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DEMOCRACY, RULE OF LAW, AND CONSTITUTIONALITY IN POST-COMMUNIST SOCIETY OF EASTERN EUROPE

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1. Democracy, Rule of Law and Constitutionality: Mutual Relations;
2. Overcoming the Past: Contrasting Background of Reforms; 3. The Change of a System in *Statu Nascendi* — the Years 1989—1990; 4. Prospects and Forecasts.

Most generally speaking, the changes now in progress in the political systems of Eastern Europe[1] consist in transition from autocracy[2] to liberal democracy; from arbitrariness of the Communist Party-controlled State to unconditional subordination of State to the rigours of law; and from a loose system of sources of law, their hierarchy obscure in practice, to a coherent and strictly hierarchical

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[1] I am using the term *Eastern Europe*, and not e.g. Central or East-Central Europe, for the reason that to me that term has first of all the political and not geographical and cultural meaning and thus seems more adequate as a collective name of a region which had special relations with its Eastern neighbour, that is the USSR, and whose societies share the experience of (authoritarian) *Real-sozialismus.*

[2] The term *autocratic* regime is more temperate than the commonly used category of totalitarianism and as such seems more adequate as a general name of political systems established in Eastern Europe in the name of fulfilment of the ideas of Marxism-Leninism. Not in all the countries involved did the regime then in power manage to preserve till its very end the traits attributed to totalitarianism in the now classical works devoted to this subject. For a brief characterization of totalitarianism, see C. J. Friedrich, Z. Brzeziński, *Totalitarian Dictatorship and Autocracy*, 2nd ed., New York—Washington—London 1966, p. 22. See also A. Walicki, "Czy PRL była państwem totalitarnym" [Was Polish People's Republic a Totalitarian State], *Polityka*, No. 29 of June 21, 1990, pp. 1 and 13. Answering the question contained in the title in the negative, the author quotes the theoretical construction of Z. Brzeziński, *The Grand Failure*, New York 1989

one, based on a stable foundation of the national Constitution treated as the basic statute and the supreme law.

The direction shared by all those changes is adequate to a profound revaluation of mutual relations between the individual, society, and State, executed parallel in the ideological sphere. The idea of the individual's submission to the laws of history (freedom as understanding of the necessity according to F. Engels) is being replaced with that of inalienable human rights, the philosophy of collectivism — by that of personalism, and the conception of State control — by one of civic society.

It is only against this background that the main thesis of this study becomes explicit: the aims assumed by East-European societies may and indeed are achieved owing to their understanding of the mutual relations between democracy, rule of law, and constitutionality, that is — to parallel reforms in all three spheres: this is actually what really happens to a large extent. Treated jointly, those reforms will manifest their importance for the individual's position in society and State; they will provide due guarantees of that individual's rights and freedoms; and will define the State's functions in relation to society as a whole and also to individuals who compose it.

A parallel implementation of reforms accelerates their progress in each sphere separately; on the other hand, it cumulates the effects of those reforms providing their mutual consolidation. Instead, a delay in one sphere (e.g., of democracy) sets back the progress in the remaining spheres (of rule of law and constitutionality) and limits the import of achievements in those spheres.

Let us now consider that mutual relationship between democracy, rule of law and constitutionality from the Eeast-European perspective and from the viewpoint of the changes now in progress in that region. What does that relationship consist in and how is it manifested?

I

1.1. Whichever of the many definitions of democracy we choose to adopt, its essence can be reduced to the decisive participation of the people in the equal and free deciding of the public authority which is an attribute of State as a rule.[3] If we confine ourselves to A. Lincoln's famous formula

[3] See J. Wróblewski, "Z zagadnień pojęcia i ideologii demokratycznego państwa prawnego (analiza teoretyczna)" [The Notion and Ideology of Democratic *Rechtsstaat* : Selected Problems (Theoretical Analysis)], *Państwo i Prawo,* 1990, No. 6, pp. 3—16, with the quoted literature.

