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Chapter 2

State and Economy in Transformation Revolution by Law in the Central and Eastern European Countries

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Chapter 2

STATE AND ECONOMY IN
TRANSFORMATION

REVOLUTION BY LAW IN THE
CENTRAL AND EASTERN
EUROPEAN COUNTRIES

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I. INTRODUCTION*

1. – Given the historic transformations that have occurred since the late 1980's and changed the world, not to mention the relationship between state and economy in the Central and Eastern European countries, it seemed reasonable to include a new chapter on these developments in the present volume on "State and Economy". This chapter takes up that challenge.

The Detailed Table of Contents shows how comprehensive the treatment had to be in order to cover at least the most important areas and issues.

The method and nature of this chapter therefore are intended to offer a general and more theoretical overview of the main trends of development, rather than a detailed positive-law analysis of the innumerable legal institutions and modalities operating through the current laws and practices of the countries in question.

While looking for the main trends, the laws and other sources are presented with varying intensity both in regards to their subject matter and their emergence in time, depending on how and when their nature expresses the substance of these developments. While this chapter tries to capture the transformation process "as a snapshot of a moment in time", one must see that the whole process is in constant motion. What we see now comes from the past, culminates for us, here, in the present, but

immediately turns into the future, as this present becomes the past.

In conclusion, two additional remarks as to the nature of the developments discussed in this chapter are in order. First, a number of matters may seem to many as foregone conclusions (*Selbstverständlichkeiten* as the German formulation goes), which indeed they well may be in developed market economies. However, they constituted a real revolution in Central and Eastern Europe, especially in countries, where market-economy traditions had faded away almost totally and where no liberalizing reforms had yet "domesticated" the arriving capitalist categories. Given this evaluation, one has to weigh the phenomena discussed not against the foregone conclusions of today, but against the legal and political situation of the past.

Second, this study is meant to present the legal structure and principles as conceived and translated into laws and other state actions. Legal sociology might demonstrate how this structure in fact works on a day-to-day basis. One may claim that the depicted structure represents only an "ought" (*Sollen*) rather than an "is" (*Sein*) state of things. Undoubtedly, the aims and laws discussed in this chapter are far from being implemented everywhere. Nevertheless, the dynamics of the *Sein-und-Sollen* driving forces are at work and are, with all their inevitable problems and setbacks, moving these states and economies forward.

II. THE PROCESS OF TRANSFORMATION

2. *Calls for fundamental change – The general crisis.* – "Europe whole and free is calling for a new beginning. We invite our peoples to join this great endeavour." Although this euphoric joy very soon gave way to various difficulties Europe in general and the former socialist countries in particular have had to face in the intervening years, still this declaration, adopted by the member countries of the Conference on Security and Cooperation in Europe at a special Paris summit in November 1990 expressed an historical defining moment. It expressed a new

beginning: the fundamental transformation of the former socialist countries and the need for great endeavours to help make this a success. No wonder that the major "Political and Economic Survey – Eastern Europe and the Commonwealth of Independent States" opens with this declaration when writing about "Political Perspectives on Eastern Europe".¹

In order to see the substance of the historical change in Central and Eastern Europe, and in order to develop an adequate grasp of this still ongoing transformation process, one must also

* The author extends his gratitude to the Faculty of Law of the University of Munich and to the Collegium Budapest/Institute for Advanced Study for en-

abling him to work on this study under excellent and stimulating conditions.

¹ *Eyal* 3.

see the reasons why such a revolutionary change had to come about. The main reasons – culminating by the end of the 1980's in a general crisis in the former socialist countries of Europe – can be identified in the complexity of the following phenomena.

Although much energy and money had been spent on fundamental research – especially in institutes of academies of science – and on technology-development research projects, the actual use of science in the former socialist countries was very poor. Not only was research inadequately transposed into satisfying social needs and education (especially higher education, undersupported and consequently not adequate to its task of translating science for its application to different areas of social production), but – despite the efforts of these institutions of research and higher learning to remain part of international cooperation in these spheres – the interrelation and interaction with the developed world in these fields was weak. Especially in technology development and international technology transfers the organic links were poor, let alone their connection to the need for environmental protection.² Yet these defects were hardly incurable, considering that the developed countries produced breathtaking advances in various modern areas of human activity (e.g. communications, transport, automation) where Western economic progress undoubtedly was due to scientific-technological research.³ There is much truth in the proposition that “communism was defeated by a system which made better use of science”.⁴

These problems were compounded by the failure of the party-state's economic and political philosophy and practice to respond to the demands for human dignity, human rights, national self-appreciation, political freedom, the rule of law and democratic decision-making. The human driving forces so much needed in the value-producing spheres, especially in the economy – social and ethical responsibility, entrepreneurial initiative, innovative thinking, management faculties – could hardly develop and manifest themselves because of the totalitarian state's complete dominance of the economy. This applied to the macro- as well as the microeconomy, and applied also to the

understanding of international economic conditions. Phenomena like economic competition, profit and interest incentives, as well as private property, were not allowed to be decisive factors, while the efficiency of the state as owner and manager of the economy became completely inadequate.⁵

While globalization is a vital feature of the developed-world economy, and while quite a few former socialist countries strove for a better participation in the international division of labor, especially in the later years of their existence, the Central and Eastern European economies still existed within a strong economic autarchy, for which the Council of Mutual Economic Assistance (CMEA) was their international organization.⁶

Industrial production in general was not exposed to real domestic or international competition and, in not relying on the previously mentioned human aspirations in this sphere, fell short of the needs and expectation of the people. It was unable to master the modernization crisis, the need for industrial restructuring away from material- and energy-consuming industries and into modern light industries and information- and other service sectors. This was especially true in the former Soviet Union, where the heavy-arms industry continued to be favored.⁷

Disproportionately much was spent, again especially in the Soviet Union, on the maintenance of the global power position of the Warsaw Pact, a contest which – considering the arms race at the time of Star Wars – the Soviet Union lost.⁸ But simultaneously these states also lost the confidence of the people that they would ever be able to satisfy their basic needs, let alone achieve those Western standards of living of which the people became increasingly aware.

