Mixtures and Harmonization of Civilian Subtraditions

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Warszawa, 1st March 2017

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I.1. Mixed Legal Systems of Europe

- Historicity of law (Savigny): we can never isolate from the Past

  → understanding the Past!

- Factors shaping our modern Private law:
  - Roman law
  - Canon law
  - Customary law
  - Law Merchant *(lex mercatoria)*
  - Natural law theory

  none of our legal systems has remained ‘pure’ in ist development

- Europe as a Mixed Legal System (Smits)

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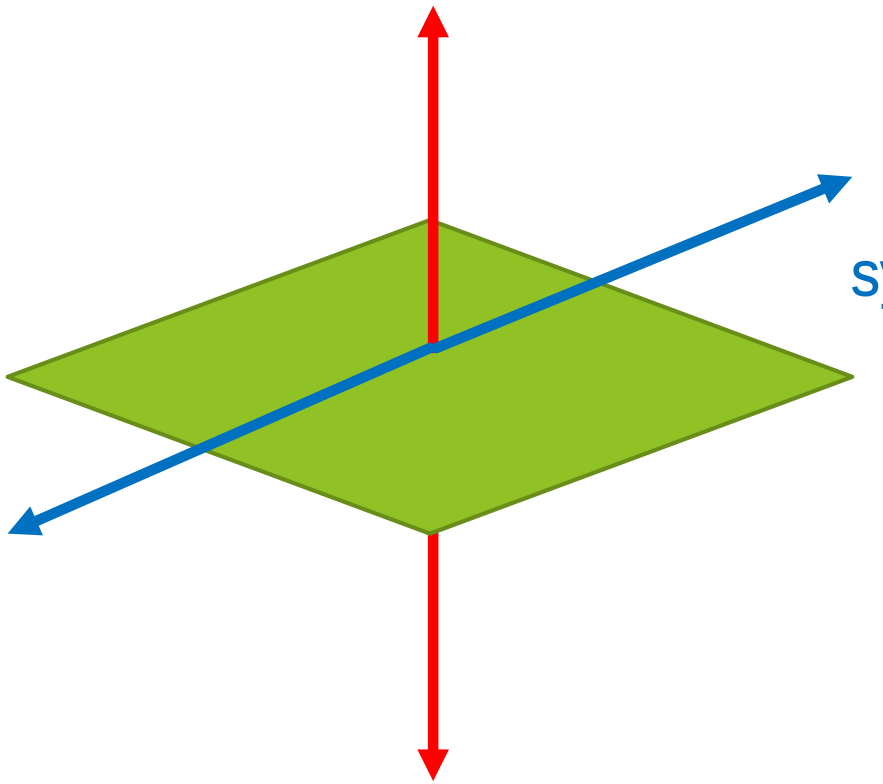
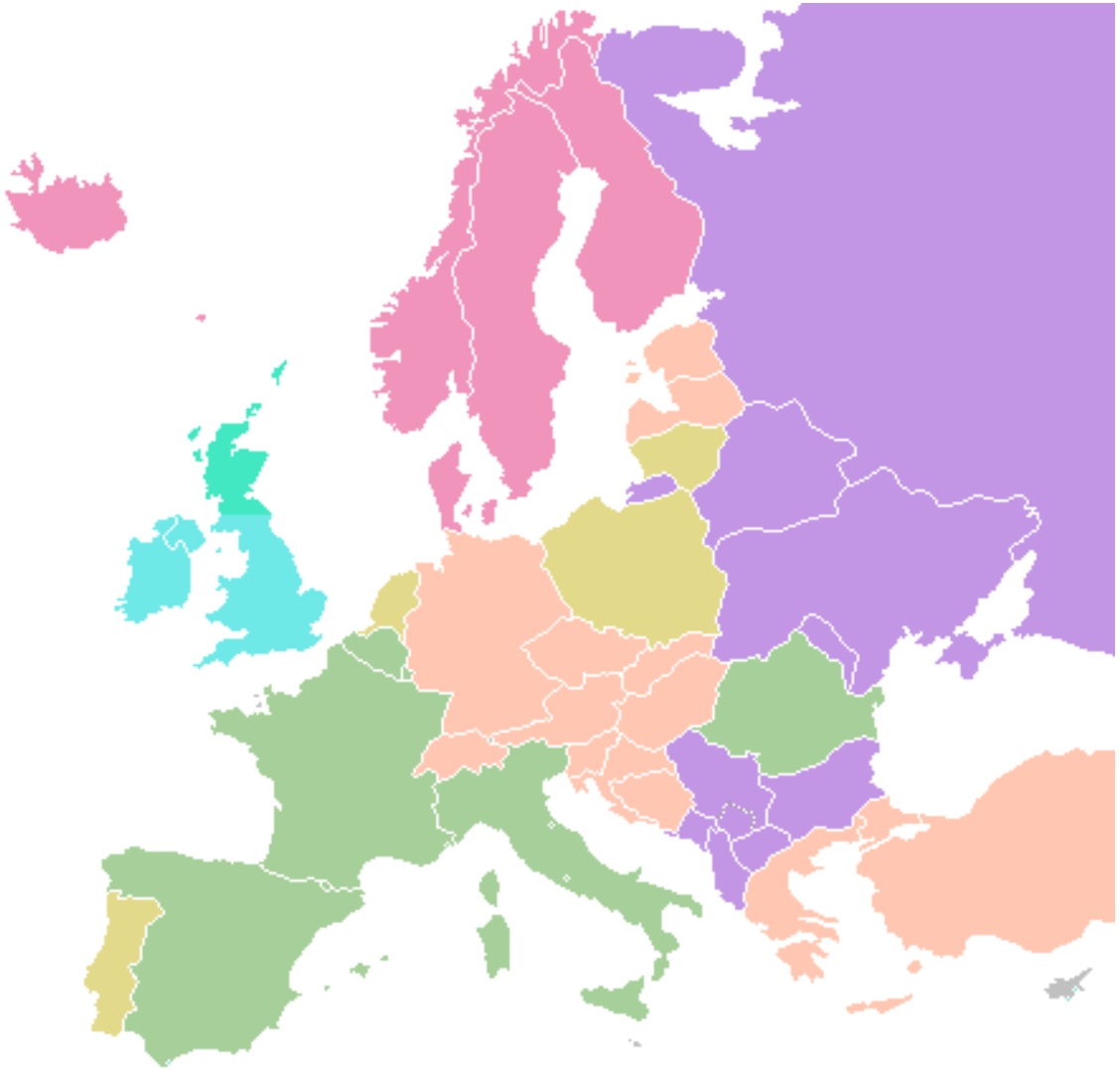
I.2. Multi-axial approach