("government of the people, by the people, and for the people" [4]), it appears straight away that the point here is to create structures and procedures of public authority which would make the people as a whole the subject of that authority, and not its separated part (a variously conceived élite); which would create conditions of genuine participation in that authority for all social groups of which that particular people is composed; and which would guarantee the adequacy of decisions taken with the interests of the people. The permanence and validity of this mechanism of public authority can be secured to the fullest if the rules that govern it are given the form of legal provisions binding to those in power at the moment. To quote another well-known formula — if the rule of law prevails over that of individuals.

Democracy can be realized to the fullest when power results from nothing but law and is subordinated to that law *(sub lege),* and when its main instruments are laws *(per leges).* Law secures for power its desired social effectiveness, defining its structures and procedures and the forms of social control over its uses. It guards those in power from the temptation, ever-inviting for all rulers, to make their rule discretionary and arbitrary and in consequence, to abuse their powers in order to extend the group or even individual authority beyond what is a socially accepted necessity. Instead, if power is not submitted to the rigours of law, the way is thus paved for a democratic rule to degenerate into an autocratic or even totalitarian one, or if the course of events is different, for democracy to be transformed into anarchy. But the above-mentioned function of law as a regulator and guarantor of democracy can only be performed effectively if law itself is created democratically, that is by agencies democratically authorized to create it, and in a way to make it possible for that law to represent the will and interests of the people as a whole, protecting the rights of minorities against "tyranny of the majority" and at the same time — the rights and freedoms of the individual against an intervention of society and State unwarranted by a superior interest. *What is therefore the supreme guarantee of democracy, indispensable though merely formal, is a law whose desired contents and form can only be guaranteed, in turn, by a democratic authority.*

1.2. The rule of law should not be reduced to legality interpreted formally as the requirement that public authority should be exercised on the grounds of law, by legally authorized agencies or institutions, and in a way provided by law. The requirement of observance of law is a value in itself, and a democratic political system obviously favours that observ-

[4] "Gettysburg Address," delivered on November 19, 1863, in : *Selected Writings*, New York, N. Y. 1962, p. 439.

ance. But the point is also that law should provide in its contents a possibly accurate definition of the structures and procedures of power on the one hand, and guarantee a duly broad sphere of inviolable civic liberties on the other hand. It is not enough to state that State may only do things that are allowed by law, while a citizen — everything that is not forbidden by law. If the range of things allowed in the first case and forbidden in the latter one is too broad or imprecisely defined, neither democracy nor human rights can be properly guaranteed. Thus conclusions about law-making have to be drawn from the postulate for the rule of law the accomplishment of which leads to the indispensable limitation of the "freedom" of State authority, and to nothing more than the necessary limitation of individual freedom.

Thus formal legality is an element of the rule of law but does not exhaust that notion to the full. What is more, a conflict may emerge between the two above-mentioned categories. If at any moment the coherence is severed between the democratic values that are immanent in the formula of rule of law and the contents of statutory law, that is if statutory law ceases to be a just one, a civil protest against that law and its makers becomes justified, its legitimation being precisely the trend towards rule of law and democracy. The conclusion can be drawn that rule of law means subordination of the rulers and the ruled not to any law whatever but to one that expresses definite democratic values: democracy, freedom and equality, that is to a just law in this interpretation.[5]

1.3. While rule of law is both a condition and a prerequisite of democracy, also constitutionality is in turn the best condition and guarantee of rule of law and democracy, at least within the discussed area of legal culture (the situation shaping differently in such countries as Great Britain, New Zealand, or Israel) and in the discussed period of history. I interpret constitutionality as constitutional legality, the requirement to lay down a written Constitution as the supreme law of State, and to create guarantees of its application by all State agencies, in all spheres and forms of their activity, law-making included. Constitutionality guarantees the rule of law to the extent to which a given Constitution arranges law into a hierarchic system of provisions subordinated to the values, also formulated in that Constitution, that are recognized to be supreme; specifies the competences of the separate State agencies in the sphere of law-making