A sort of state bankruptcy became the other crisis element. In order to save the system – to find sources of modernization, of somewhat tolerable or better living standards and of the operational costs of the Nomenklatura-run state mechanism – huge debts were accumulated in many of these countries, which, through interest and repayment of the principal – started drastically to consume the gross domestic product that in any case was domestically too low.⁹

² *Revol* 13–14; *Gál and Simai* 213 ss.

³ *Sachs* 694; *Evangelopoulos* 24.

⁴ *Revol* 14.

⁵ *Kádár, Átalakulás* 40–42; *Mádl, Revitalizing* 365 ss.; *Sachs* 694 ss.

⁶ *Kádár, Átalakulás* 40 ss.; *Smith* 32 ss.

⁷ *Kádár, Átalakulás* 41; *Sachs* 701–705.

⁸ *Kádár, Átalakulás* 40–41; *Smith* 32 ss.

⁹ *Sachs* 703.

All this, and many other factors, such as low-quality medical and other social insurance systems, poor infrastructure in housing and other spheres, led to deplorable health conditions, high mortality and increasing poverty of the population.¹⁰

To all this one must add a growing awareness and conviction, based upon the evident historic experience – present also within the ruling party's rank and file – that socialism was not an adequate alternative to capitalism, and that Western democracies and free market economies offered more for human development. This understanding was supported by the growing presence of the historic, political and philosophical perception that exclusiveness of a political credo in dictatorship contradicts human nature and human spirit, that man always will strive for freedom, integrity and uphold ethical principles and human values, as these had been expressed in national cultural traditions and European heritage: Berlin 1953, Budapest 1956, Prague 1968 *inter alia* have shown that this thinking was deeply rooted and widespread in society, and that in a given situation people would stand up for another world.

Strengthened by this credo, well prepared (although in varying degrees from country to country)¹¹ in the public discourses and in the media by independent intellectuals – politicians, lawyers, economists, journalists, and their new political forces – society turned to various forms of pressures such as strikes and massive demonstrations. Political tension grew. The party-state had to admit that the communist regime had lost control. To avoid an armed defeat (which it could not escape in Rumania), it had no choice other than to step down from the stage. Furthermore, a peaceful transformation, at the time a realistic speculation of the Nomenklatura, would provide means to convert their positions into viable ones under the new conditions.

3. *Reforms to save the system.* – “The majority of the Eastern European countries made serious attempts to introduce economic reforms in the mid-1960's”, as justifiedly claimed by Smith's study of these economies.¹² The reason was to overcome the poor performance of economies suffering under constant shortages, and thereby

to improve the future chances for the system itself.¹³

The reforms were especially substantial in HUNGARY, where the “New Economic Mechanism” was introduced in 1968. The CZECHOSLOVAK reforms of 1967–1968 were even more far reaching, although blocked after the Soviet-led invasion of the country in 1968. POLAND followed with a similar pervasive reform which was, however, halted by the intervening strong political control of the *Januzelsky* era, including martial law. There were also certain reform trends in other EASTERN EUROPEAN countries, but without decisive change in the economic or political system, although towards the end of the 1980's most of “the socialist countries including the Soviet Union, have gone beyond the classical system” of the socialist economy originating in the *Stalin* era.¹⁴

The reforms were, of course, different in intensity both from country to country and over time, if we compare the first phase of the 1960's with the more developed climax of the 1980's. This shift finds its corresponding expression and support in the evolution of a fairly sophisticated regulation and legislative process in these years.

As competent legal observers put it, so far as the real depth and important details are concerned¹⁵ the main elements and trends of the reforms can be described as follows:

In the early phase, central comprehensive planning was loosened: state enterprises obtained more competence replacing binding management from above; individual incentives and output were encouraged, especially in agriculture; foreign investment was admitted, though to a limited extent and under special regulations protecting the socialist character of the ownership structure; small-scale individual businesses in the retail trade and craftsmanship fields were allowed; price control changed from comprehensive central planning to more cost- and market-oriented approaches; foreign trade monopolies were allowed to engage in transactions on liberal rather than controlled bases; and East-West relations became more important.

The reforms became really decisive and fundamental in the 1980's in the specified countries but also extended, though less in-

of the socialist command economies see *idem*, *Socialist System passim*.

¹⁴ *Ibidem* 378.

¹⁵ See *inter alia* the works of *Ivanov; Kádár; Mádl, Foreign Investment; Mádl and Vékás; Sajko; Smith; Wlodyka.*

¹⁰ *Andorka* 92.

¹¹ For the special development in Russia, see *Jawlinskij* 12–13.

¹² *Smith* 36.

¹³ *Idem* 36 (ch. “Economic Reforms in Eastern Europe”); for the “shortage-economy” phenomenon see especially *Komai*, *Shortage*; for a general analysis

tensively, to the other Eastern European countries. Close to their climax – expressed and regulated in a very pragmatic decision- and law-making activity – the reforms went so far as to abandon central state planning altogether: Plans were binding on the government only; enterprises enjoyed broad independence, the state expected efficiency only; state planners guided enterprises towards long-term targets by applying financial instruments, exchange rates, selective price-regulation, bank credits, and wage determination rules; the state administration of inter-enterprise supply was abandoned – the enterprises, being expected to find the commodities they needed on the market, also received the competence to invest; pricing developed into market-oriented prices; under a new state taxation philosophy timely tax laws were introduced; private entrepreneurship was also encouraged at the company level, *inter alia* by introducing modern company laws; foreign investment was wholly liberalized; foreign trade monopolies were completely abandoned; co-operation within CMEA became more market-oriented, with a growing role for direct inter-enterprise dealing; and East-West relations strengthened rapidly at both enterprise and intergovernmental levels.

