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AFTERWORD

THE DEMOCRATIZATION OF CENTRAL AND EASTERN EUROPE: AN AFTERWORD

Mark S. Ellis*

If one were asked to identify the common denominator that links the various themes discussed in this symposium issue, it would be the priority accorded to the establishment of a state based on the rule of law. Clearly, this is a necessary prerequisite to creating a lasting and vibrant democratic society. The methods used, however, to reach this position are both diverse and intrinsically interwoven. Furthermore, the perception that the transformation from a totalitarian system to a democratic, market-based society follows a certain prescribed set of rules is misleading. The authors in this symposium issue, by focusing on a variety of legal reform issues, indirectly make a compelling argument that an incremental, step-by-step approach to legal reform in Central and Eastern Europe is simply unrealistic in light of the urgency for reform. The successful transformation from communism to democracy in the countries of Central and Eastern Europe requires no less than a complete and immediate overhaul of their legal systems.

Presently, the national assemblies of these countries are struggling with a vast legislative agenda to achieve this legal overhaul. For instance, the Czechoslovakian National Assembly will have adopted over 500 laws between January 1990 and mid-1992. The laws that have already or soon will be adopted in the countries of Central and Eastern Europe include comprehensive civil and penal codes as well as an extensive series of laws addressing economic and commercial issues. This

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symposium issue also suggests that the most important legislative initiatives address efforts to promote economic development. Of the eleven articles and comments in this publication, ten deal with economic matters such as property rights, banking reform, labor protection, and foreign investment.

An important question, however, is whether this vast legislative initiative is occurring in a constitutional vacuum. What is the relationship between the legislative agenda for economic reform and constitutionalism? Occasionally, the authors refer to these agenda items within the context of a country's draft or adopted constitution. For instance, Gray and Hanson argue that the most fundamental law defining the legal framework for economic activity *is* the constitution. Hoskova emphasizes this same point in regard to the new Czechoslovakian Constitution which "specifically provides for liberal economic relations between the government and the Czechoslovakian people."¹ Yet, some feel that the emerging constitutions have very little practical relevance to the legislative agenda for economic reform. Thus, even though Lithuania does not yet have a new constitution, the National Assembly is still drafting and adopting a number of economic laws.

I believe that the present constitution-making in Central and Eastern Europe is fundamental to creating lasting institutions that instill public confidence in the relatively new practice of the rule of law. Through these constitutions, the communist legacy of one party political superiority and legal manipulation can be replaced with the principle that the citizen is superior to the state, which in turn is defined through the law. Several factors bind a state based on the rule of law, including the relationship between the constitution and regular law. The constitutions in Central and Eastern Europe must strike a balance between providing sufficient guidance and stimuli to regular law that defines economic development, without interposing restrictions, directly or indirectly, that would curtail this development. To date, the trend in the region indicates that this balance has not been reached.

At one end of the equation, these newly drafted or adopted constitutions often fail to set an underlying constitutional philosophy for the pressing economic issues. Inconsistencies persist between the attempt to introduce basic free market and private ownership concepts and the old system of state ownership. Consequently, the constitutions tend to adhere to the old notion of state intervention in the market rather than

1. Mahulena Hoskova, *The Evolving Regime of the New Property Law in the Czech and Slovak Federal Republic*, 7 AM. U.J. INT'L L. & POL'Y 605, 605-06 (1992).

encourage economic development. Constitutions actually impose a duty to promote government interference in the marketplace. For example, Albania's draft constitution still authorizes extensive state powers over economic activity. There are overly broad and undefined grants of authority to the state to "exercise control over internal and foreign trade" and to plan "for the entire economic and social authority" of the country. Furthermore, overly restrictive provisions require state approval of alternative uses of agricultural lands and limit private enterprises that infringe upon the "interests of society." This restriction itself is so broad that it places almost unlimited discretion and power in the government's hands.

Lithuania is struggling with these same concepts. In the current draft constitution, there are a number of ambiguities relating to private ownership, competition, and the free market. As with the Albanian draft, the Lithuanian draft constitution provides that the private market will not be permitted to adversely "affect the general welfare" and "citizens' rights." This restriction can easily be construed to prevent a variety of economic activities that are commonly controlled by the market. Bulgaria's constitution goes so far as to say that it is the state's task to eliminate the "impediments of economic and social character" which restrict the "quality of the citizens."

With these broad, undefined limitations on private market activities, it will be more difficult for governments to create a legislative agenda that supports a free market economy. Authors Gray and Hanson allude to this issue in their discussion on private sector development in Romania by noting that Romania's constitution prohibits the ownership of land by foreigners - an unnecessary barrier to the development of a market economy.

The second part of the equation in the relationship between constitutions and the enactment of regular laws is the propensity to provide traditional concepts of constitutional guarantees to issues that are intrinsic to economic development. This conception of constitutionalism has its origin in the old Soviet-style constitutions. Such constitutions provided both obligations and restrictions directed primarily at the private citizen. There was no attempt to curtail the actions of the state because citizens were able to actualize these duties and rights only through the mechanism guaranteeing the supremacy of the Communist Party. As Hartwig notes in his article, the Soviet constitution "guaranteed the [P]arty a position beyond the constitution and immunized it

against any control.”² Clearly, the Soviet-style constitutions were designed to proclaim general ideological principles that were the basis of the Communist Manifesto. Hence, these constitutions were replete with communist ideological goals such as the right to leisure, the right to health protection, the right to disability insurance, and the right to job protection, to name just a few.