[5] Concerned here is just one aspect of justice, and in one of that notion's meanings only, and not a settlement of the dispute about the contents that should be attributed to justice. Of the ample literature of this subject, it suffices to mention the famous work by J. Rawls, *A Theory* of *Justice*, Cambridge, Mass. 1973 and the references of justice to equality and freedom contained in that book.

and application of law; regulates the relation of the norms of domestic law to the international ones; creates a system of institutional guarantees of observance of law and of removal of contradictions between the contents of the separate legal acts, should such contradictions ever take place. Constitutionality also performs the function of guarantee in relation to democracy as it is in the Constitution that the most general but at the same time also the "strongest" definition (from the viewpoint of the legal force) is provided of the sphere of individual freedom protected against any State intervention whatever, and of the sphere of the civic, among them the political, rights which the State is obliged to guarantee. Also in the Constitution, a binding definition is contained of the main forms of accomplishment of State authority; the competences of the separate State agencies are delimited; and the forms of social control over the State's activity are established.

What remains open to discussion, instead, is the question whether "separation of powers" (Montesquieu's triple separation) is a logical and *necessary* consequence of rule of law and constitutionality. While it is self-evident that what has necessarily to be that consequence is the existence of a truly independent judiciary, the separation of powers between the executive and the legislative authority is theoretically less obvious, particularly if it were to mean not just mutual independence but also balance of those two segments of State authority.

2

2.1. The model of *Realsozialismus* (which was in fact authoritarian), implemented in Eastern Europe on the ideological inspiration of Marxism in its Leninist variation, and under an overwhelming suggestion provided by indiscriminately universalized experiences of the Soviet Union, included in its theoretical assumptions the principles of democracy (in the version of "socialist democracy"), of legality (in the version of "socialist" or "people's" legality[6]), and of constitutionalism, also in a specific crippled version. In the practice of their implementation, however, those principles were limited and subordinated to the authoritarian or even totalitarian nature of State power. Nevertheless, after a change of that nature and

[6] The opinion, that socialism rejected legality and rule of law in any form whatever out of its very nature—see e.g. S. Yoshino, "The Conception of Rule of Law and Independence of Judicature," *Journal of Behavioral and Social Sciences* (Tokai University, Japan), 1991, Vol. 35, p. 178—is exaggerated and fails to correspond with the facts.

removal of the above-mentioned limitations, *some* of the previously established *forms* of implementation of those principles (both institutions and procedures) may still be continued.

2.2. The "socialist democracy" assumed a broad participation of society in the exercise of power. Many forms of participation were established. But the freedom of the participants was limited in so far as they could not choose any option which would be different from the officially and centrally defined direction of State policy or get organized basing on such an option. A political system considered to be immovable was the monocentric one where the only centre to control and decide was the *Communist Party* which controlled through its machine the entire State mechanism as well as the extra-State forms of organization of society. *Other parties* existed in some countries of the bloc only, like Bulgaria, Czechoslovakia, Poland and the GDR, while a single-party system was introduced in Rumania, Hungary, and the USSR. But even if they did exist, such other parties constituted no political (programmatic and/or personal) alternative to the Communist Party. They were at most specific "pressure groups" in the sphere of decisions concerning the circles they represented; in essential matters, they cooperated with the Party and contributed to the fulfilment of its programme. Accordingly, also the elections to representations (both parliamentary and local) lacked the element of competition between the parties, and usually also between individuals.[7]

2.3. In the conditions of that monopolistic influence of the Communist Party on the whole of State authority, also legality was of a most limited importance as compared to its original sense; it was called "socialist" or "people's" legality. That limitation was most apparent in the following .spheres: 1) the State was governed not only by law but also, and first of all, by directives of the Party which lacked any legal force whatever but were given priority in practice over legal provisions; 2) the State intervened freely in the life of society and individual citizens, regulating it so as to make the rule easier and to petrify the existing relations;[8] 3) law in its essence corresponded with the doctrine of the Communist Party which had an unlimited influence in principle not only on law-making but also;

[7] In the 1980s this situation started to change rapidly, also in the extra-European socialist States—see below.