These developments meant “the extension of the use of financial and market levers to such a degree that they represented a major departure from the traditional economic system”, as Smith rightly claims with regard to the CZECHOSLOVAK and HUNGARIAN reforms.¹⁶ In addition, it became more and more evident and was also spelled out, especially by independent authors and the growing opposition forces, that economic and political reforms were interdependent. The party-state, of course, professed that the reforms were within the “ambit of socialism”, and no substantial political changes were justified, though reforms in that sphere still could unfold.

However, although liberalizing trends also spread to other spheres of life in the reform countries, reforms could not cure the systemic ailments. The state-run economy, even in its far-reaching reformed variant, as e.g. in HUNGARY, could not answer all decisive challenges of development, such as the drive for freedom, human rights, human dignity and the rule of law; the challenges of the globalization effects

and requirements of the world economy, of the scientific-technological revolution, and of social and economic restructuring on both national and international levels; nor finally the challenges posed by other economic ailments (poverty, low income, financial instability, growing inflation, hidden and imminent open unemployment, poor support of education, healthcare and culture *etc.*).¹⁷ It was felt more and more that reforms had to go further; that the process contained within the viruses of the newly introduced market-economy categories could not be halted, let alone reversed; that the reforms really questioned the *raison d'être* of the party-state system, and in fact were contributing to the foundations for the introduction of a market economy after the collapse of communism. Not for the first time, the train did not stop at the Girondist station.

4. *The revolutionary change.* – Authors will probably argue for a long time as to whether it was a Girondist or a Jacobinist revolution, or whether it was a climactic point of an irreversible evolution. Certainly, in some places, it bordered on a Jacobinist extreme (in Rumania they went *aux armes*, and it came close to this in Russia and, combined with the interest in national independence, in Estonia, Croatia and Slovenia). But the substance of the change – if seen from the viewpoints of social philosophy and the philosophy of history – was surely a revolutionary transformation. Only in the People's Republic of China did developments take a different course.¹⁸

The crisis (*supra* s. 2), the evolving economic, social and political developments, the dramatic events that now are already history, reached their definitive turning points in 1989 and 1990. In these climactic years the condensed message of history, the substance of the metamorphosis, was spelled out by the political forces and fora concerned: The *ancien régime* had to be replaced by a new one, and new constitutional legislation had to open the way to this future. The revolutionary character of this change was expressed by the substance of what was replaced: The one-party system by a parliamentary democracy; the suppressive totalitarian rule of the one-party system by political freedom, freedom of thought, conscience and conviction, freedom of the press and freedom of association; arbitrariness by the rule of law (*Rechtsstaatlichkeit*), and

¹⁶ Smith 37.

¹⁷ Kádár, Átalakulás 40.

¹⁸ This chapter was meant to cover the changes of state and economy relations in the CENTRAL and

EASTERN EUROPEAN countries where the transformation was fundamental both in the political and the economic structure. For the changes in CHINA see Xu Chegang, *passim*; Lauffs and Bohnet, *passim*.

by the respect for human rights; the largely state-owned and state-run command economy by a promising alternative of a market economy; the autarchy-ridden national economies and the Soviet-dominated CMEA and Warsaw Pact international relations by reintegration into the cooperative efforts of the free-world economy and by newly created bilateral arrangements between truly independent states.

It can hardly be questioned that these are antagonistic values, or that the new options, in totally negating the old structures, unequivocally demonstrated the revolutionary character of the change. The fact that after these decisive steps had been taken legislative, political and social practice would substantiate the historic message only in the course of a long transition period really does not alter or challenge the nature of the change, enshrined in a set of fundamental legal instruments.

The most important ones on the national level were, of course, the constitutions and other laws of constitutional standing. The Declaration of Human Rights and Civil Liberties of the RUSSIAN FEDERATION of 22 Nov. 1991 closely follows the principles enunciated in the Universal Declaration of Human Rights of 1948. The Declaration notes "the need to bring RSFSR legislation into conformity with the standards of human rights and freedoms generally accepted by the international community." It also states that "the generally accepted international rules pertaining to human rights shall have precedence over the laws of the RSFSR, and shall directly create rights and duties for RSFSR citizens" (Preamble art. 1 ss.). In fact, the Constitution of the RUSSIAN FEDERATION of 12 Dec. 1993 incorporated the human rights laid down in the Declaration, in particular, the legal requirements of the rule of law and of civil liberties. It also incorporated the institutions of parliamentary democracy, the general principle being that "political plurality and the multi-party system shall be recognised in the Russian Federation"; a detailed substantiation of the basic principles of a public law nature follows in the relevant provisions of the Constitution.¹⁹ The HUNGARIAN Constitution as amended – really almost a completely new corpus of constitutional dispositions – pursuant to the National Roundtable Talks at the end of

1989 declares in its Preamble that "in order to facilitate peaceful political transition into a state based on the rule of law ready to implement a multi-party system, introduce parliamentary democracy, and to promote the transition to a social market economy", the subsequent text of the Constitution shall be in force. This text then regulates a state under the rule of law, political democracy and human rights according to the principles above.²⁰ So far as these basic principles of a public law nature are concerned, similar provisions form part of the constitutions of other new democracies.²¹

As for the economic philosophy that was newly envisaged, market-economy orientations are also declared in the various constitutional instruments. Where this did not occur as explicitly as in the Preamble of the HUNGARIAN Constitution ("transition to a social market economy"), then in the form of guaranteeing the right to property, free entrepreneurship, and free access to economic resources to pursue business activity. Thus the BULGARIAN Constitution of 12 July 1991 claims that "the economy of the Republic of Bulgaria is based on free economic initiative" (art. 19). The RUSSIAN Constitution says that "everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by law" (art. 34 par. 1). Perhaps the most comprehensive and systematic credo might be read in the ALBANIAN Law on the sanctioning and protection of private property, free initiative, independent private activities and privatization of 19 Aug. 1991:

"In the Republic of Albania private property, free initiative, independent private activities, the conduct of business, the right to obtain and to extend credit, the right to employ others and to be employed, the privatization of state property and the entire process of the conversion of the economy of the Republic of Albania from a planned economy controlled by the state to a free market economy are sanctioned and protected" (art. 1).

