of liberal individualism. In this light, Dikov, Llewellyn, and Vassalli paved the way to embracing principles which depart from the spirit of liberal individualism and the sacred principle of freedom of contract which dominated the 19th century.

4.3.1 HARDSHIP

To avoid confusion at the start of discussion, it should be clarified that the doctrine of hardship is known under different names – impracticability in the US, supervening onerousness (*onerosità sopravvenuta*) in Italy, economic onerosity (*stopanska neponosimost*) in Bulgaria, *imprévision* in France, etc.

At first glance, it is rather peculiar that the US, Italy, and Bulgaria are among the first countries to codify rules on hardship in contracts – respectively, in the UCC, the 1942 ICC, and Bulgaria's 1950 LOC. In stark contrast, leading continental jurisdictions codified this principle much later. For instance, while German judges are known to be the first ones to address instances of supervening onerous performance by relying on scholarly theories in the aftermath of World War I, a concrete rule made its way to the German Civil Code only after the reform of 2001.[76] Similarly, while the doctrine of *imprévision* appealed to French scholars in the interwar period, it was permanently enshrined into legislation only after the 2016 reform of the French Civil Code.[77]

It is well known that Llewellyn drafted Section 87 of the Revised Sales Act, incorporated as Section 2-615 of the UCC, which recognises impracticability in the contracts of sale.[78] Moreover, it has been pointed out that he used the term impracticability purposefully to distinguish the principle from the common law doctrines of frustration and impossibility and to reflect commercial reality – for him, the widespread use of force majeure clauses evidenced that parties were willing to excuse non-performance when performance had become too burden-

[76] André Janssen and Reiner Schultze, 'Legal Cultures and Legal Transplants in Germany' (2011) 2 European Review of Private Law 225.

[77] Catherine Pédamon, 'The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?' (2017) Amicus Curiae: Journal of the Society for Advanced Legal Studies 10-17.

[78] William Hawkland, 'The Energy Crisis and Section 2-615 of the Uniform Commercial Code' (1974) 79 Commercial Law Journal 75, 77.

some.[79] It should be further noted that English courts seem to reason in the reverse – they encourage parties to distribute risk by themselves in force majeure clauses to enforce freedom of contract.[80] To this day, English judges are reluctant to recognise a doctrine of impracticability.

Vassalli had strong views about the doctrine of hardship, too – recent historical research has shown that he declared that Italy was on its way to embracing the principle of *onerosità sopravvenuta* as early as 1930.[81] While Vassalli believed that legislation enacted *ad hoc* was better placed to address contractual imbalances due to supervening events, he seems to have conceded to a general principle on hardship, as illustrated by Articles 1664 and 1467 of the ICC.[82]

Dikov, on the other hand, consistently argued in favour of embracing the doctrine of economic onerosity in Bulgarian law – in his view, this principle reflected most clearly the transition from liberal individualism to an organic relationship between contract and society.[83] In that light, it is not surprising that Bulgaria enacted a principle (Article 266, paragraph 2 of the LOC) addressing such instances in manufacturing contracts by copying Article 1664 of the ICC of 1942. Bulgaria adopted a general principle on hardship in 1996 (Article 307 of Bulgaria's current Law on Commerce), but it has been argued that Dikov's writings have played a key persuasive role in this regard.[84]

4.3.2 OPEN NORMS

It is certainly interesting that the UCC, the ICC, and the Bulgarian LOC provided judges with more open norms which allow for more flexibility, including a case-by-case approach.

It has been asserted that Llewellyn was "primarily responsible for [UCC's] adoption of a general obligation of good faith".[85] Certainly, this feature readily distinguishes US law from English law – English courts are consistently hostile to the notion of good faith.[86] Furthermore, Llewellyn supported the inclusion of

[79] Jennifer Camero, 'Mission Impracticable: The Impossibility of Commercial Impracticability' (2015) 13 University of New Hampshire Law Review 1, 18-20.

[80] McKendrick emphasises that this approach does not entail 'the danger of becoming involved in making a new contract for the parties or imposing an outcome irrespective of their wishes', Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edition, Oxford University Press 2009) 239.

[81] Giovanni Ferri, *Filippo Vassalli O Il Diritto Civile Come Opera d'Arte* (CEDAM 2002) 58.

[82] *Ibid* 58-62.

[83] See Dikov, 'Norma giuridica e volontà privata' (n 45); Dikov, 'The Evolution of Contract' (n 54); Dikov, 'Die Abänderung von Verträgen den Richter' (n 44).

[84] Vassileva (n 18) 90-93.

[85] Paul MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99 Minnesota Law Review 2051, 2060.