History involves comparison. Comparison involves history.

I.3. „Geography of Legal Orders”: Macro-comparison



Romanic family

Germanic family

Common law

Nordic law

„mixed legal systems”

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I.4. Micro-comparison. Functional method.

Micro-comparison

- Selection of a legal problem, i.e. objects of the same category,
- dogmatical analysis of foreign legal material (objective approach),
- Comparison, conclusions and (eventually) building of a system (subjective approach).

Functional method(s?)

- Represented mainly by K. Zweigert/H. Kötz, R. Michaels),
- Is not perfect, but noone has ever invented anything better,
  - Adjusted for diversified legal material (especially when terminology and institutions differ),
  - The function is a certain factual situation, practical legal problem to solve,
  - Equivalence of objects of comparison.
- Sometimes heavily criticized (J. Gordley, E. Weinrib, E. Örücü).

I.5. The Rise of Comparative Law

Fundamental questionmarks:

- Is it a scienc or a method (→ plurality of methods)?
- The problem of a proper name: *comparative law, droit comparé, diritto comparato, Rechtsvergleichung*

History of Comparative law as a discipline:

- The rise of legal positivism, strong legal nationalism and comparative legislation in 19th century,
- International Congress of Comparative Law in Paris, the German BGB (1900),
- Unification attempts of the 1900s (Hague conventions) and 1920s:
  - French-Italian Project on the Law of Obligations (1927),
  - UNIDROIT (1928),
- Law Unification in the UN,
- Harmonisation in Europe (1990s-2000s).