Of course, many other laws of a constitutional nature have been passed, such as laws on free elections, on political parties, on the freedom of press, on the freedom of conscience and religion, on the constitutional court, on the right to strike *etc.*²² In addition, it should be

¹⁹ RUSSIAN Const. (1993) art. 1 ss., 11 ss., 12 (the quoted text par. 3), 80 ss., 94 ss., 118 ss.

²⁰ HUNGARIAN Const. (amended 1989) Preamble, § 1 ss., 19 ss., 28 ss., 32A ss., 41 ss., 54–70 (the fundamental rights and duties of citizens), 71.

²¹ See BULGARIAN Const. (1991) Preamble,

art. 4 ss.; RUMANIAN Const. (1991) art. 1 ss.; SLOVAK Const. (1992) Preamble, art. 1 ss.

²² See Mádl, *Umgestaltung* ch. I 2 (Rechtliche Fundierung in den Verfassungen und anderen grundlegenden Rechtsquellen).

emphasized that most of these countries also assumed binding international commitments based on the COUNCIL OF EUROPE value system: international commitments for the respect of human rights, parliamentary democracy, the rule of law (*Rechtsstaatlichkeit*), the right to private property and free entrepreneurship, the development of a free and socially committed market economy. First HUNGARY in 1990 and then – with the exception of the COMMONWEALTH OF INDEPENDENT STATES (CIS) countries and others of that region – almost all CENTRAL and EASTERN EUROPEAN countries may now be seen to have developed their legal systems in conformity with COUNCIL OF EUROPE requirements. As a result, these countries became members of the COUNCIL OF EUROPE.

Before turning to subch. IV below, with its more analytic survey of the new international relations of the countries in question, including relevant issues of state partitions (*e.g.* in the former SOVIET UNION and the CZECH AND SLOVAK FEDERATIVE REPUBLIC) and of GERMAN unification, the Charter of Paris for a New Europe of 1990 (*supra* s. 2) should be cited again. All heads of state or government of the participating states of the Conference on Security and Co-operation in Europe (CSCE) – *i.e.* all former SOCIALIST countries – assumed in this Charter specific obligations towards “human rights, democracy and the rule of law... towards economic liberties and social responsibility... towards constructing a new Europe.”²³

The HUNGARIAN-initiated dissolution of the CMEA and the Warsaw Pact (*infra* s. 62), including the departure of the Soviet Army from the former socialist countries, was an integral part of this revolutionary turning point in the national and international transformation processes. Other international efforts involving re-integrating into Europe and building up new relationships with individual countries, as discussed below, materialized during the subsequent years of development. The same applies to the vast legislative activity of these years establishing the legal foundations of the market-economy structures.

5. *The regulation applied.* – The laws and other legal instruments by which the transformation was and is being managed and performed can be attributed to two different periods. The first and decisive period encompasses those legal instruments – discussed above in s. 4

– which brought development to its historic turning point. This occurred at different times in the different countries; as a rule free elections, with all their preceding political and legal efforts and actions and with their intimation of the acts to follow, symbolized this turning point. The second and subsequent period is marked by the unfolding of everything immanent in this decision: to develop further and put into actual operation the public law institutions and regulations of democracy, and to learn and practise democracy on the one hand; to produce that vast number of laws and measures comprising that coherent regulatory scheme which alone could make the transition to and the functioning of a market economy viable. Anticipated or not, these latter acts proved to be the really hard core on a stage full of conflicts and tensions. Indeed, retaining this drama-simile, we may visualize the relationship between the two types of acts in the law-making process as comparable to that of the overture and the opera: The theme is already given by the overture but its full realization only takes place thereafter.

The efforts to realize the entire opera needed and produced an unprecedented and often torrential stream of legislation and other political and governmental activities; all these in hard and frequently tension-producing dialogue under strong criticism in the political arena and from the public in general. Responsible political actors, both legislators and administrators, however, had to look to their historic responsibility to bring about the needed legal structure. This challenging function was and continues to be met. Alone the quantity of new laws and other legal instruments is impressive, as the picture of social engineering by law represented by the thick ten volumes of the English translation of the most visible and important laws of the Central and Eastern European countries published by the Parker School of Columbia University demonstrates.²⁴

A more illustrative example may be the experience of one country. In HUNGARY the acts of parliament alone – not to mention the regulations and orders of the ministries and other central and local governments – produced an average of 200 laws and other decisions per year!²⁵ Their subject matter reveals the range: ratifications of international, European and bilateral treaties; local (self-)government; social

²³ Charter for a New Europe s. 1 and 2 under the cited headings.

²⁴ See Hazard and Pechota (ed.) and Pechota (ed.),

Foreign Investment.

²⁵ See Hieronymi and Bérczi (ed.) 43 ss.

insurance and social policy; interest conciliation of social partners; restoration of the function of private property; privatization; compensation for lost property and political harm caused in past decades; entrepreneurship; company law; domestic and foreign investment; contract law; intellectual property; banking and credits; taxation; education; culture; science; social solidarity; unemployment; subsidies; judiciary; trade; industry; defense, and security. These terms reveal merely the most important themes which were regulated during the last few years in some areas, in some cases more than once in order to improve the treatment of some of the same issues through subsequent waves of change.²⁶ This catalogue does not even include the codification work on such codes as the Civil Code, Penal Code, Codes of Civil and Criminal Procedure, which are not further covered here though their modernization is of equally great importance.

In addition to the foregoing, we may also view this legislative and governmental activity from another angle. Part of the effort went into a deregulation activity which resulted in the repeal of hundreds of statutory acts linked to the centralized, thoroughly regulated state mechanism of the past.²⁷ Traditional bodies of law of a more general nature and role also had to be renewed in order to eliminate their "socialist" imprints and make them respond to the requirements of the new situation. All in all, the significant challenge and work, however, were found in the areas which called for new laws to construct the new world, a market-economy structure replacing the command economy.