[86] While in *Yam Seng v International Trade Corporation* [2013] EWHC 111, Justice Leggatt recognised such principle albeit with a limited application (only in relational agreements), higher

Section 2-302 on unconscionability in the UCC, which permits the court to avoid a contract or strike out a clause, which results in a contractual imbalance.[87] Once again this approach sits in stark contrast to English law – the English equitable doctrine of unconscionability specifically requires exploitative behaviour and impaired consciousness.[88]

Italian and Bulgarian law also saw the rise of a more palpable role of the principle of good faith. Article 1366 of the ICC explicitly requires that contracts be interpreted in good faith. Article 20 of the LOC, which draws upon the rules of contractual interpretation in the ICC, also introduced good faith as a principle of contractual interpretation to Bulgarian law.[89] This development is notable because good faith was not a principle of contractual interpretation in the original version of the French Civil Code which Italy and Bulgaria had borrowed.[90] The ICC and the LOC also imposed a requirement for negotiations to be conducted in good faith, thus departing from the spirit of the original French Civil Code.[91] In France, such a requirement was introduced only after the 2016 reform of the law of obligations.[92] Italian and Bulgarian law also saw the development of rules promoting the substantive fairness of transactions by giving judges powers to modify contracts under certain conditions. The most powerful example is surely the principle on hardship mentioned above.

Once again, these interesting shifts in contractual values (from prioritising freedom of contract to giving precedence to principles promoting substantive fairness) can be better understood if one considers the role of scholars in advancing legal change. It has been pointed out, for instance, that Vassalli was personally committed to infusing the ICC with the principle of good faith.[93] By contrast, Dikov's views were much more radical – he was convinced that organic social theory had redefined the notion of contract and this in itself gave prerogatives to the judge to promote fairness which could not exist in the framework of liberal individualism.[94] Dikov's students, however, who are suspected of drafting the LOC adopted views which were closer in spirit to Vassalli's convictions – Ivan Apostolov, for instance, was indeed a proponent of giving larger precedence to good faith.[95]

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instances have not shown much sympathy to the idea. See Chris Nillesen, 'Keeping the Faith' (25 March & 1 April 2016) New Law Journal 12-13.

[87] See Arthur Allen Lef, 'Unconscionability and the Code: The Emperor's New Clause' (1967) 115 University of Pennsylvania Law Review 485-559.

[88] *Boustany v Pigott* (1995) 69 P & CR 298, 303.

[89] Vassileva (n 19) 79-81.

[90] See former Articles 1156-1164.

[91] Article 1337 of the ICC; Article 12 of the LOC.

[92] Compare former Article 1134 of the French Civil Code to its current Article 1104.

[93] Chiodi (n 39).

[94] Dikov, 'The Evolution of Contract' (n 54).

[95] See Ivan Apostolov, *The Law of Obligations: General Part* (3rd ed., Bulgarian Academy of Sciences 1990).

5. CONCLUSION

The classical theory of legal families as well as modern attempts for comparative taxonomies traditionally group East European jurisdictions together because they overfocus on their communist experience. The assumptions imposed by these typologies close off promising avenues of comparative studies into East European legal systems. To this day, the patterns of legal change – the intricate ways in which law evolves – are largely under-researched, possibly because of the disconnect between comparative law and legal history and because of the political assumptions which taint comparative law as a discipline.

It is often forgotten that legal change is induced by small groups of individuals who are often scholars. Learning more about their backgrounds, influences, and the intellectual circles to which they belonged and paying more attention to the views they expressed in academic writing may hold the key to a more in-depth understanding of the evolution of the law. Such inquiries may also expose little-known connections between legal systems which, according to comparative taxonomies, have little or even nothing in common.

This article built upon earlier work in which I exposed a paradox – namely, that the Bulgarian LOC of 1950 is heavily inspired by Book IV of the ICC of 1942. It argued that in the same historical period, Bulgarian, Italian, and US law experienced paradigmatic shifts in values, which can be better appreciated if one delves into the biographies and research interests of the scholars who played an important role in facilitating them – Lyuben Dikov, Filippo Vassalli, and Karl Llewellyn. The changes advocated by these scholars illustrate a tendency to bridge the gap between the law and an industrialised society, respectively in three very different political environments, and to ensure the longevity of law by providing judges with mechanisms to adapt to the local commercial reality. While certainly many other scholars have left their marks on these jurisdictions' laws, undeniably one can find noteworthy connections between Llewellyn, Vassalli and Dikov, which provide food for thought for those interested in comparisons, which transcend the stigmas of mainstream comparative taxonomies.

It has been contended that "…the most important and true mission of comparative law and comparative legal studies is to inspire the curious mind, ever searching to understand more".[96] If indeed meaningful understanding is the main goal of these disciplines, future research should attempt to correct simplistic assumptions and generalisations rather than propel them. One may suspect that the connection between Bulgarian, Italian, and US law is not an isolated case – substantive research may showcase the less-known patterns of legal change and shed more light on the decisive role of legal scholars in conditioning the evolution of the law.

[96] Esin Örücü, 'Comparative Motley: Offerings from a Comparative Lawyer' (2022) 2 Critical Analysis of Law 8:2 (2021) 1, 11.

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