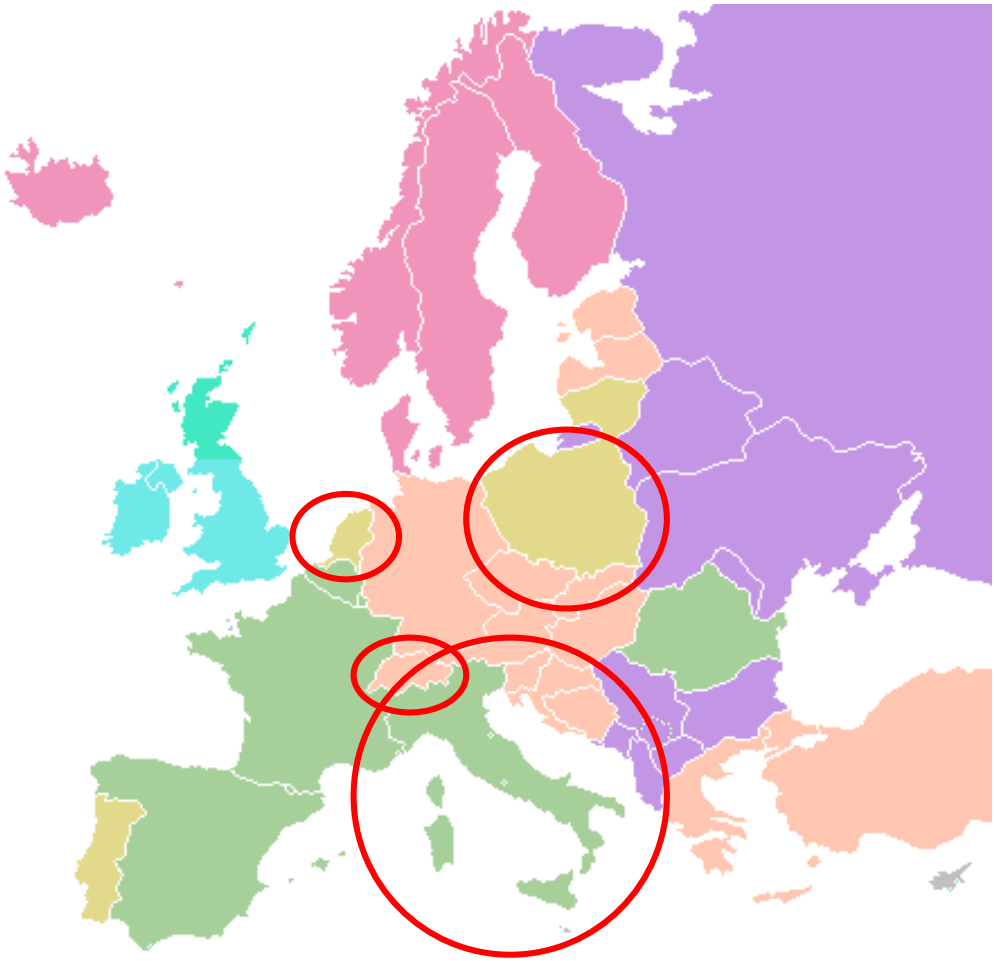
II.1. Harmonisation, Unification and Europeanization of Law

- Restatements of law of the American Law Institute (since 1923),
- EU legislation (since 1957),
- European Court of Justice,
- CISG – Vienna Convetion on the International Sale of Goods (1981),
- Principles of European Contract Law (1995-2000),
- Principles of European Tort Law (1997-1998),
- Principles of European Trust Law (1999),
- Draft Common Frame of Reference (2009).

II.2. Paradoxon of Comparative law

- The more you unify, the less it remains to compare

III.1. Eclectic civil codes of the 20th century



- *Civil Law Tradition*
- *moderni sistemi di civil law tra influenze francesi e tedesche* (A. Gambaro/R. Sacco)

<u>V. Constantinesco/Th. Kadner-Graziano:</u>
„some derived legal systems („Tochterrechte“) *may achieve* ***a level of originality*** *which requires taking them into consideration...”*