One may ask, from whence came all the wisdom and ideas contributing to this output? The resources and also the quality of the output were and are different from country to country. The often poor professional quality surely is also due to the urgency of the mission. Even so, enormous input was needed. In some of the countries a substantial number of lawyers, professors, political scientists, economists and other experts already had significant knowledge of and interaction with the culture of the WEST in the fields of public and private law: comparative studies and cooperation under this umbrella were fairly intensive. Especially in the CENTRAL EUROPEAN countries the traditions of

EUROPEAN heritage survived well in many areas. Timely education – in the sphere of adult education too – was very much encouraged immediately upon the change, with e.g. thousands of young people studying abroad. A very important resource appeared in "technical assistance", as it is often referred to, meaning the many East – West workshops and conferences, expert opinions, professional books and articles, and other adviser activity from the developed countries; through these forms substantial contributions were channelled into the efforts in question.

It needs to be recalled that the earlier reforms, adopted to save the prior system (*supra* s. 3), already had produced in some countries close to market-economy structures. Thus the relevant countries were indeed not starting from a position of no law or of a thoroughly poor legal structure, as some might have thought, and simply rushed to transplant WESTERN laws as such. All the sources of wisdom and information mentioned made serious contributions to the efficiency of the newly mushrooming professional writing and other efforts of expertise to build up and develop new bodies of knowledge in the fields concerned, such as macro- and microeconomy, economic law, commercial law, civil law and the like.²⁸

6. *Some special features of the regulation.* – Quite apart from the question whether in the process of the historic change the revolution in its political sense as described above (s. 4) was carried through or to what extent it remained incomplete in one or the other country,²⁹ the issues also emerged in a specifically legal context, especially as to the following special considerations:

Was the transformation also a revolution in a legal sense, *Revolution auch im Rechtssinne*, as the German formulation goes? *Stricto sensu* this would have required a total *uno actu* break with the preexisting law, legally a total disjunction and discontinuation of everything produced before the change, before a certain sharply defined intersection with it. Professor Brunner, with a vast body of legal commentary, statutory material and court practice at hand,³⁰ justifiably claims that the transition from the communist dictatorship to democracy based on the rule of law also demonstrates, when compared with all

²⁶ See Mádl, *Umgestaltung* 4 ss.

²⁷ See e.g. HUNGARIAN Law on deregulation of 1990.

²⁸ For this *inter alia*, see Mádl, *Umgestaltung passim* (the listed writings on the above developments).

²⁹ See e.g., Gabanyi, *Die unvollendete Revolution. Rumänien zwischen Diktatur und Demokratie* (Munich 1990).

³⁰ Brunner 1 ss.

other analogous shifts, a discontinuation or at least a "regulated revolution" ("*geordnete Revolution*") in the legal sense in two countries, in GERMANY and in the former SOVIET UNION. In the GERMAN unification process, on 3 Oct. 1990, the day of the GERMAN reunification, the EAST GERMAN law was almost completely repealed and replaced *uno actu* by the legal order of the FEDERAL REPUBLIC OF GERMANY. In fact this occurred by virtue of a few basic legal instruments: the Unification Treaty extending GERMAN federal law in general to the former GERMAN DEMOCRATIC REPUBLIC, and, before this event, by the State Treaty between the two states establishing the GERMAN - GERMAN Monetary, Economic and Social Union and requiring the GERMAN DEMOCRATIC REPUBLIC to accept and apply on its territory the federal laws on the economy and trade.³¹ Nor was this "regulated revolution" so unexpectedly sudden, *unplötzlich*, as Brunner puts it, in the other, the forward direction. He goes on to discuss, under the title "*Fortgeltung des DDR-Rechts*",³² not only the prerevolutionary development of the transition law, which began under serious pressure within the then GERMAN DEMOCRATIC REPUBLIC, but also the fairly protracted survival of particular former EAST GERMAN norms.

In the former SOVIET UNION this issue emerged in the framework of the partition of the country. The Treaty Establishing the Commonwealth of Independent States (CIS), the "Minsk Agreement" of 8 Dec. 1991, declared, after the fall of the Soviet state, that "from the moment that the present agreement is signed, the norms of third states, including the former USSR, are not permitted on the territories of the signatory states."³³ However, as evidenced by subsequent legislation and court rulings, in order to avoid a legal vacuum and legal uncertainty, former law of the SOVIET UNION might be applied except when contrary to national legislation and other provisions of the CIS Treaty.³⁴

A very similar situation evolved at the partition of CZECHOSLOVAKIA, though in this case the constitutions of the two emerging states (the CZECH REPUBLIC and the REPUBLIC OF SLOVAKIA) expressly declared that former federal law continued to apply if not contrary to the law of the

new state. Court practice added to this the concept that the application of old norms had to be weighed against the values of the new legal order of the democratic society. "This means, in spite of the continuity of 'old law', the discontinuity of the values of the 'old regime'", as is said in the relevant decision of the CZECH Constitutional Court.³⁵

Given that the relevant legislation and practice of the other new democracies clearly followed the continuity rule, the formulation of the HUNGARIAN Constitutional Court on this issue seems an apt reflection of what really happened both politically and legally in the transition from dictatorship to democracy. As that court stated:

"The Constitutional Court cannot ignore the actual procedure of the transition... The Constitutional Court is guardian of the paradox of the 'revolution by the rule of law': in the peaceful change of the system, which started out with the Constitution based on the rule of law, and [the court] is expected to substantiate this message [; namely, that] the Constitutional Court must by its very competence guarantee the harmony of the legislation with the Constitution."

The nonlegal language is more explicit: "When the most radical change possible occurs..., when the Communist party's monopoly of power is broken, the change crosses the Rubicon; it is not a reform any more but a revolution."³⁶

In sum: revolution as to the political, social and ethical substance; a peaceful revolution with the mentioned deviations; at the same time a revolution by means of law – even then, however, in the context of a transitional legal continuity weighing the old norms against the new law and the values of the new democratic order.