This very distinct conception of constitutionalism does not show signs of fading, even in the current post-communist legal transformation. For instance, in the Bulgarian constitution there are a number of provisions which attempt to assure job security through free health insurance, free education, minimum pensions, paid annual leave, maternity leave, and public assistance. The Czechoslovakian Bill of Fundamental Rights and Liberties fell short of guaranteeing the right to work but states that “everyone has the right to make his/her living through work.” The bill also guarantees the right to strike, the right to free medical care, free education (including higher education), and the right to an “unharmful environment.” The newly drafted or adopted constitutions of Romania, Albania, Poland, and Lithuania contain similar commitments to maintain positive economic and social rights.

While these are admirable goals, it is questionable whether the constitutions should equate these economic guarantees with traditional constitutional guarantees concerning the protection of individual rights. Such provisions oblige governments to assertively protect these economic rights. Yet, these “rights” are not easily enforceable through the judiciary, particularly through the newly established constitutional courts. It is perhaps more appropriate to view these rights as laudable aspirations, rather than constitutionally enforceable rights. Moreover, by equating economic entitlements with the fundamental protection against government infringement of personal liberty, newly democratizing countries run the risk that the importance of the constitutions as benchmarks for a rule of law will be denigrated when the economic guarantees fail — and many of them will fail.

The first truism has emerged in the early stages of the reform process in Central and Eastern Europe. Creating a democratic, market-based society brings serious short-term costs. We are now witnessing the impoverishment of millions of people in this region, including the former Soviet Union. According to Radio Free Europe reports, Bulgaria’s gross domestic product declined by as much as thirty percent in

2. Matthias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM. U.J. INT'L L. & POL'Y 449, 456 (1992).

the first half of 1991 alone. Its unemployment rate was, after Poland, the highest in Central and Eastern Europe. In the first three quarters of 1991, consumer prices rose over 500%. In Poland, real wages dropped over thirty percent in the first three quarters of 1991 and unemployment surpassed two million workers (11.1%). In recent months, Albania, has been on the brink of political, social, and economic collapse. Simply stated, without Western aid, Albania would have descended into the post-communist, post-democratic reform abyss.

The question is whether popular dissatisfaction with the economy will undermine the governments' achievements in establishing a rule of law that is lasting and protected by constitutional principles that do not change with the fluctuations of the economy or the political system. As it stands now, the public's theoretical support for economic reform is not matched by its readiness to accept the upcoming hardships. Despite these governments' impressive achievements in setting the foundations for a democratic political system, they have so far failed, in the public's eye, in securing strong and stable economic systems. There is now a serious concern that the citizens of the former Eastern bloc might not be willing to endure short-term hardships for the prospects of securing future economic prosperity that so far seem to be enjoyed only by the nomenclature of the old communist system.

A recent series of public opinion polls commissioned by the United States Information Agency (USIA) revealed the uncertainty and lack of support for the current economic reform process. Faced with the hypothetical choice of "freedom to express one's views openly" or "a life with few economic worries," sixty-three percent of Poles choose the latter. Roughly one in two Poles think the state should assume greater responsibility for the welfare of individuals. In Bulgaria, more Bulgarians want government to assure jobs and decent living conditions rather than offer broad opportunities for private initiative. A majority of Bulgarians think that only some businesses should be privatized, while the rest should remain state-owned.

This degree of dissatisfaction coupled with the perception that the new constitutions impose duties on the government to uphold the guarantees embodied in a social welfare state also threatens to paralyze the judiciary. If the constitutions are to be instruments wielded to realize the rights projected by the new legal systems, the constitutional provisions must be enforceable in the courts. In fact, the rights and obligations contained in the constitutions are justiciable through the newly established constitutional courts in each of the Central and East European countries. The constitutional courts are poised to forge the creation of a lasting constitutional framework for the new political systems

throughout the region. In his article, Hartwig describes the importance of these new courts:

The most significant and most effective protection of human rights is guaranteed by the individual complaint mechanism. Where every person has direct access to the court he or she can defend his or her rights. Direct access to a court enables the individual to gain status as an autonomous personality *vis-a-vis* the State. The constitutional courts will become the custodians of the constitution, and will enable individuals to defend their rights even against state organs. The constitutional courts will inspire trust in the law and will foster respect for the newly established legal systems of Central and Eastern Europe.³

If, however, the new constitutions maintain the perception that all provisions are judicially enforceable, then the unlimited access to the constitutional courts will, as stated by Hartwig, lead to an "overburdening" of the courts. For instance, citizens of both Hungary and the CSFR have standing under their respective constitutions to assert their constitutional rights in the constitutional courts. Already, between January 1990, and July 1991, over 3,000 people have petitioned the Hungarian Constitutional Court.

Since the first democratic revolutions in late 1989, the countries of Central and Eastern Europe have worked to complete the reconstruction of their legal systems. Even with the frenzied pace of reform, the process will undoubtedly be prolonged, and full of mid-course changes. The character of this process and the resulting legal system cannot be separated from the process of drafting the countries' constitutions. Because of the lack of established institutions such as administrative, commercial, and constitutional courts, as well as the absence of basic governmental structures, the emerging constitutions in Central and Eastern Europe must provide myriad principles to set the foundations for a democratic and market-based system. The principle of limited government intrusion is an important aspect of this constitution-making. The over-regulation of people's lives through constitutional guarantees that are either unenforceable or overly restrictive will be devastating to the ultimate objective of fostering public confidence in a society premised on the rule of law.

3. Matthias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM. U.J. INT'L L. & POL'Y 449, 469-70 (1992).