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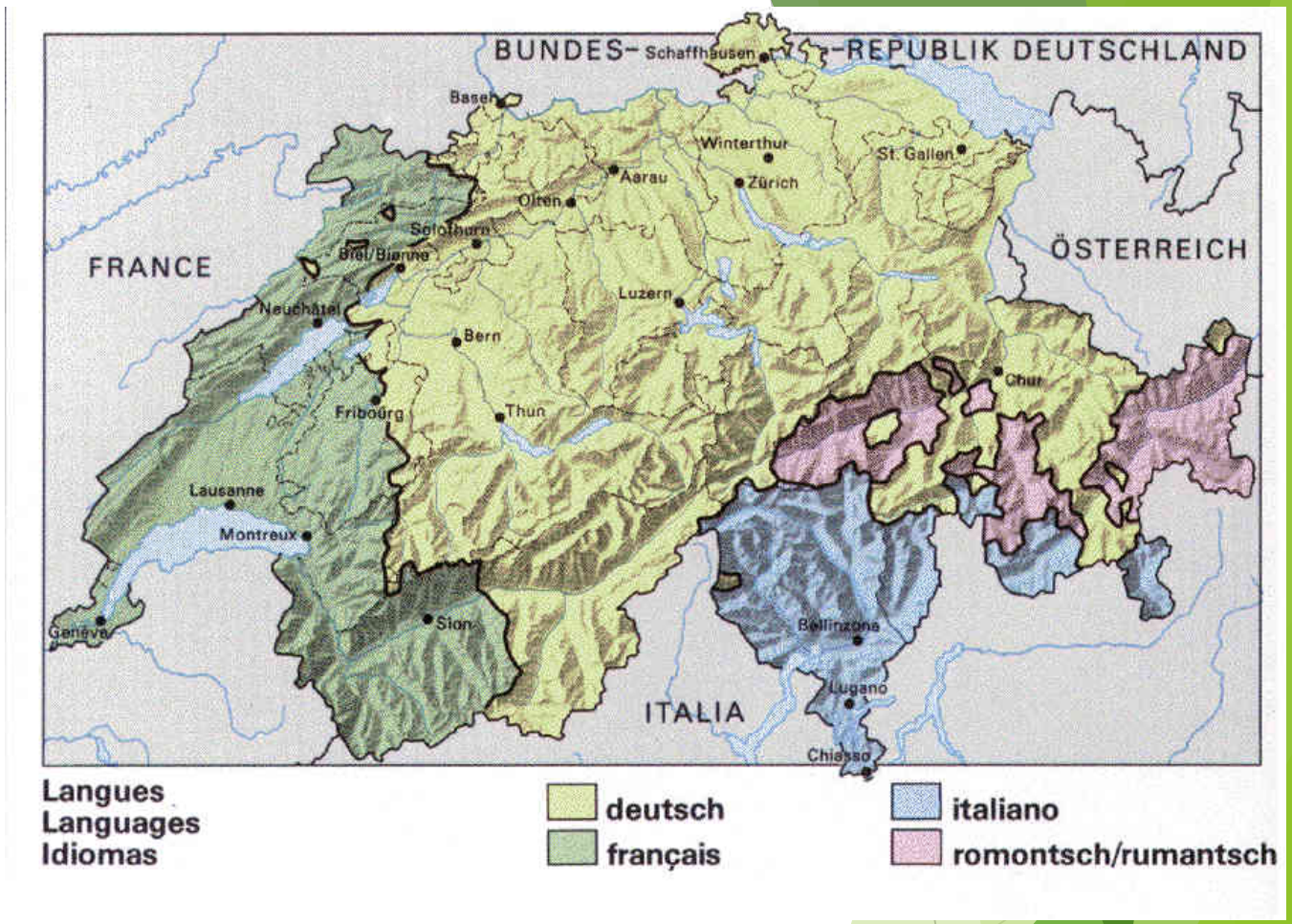
III.2. Swiss Codes

- *Zivilgesetzbuch (ZGB)* of 1907
- *Obligationenrecht (OR)* of 1883 and (new Code of 1911)



Eugen Huber (1849-1923)

- French influence (cantonal civil codes)
- German influence (pandectist legal science)

III.3. Swiss Example: Benefits and risks *(periculum est emptoris)*

Art. 185 OR [1] The benefit and risk of the object pass to the buyer on conclusion of the contract, except where otherwise agreed or dictated by special circumstance.

[2] (…) [3] (…)

Art. 1583 of the French Civil Code of 1804

It is perfect between the parties and the ownership is acquired as of right by the buyer with regard to the seller as soon as they have agreed on the thing and on the price, although the thing has not yet been delivered nor the price paid.

§446 of the German BGB (1900)

The risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the thing sold. From the time of delivery the emoluments of the thing accrue to the buyer and he bears the charges on it. If the buyer is in default of acceptance of delivery, this is equivalent to delivery.

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III.4. Polish law

- 5 legal orders in 1918
  - German BGB
  - French Code civil
  - Russian law
  - Austrian ABGB
  - Hungarian customary law

- Code of Obligations (1933)
- Unification of Private law (1946)

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IV. Conclusions

- Comparative law as a young legal discipline
- Objects of comparison do change in time: ***comparison involves history***
- Macro-comparison: model legal orders (France, Germany, England) and eclectic legal orders (Switzerland, Poland)
- **Comparative paradoxon**: the more we unify, the less there remains to compare

Thank you for your attention

If any question arises, do not hesitate to contact:

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