Linked with the continuity concept in the said meaning are a few other vital issues. To be brief – since excellent secondary sources make the point in detail³⁷ – the following issues should be mentioned. (1) So far as the continuing validity of the "old law" is concerned, the above considerations clearly provide the appropriate approach. (2) International obligations of partitioned and (re-)unified states are of special interest and are considered in their spe-

³¹ GERMAN Unification Treaty art. 8 and GERMAN - GERMAN State Treaty art. 3 - 4.

³² Brunner 9.

³³ CIS Agreement of 1991 art. 11.

³⁴ As demonstrated by the analysis of Brunner 2, 18.

³⁵ Quoted *ibidem*.

³⁶ HUNGARIAN Const. 5 March 1992 (no. 11/1992) (German transl. Brunner and Sólyom (ed.) 337). For the issue see Sólyom 155. For the second citation see Komai, Socialist System 388.

³⁷ Brunner, *passim*; Seiffert, *Fortgeltung passim*.

cificity below (s. 63–66). (3) The validity of former individual decisions of courts and other state agencies, based on the “old law” and thus contestable in particular in the light of the values of the new democratic order, bears on the fate of the many politically prosecuted victims; thus, prescription of political crimes is *inter alia* at stake.³⁸ (4) As a result of intertemporal conflict-of-laws rules of the new legal system, courts might frequently be required, in the sphere of civil and commercial law relations, to apply “old law” to old fact situations, although there is newly enacted law in force concerning the question at issue. Probably, as a rule, in such cases an internal *ordre public* control immanent in the new values could be available for application.

7. *Strategies for transition to a viable market economy.* – As discussed above (s. 4), it was soon fairly evident – especially in the phase immediately leading to the climax of the revolutionary change (adoption of constitutional instruments and free elections, respectively) – that for transition in the economic sphere the market economy should be introduced. But what kind of market economy? Were the developed market economies themselves identical in their Western settings, where they evidenced their historical viability and vitality? And within their own contexts what was their message for the new democracies? What would “market economy” mean in the actual situation of a formerly Socialist country?

There was no chance for a laboratory experiment, nor was there any experience with this type of economic transition that might have been exploited: in short, there simply did not exist any patent medications for these ills. But the crisis was deep, the dissolution of the old structures went on apace, and eruptive forces and laws of social and economic processes were at work. There was no way to halt this for a period of contemplation of eventual action within these atomized societies. The only appropriate attitude for those who felt responsibility for their countries and for the future was to get on board and initiate those moves by which they thought the ship might sail in an appropriate direction.

Of course, these responsible people had their own more or less organized ideas and skills concerning this unexpected navigational experience when they went on board. It also was

evident to them that during their voyage they would receive advice and assistance from more experienced seafaring people. The moves towards introducing market-economy-type legal conditions and actual measures were, consequently, not simply spontaneous.

Of course, the conditions of both ship and sea were different from country to country, as was the sailing expertise of the sailors. In the former Czechoslovakia *e.g.*, early reforms were articulated by well-known economists with a deep knowledge of modern economic philosophies (*Sik, Kohontec*); there existed a considerable knowledge of useful traditions, both among intellectuals and in the business sphere. Similar situations can be seen, when we look back at the origins of the theoretical ammunition, in Poland and Hungary.³⁹ Furthermore, there had been significant experiments and experiences with market-economy ideas, even if blocked by conservative communist throw-back regimes, in both Czechoslovakia and Poland. In Hungary, too, market philosophy-oriented reform (*supra* s. 3) already had evolved to a fairly mature level. Considerable experience and knowledge had been accumulated during this earlier process. Professional intellectuals, a historically strong interaction with Western countries and institutions, and rapidly strengthening managerial strata were largely responsible for this.⁴⁰

Other countries had barely begun to move towards any market orientation, and showed less evidence of professional preparedness for the changes that took place. In the former Soviet Union, as *Jawlinskij's* thorough analysis concludes, there was a very thin layer of intellectuals who had ideas and knowledge concerning an economic order at one time thought possible, though the so-called “dissident” artists, writers and scientists also had a significant and positive impact on the new development.

In the sphere of political and economic thinking two major features could be witnessed. First, the “Democratic Revolution”, as it was referred to and carried out between August and December of 1991, was an outcome of objective processes, of the *glasnost*-opened vistas, and of the rapid spread of two fundamental ideas: first, the freedom of nations, their right to define their statehood for themselves; and second, the freedom of human beings regarding their political options and their options for a

³⁸ For the controversial issues: *Schroeder, passim* and *Zimmermann, passim*.

³⁹ For the survey see *Smith* 36–37.

⁴⁰ *Kádár, Magyar* 41; *Rady* 327–328; *Berry* 331–332.

market economy as the organizational pattern of the economy. These ideas, however, were adopted in the transformation process without critical evaluation. As a result, they were applied without well-founded scientific organization and coherence when practised live. Real actions were then led, more often than is acceptable, by journalistic skill rather than by theoretically well-founded strategies. "One must admit, unfortunately, that the intellectuals by whom the social changes have been prepared, were not prepared for the devastating consequences",⁴¹

Notwithstanding the fact that there existed various levels of this state of non-preparedness – both in the former socialist countries and in the West⁴² – one had to repair the ship and navigate. Actual strategies had to be put into operation, and – once the political turning point and time for economic responsibility was there – one had to act. Coalition governments, winning parties, parliaments and other agencies with competence had to respond to the challenges, with whatever knowledge they and their advisory teams and intellectuals had available. Advisors and advisory teams were active, in one or the other form, in all countries. In Hungary *e.g.* two teams – the "Bridge" and the "Blue Ribbon" teams – were formed by independent scholars (economists, lawyers, political and social scientists, historians). They elaborated economic strategies and published their papers. These contributed significantly to the strategies the government and the opposition were then actually pursuing.

For the government programs emerging in this fashion, of course, the economic philosophy and practice of the countries with a developed market economy were closely studied. Western advice was also very active and instrumental. Both in the West and in the East considerable disagreement concerning the implementation of the transition to a market economy existed, differences that naturally emerged in the articulation and arguments about actual strategies. Some advocated rapid transition, a so-called "shock therapy," with minimum government intervention. Others advocated a more gradual approach, adopted and sequenced to the specific situation and to possible international input and the market opportunities of each particular country. This

would mean a slower structural adjustment and greater government responsibility for economic policy. It is clear that both a *Keynesian ordo-liberal* and a more neo-liberal philosophy were in play.⁴³ The latter concept, it was argued, offered a faster cure and development of the economy, but at higher social costs. Given the serious ailments of the economies (*supra* s. 2, 3) the rapid therapy promised to be painful. The gradual approach would prolong the transition – less pain but for a longer period – but with better acceptance by society.

On the other hand, there was full consensus that viable strategies had to aim at financial-monetary stability; a liberal external economy (in trade and investments); private property, entrepreneurial freedom, and adequate laws therefor; the possibility of the shareholding (*i.e.* stock-exchange) system; privatization; capital markets; social solidarity – to mention only the more important requirements.⁴⁴ The form of implementation, however, had to be adapted to the actual circumstances and possibilities of the economies concerned. It was also perceived that much would depend on the performance of the decision-making government and upon the readiness of the people to opt for the shock therapy or their preference rather to live with the problems for longer but with less suffering.

The differences between the actual variants of the market-economy philosophy of the developed countries – the neo-liberal Reaganism and Thatcherism, the Swedish model, the Chilean model of transition, and the more European social-market-economy concept emanating from the *ordo-liberalism* of the Freiburg school⁴⁵ were also known and appreciated by the more sophisticated analysts.

It was felt by the policy-makers, however, that in a pragmatic way it was not the demarcation and corresponding "clear" action exclusively which counted. The alternatives in question overlap even in theory, let alone in practice where adjustments are a commonplace. Where real drastic differences were involved, undoubtedly, was in the application, in rough terms, of the "shock therapy" or the gradualist approach.

In the end, most former socialist countries opted for a rapid transition strategy, *i.e.* a shock-therapy.⁴⁶ HUNGARY took the other way,

⁴¹ Jawlinskij 11–12.

⁴² Eyal 3; Sachs 709.

⁴³ Sachs 691 ss.; Gray 362 ss.; Smith 38; Kádár, Magyar 42; Bod 1011 ss.; Kouba 44 ss.

⁴⁴ A well defined version at Sachs 697–698.

⁴⁵ Schlecht p. IX.

⁴⁶ In RUMANIA and BULGARIA the economic transition is still slow, due rather to the circumstances that decisive political forces were still captives of the past and less committed to definite change; for this development in the FORMER SOCIALIST countries see Kádár, Magyar 41; Sachs 690; Eyal 5 ss.; Smith 38–41.

choosing instead a gradual transition to a social market economy.⁴⁷ This was conditioned *inter alia* by the experience HUNGARY had already gained in the "liberal-communist" reform era, by the overwhelming experience of the social market-economy countries of the EUROPEAN COMMUNITY; by the hope for integration into the world economy in general and into the EUROPEAN COMMUNITY in particular; by the reluctance to impose high social costs on the people; and by the "political creed and hope" of the ruling parties that this would turn out to be a viable way to do well to the country.⁴⁸ If the society was not willing to take the heavy costs of a thorough rapid cure, the transformation had to be pursued by government strategies, that made the road viable even if it would take more time.

Whichever option was taken by the countries concerned, the more distant aims were less controversial, both among the public and between the different political forces. The real problem was the output. One had (and still has) to see, on a strategic level, what the public in fact always sees; namely, that these alternatives were not mere theories but produced alternative outcomes in terms of employment, in-

flation, the living standard, social security and solidarity, education, and culture – to mention only the hottest issues. To be effective in these areas, one always had to be ready to be flexible, no matter whether this contradicted the one or the other theory.

While it was not a market-economy factor in itself, the role of the West also bore on whether the strategies applied would really bring about an efficient market economy in the new democracies. The hope – really part of the strategy – was that Western assistance would be decisive. The strategists' reliance on this assumption exceeded what has materialized so far: They had hoped for more than to be invited to perform the "Münchhausen spectacle" for the Western audience by lifting themselves by their own bootstraps. This assumption is still alive and justifies repeating the propositions of Professor Sachs (reviewed in more detail *infra* subch. IV). Although much has been done, the Western efforts are not in harmony with that gigantic value which is at stake. The West is still not sufficiently aware of what the successful transformation of these nations could mean for the whole world.⁴⁹

⁴⁷ See this philosophy articulated in the HUNGARIAN Constitution as amended in the 1989 Preamble, and in the HUNGARIAN Government Program of the national renewal of 1990 ch.4 ("Man and the

Economy").

⁴⁸ Smith 41–45.

⁴⁹ Sachs 709.

III. LEGAL INSTITUTIONS AND INSTRUMENTS CHANNELLING THE TRANSFORMATION

A. RESTORATION OF PROPERTY

8. *General commitments.* – A timely conceived and, given its far-reaching impact, well-organized institution of property was considered to have a central role in the market-economy system and, for that matter, also in the transformation of the command economies. This was one of the lessons emanating from the historic developments discussed above (subch. II).

It was felt, as evidenced by political and legal instruments and professional commentary,⁵⁰ that the state had to withdraw its massive presence in the command economy and permit private entrepreneurship to take the dominant position. As a consequence, the state-dominated property structure would give way to a basically private property system and a rational diversification of ownership would develop.

In order to achieve this one had to, and did, appreciate and accept the decisive function of the institution of private property for these well-founded reasons: Property is the source, driving force and foundation of the obligation of man to produce and reproduce the material conditions of life both for himself, his immediate community, and the broader community supporting the conditions of social existence; this motive-source had to be exploited both individually and in different forms of association (municipality, state, economic and other associations *etc.*). The institution of property had to accept the social functions of public interest and social solidarity by internalizing the rational shares of social costs and needs of social production. Property is one of the basic foundations of both economic and political freedom of the individual and of society. It is the foundation and driving force of competition, technological development and efficiency. Finally, property is a precondition of the existence and operation of a market regulating the exchange of goods based on real market value.

The property system, accepting these functions, is expected to operate in these dimensions. Permitting ownership rights to be acquired and exploited in accordance with the

diversified pattern of contemporary society by physical persons, by economic, social and political associations invested with legal personality, by the state, by churches, by local (self-) governments, by other entities with variously specified economic duties and corresponding legal powers. Further, owners must have equal rights to enjoy the protective aspects of property as commonly set forth in civil codes and court practice. Finally, to implement these functions, *i.e.* to achieve a market economy, private property had to be the predominant form of ownership.

The political forces of the new democracies were determined to incorporate the central role and function of this concept of property into their basic laws, constitutions and other instruments and to embark on the historic task of creating such a property system.

As to the possible ways to incorporate these basic principles and rules of the right to property, the domestic legislation of the various new democracies is fairly definite and consistent, and it is in harmony with the developed market-economy countries, and, of course, also with respect to the relevant international instruments. Differences seem to appear in two spheres. One are the doctrines of civil (private) law, especially as to the place of property within classical general ownership rules. These are the rules on the objects, content and protection of property, the acquisition of ownership, co-ownership, and rights of use, and the special rules concerning public property and the rules governing its possession and protection. It would lead us too far afield to venture here into a detailed and reasoned survey of the development in this sphere, but at least the serious codification efforts by the respective countries should be noted and appreciated.⁵¹

Another, more important kind of difference is the process of creating the desired property structure. The incorporation of basic property law rules has an unquestioned role in the constitutions and quasi-constitutional laws of the post-socialist countries. The SLOVAK Constitution *e.g.* declares that: "Everyone has the

⁵⁰ For the considerations in question see *Jawlinskij* 42; *Ajani* 2 ss.; *Toporin* 241 ss.; HUNGARIAN Government Program of national renewal of 1990 ch. 4; *Seider* 178 ss.; *Trunk* 33 ss.; *Pürner* 250–251.

⁵¹ Civil codes with renewed or new rules on

property have been amended or rewritten respectively virtually in all new democracies, including the BALTIC STATES and the RUSSIAN FEDERATION (in legal writing see *e.g.*, *Harmathy* (ed.), *passim*; *Hüper*, *passim*; *Schulze* 731 ss.).

right to own property. The ownership right of all owners has the same legal content and deserves the same protection. Inheritance of property is guaranteed" (art. 20). The BULGARIAN Constitution contains similar rules and adds: "Expropriation of property in order to meet state or municipal needs must be according to law, and provided that such need cannot be satisfied in any other way. Suitable compensation must be paid in advance" (art. 17 par. 5). The HUNGARIAN Constitution (as amended in 1989) states:

"The Republic of Hungary guarantees the right to property. Property may be expropriated only exceptionally when this is a matter of public interest, and only in the cases and in the manner regulated by law, under the terms of full, unconditional and immediate indemnification" (§ 13).

The laws of other countries feature similar principles.⁵² The UKRAINE and the RUSSIAN FEDERATION placed so much emphasis on the issues of property that they enacted separate laws on property outside their civil codes. These regulate not only the basic principle of the right to property but many other property issues which, as a rule, civil codes would regulate – this in fact later happened at least in one of these two countries as well.⁵³

New democracies which became members of the COUNCIL OF EUROPE, and all post-socialist countries as participants of the CSCE (Conference on Security and Co-operation in Europe), also committed themselves to the right to and protection of private property through international legal instruments. The First Protocol of 1952 to the European Convention of Human Rights declares (art. 1): "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the general principles of international law." It is easy to see from whence came the similar provisions of the cited recent national legislation. The CSCE-adopted Charter for a New Europe also commits all subscribing states to its credo that "everyone has the right to own property alone or in association, and exercise individual

enterprise".⁵⁴ All these pronouncements certainly echo in a solemn but also binding way the well-known principle of the Universal Declaration of Human Rights, in which the members of the UNITED NATIONS in 1948 proclaimed: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property" (art. 17). Decades had to pass, and historic changes had to come in the CENTRAL and EASTERN EUROPEAN countries before this principle could, after a long-dormant period, experience a Phoenix-like resurrection.

9. *Main fields and means of restoration – Field work considerations.* – The really big challenge and historic task was and continues to be the construction of a property structure able to support a market economy; in other words, actually to erect the building once the right and obligation to erect it was there. Since property law is so central an institution as regards its role in commodity production, consumption, and the organization of the economy, *i.e.* regarding the whole social and economic structure, the erection of the building required thorough social engineering. Much was needed in relation to the theoretical foundations and adequate theoretical orientation.⁵⁵ Science and theory could assess and follow social (ownership and other) processes, and deliver their evaluation of what happened. They might also creatively anticipate the desirable course of development. But this is the limit of what can be forecast, of what the social and political will and decision-making could assume in order to design and implement the construction work. This remains the hardest lesson, even if in most countries, especially those of Central Europe, the main structure of the building, or rather of the buildings, already has been erected.

It would be tempting and also more correct to depict the different national developments, to show separate pictures of the different buildings. This, surely, would do justice to the adequate handling of the national identity of the respective property-transformation systems. It is not only for want of space and for editorial principles that in the following framework we do not embark on an extensive survey. What follows is, rather, meant to identify those fields

⁵² See RUSSIAN Const. (1993) art. 35; RUMANIAN Const. (1991) art. 41 – 42.

⁵³ UKRAINIAN Law on property of 1991 art. 1 ss. RUSSIAN Law on property of 1990 art. 1 ss.; this Law was then repealed and replaced by the new (1994) RUSSIAN Civil Code's property law regulations; see Hüper 163.

⁵⁴ Charter for a New Europe of 1990 (Human Rights, Democracy and Rule of Law).

⁵⁵ See Lenkovic 189 ss. (ch. "Transformation of the Order of Ownership") and the legal writing mostly in privatization context (Mádl, Umgestaltung ch. II 3 "Eigentumsstruktur – Privatisierung im allgemeinen, neue juristische Umwelt").