[8] At the same time, however, law created the conditions to contest the existing system, even if on a limited and controlled scale, which in definite conditions could have served not exactly homeostasis but rather destabilization of that system. The opinion of J. Wróblewski, *Zasady tworzenia prawa [Principles of Law-Making]*, Warsaw 1989, as to the homeostatic purpose of law-making are rightly criticized in this respect by J. Jabłońska - Bonca in her review of that book *(Państwo i Prawo*, 1990, No. 6, p. 103).

4) on its enforcement by the State adjudicating agencies (courts and competent agencies of public administration); in those conditions, independence of the judiciary which is an indispensable attribute of legality was of relative importance only, despite the official proclamation and recognition of that principle, and cases of its infringement were by no means exceptional;[9] 5) law was interpreted one-sidedly as an instrument of power, subordinated to its immediate needs, and its function of a guarantee of individual rights and freedoms was in fact neglected or situated in the background.

All the above limitations have been shown in their simplified form as is inevitable in the case of a brief discussion. In different periods and countries, their actual intensity and form varied. What matters for the present remarks, however, is the final conclusion.

The *autocratic socialism* in its extreme form of Stalinist totalitarianism of its very nature deprived the so-called socialist legality of all contents which might be of any importance for the citizen; gradually mitigated with time, it did accept some attributes and values of legality, but in both cases *ruled out the development of the formal "socialist legality" into a genuine rule of law of standard value.*

2.4. While the Constitution was attributed the import of the basic statute in theory—that is, of the basis and core of the system of law in general, and of the legal regulation of structures of State authority in particular,[10] it was treated in practice as a political document "unfit" for direct application by the adjudicating agencies,[11] and what is more, of little importance and reference in relation to other legal acts. Owing to the simple procedure of constitutional amendment (a qualified majority of votes is rather easy to obtain in a parliament that is dominated by one party), the Constitution was in fact amended quite often according to the

[9] This has been demonstrated extensively by A. Rzepliński, *Sądownictwo w PRL [Judicature in Polish People's Republic]*, 2nd ed., London 1990, who rightly points to the fact that though neglected, the principle of independence of the judiciary nevertheless managed to supplant that of independence of courts both in the doctrine and in law.

[10] What a historian of law may find interesting is the purely formal convergence of the Marxist doctrine's interpretation of the Constitution as the basic statute (initiated by J. Stalin, *Zagadnienia leninizmu [The Problems of Leninism]*, Warsaw 1947, pp. 483—484, and developed e.g. by S. Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL [The Constitution as the Basic Statute of Polish People's Republic]*, 2nd ed., Warsaw 1967) on the one hand, with the Constitution being called the "supreme law of the land" (Art. VI Sec. 2 of Constitution of the United States of 1787) by the American Founding Fathers on the other hand.

[11] What may serve as an example here are the decisions of the Polish Supreme Court over many years.

current needs of ordinary legislation, instead of adjusting that legislation to constitutional principles.[12] This impaired both the authority and the legal import of the Constitution and of the principles of the system it proclaimed, democratic in the sense of "socialist democracy."

In its guarantee of the civic right, the Constitution gave priority to the socio-economic and cultural rights over the political and personal ones, to material over the formal (procedural) guarantees, to interests of society and State over those of the individual and citizen, invariably assuming, as its fundamental reason, that the basic source of individual rights and freedoms is the *will of State* expressed in the Constitution (and statutes), and what ultimately limits the exercise of those rights and freedoms is the *interest of the* ("socialist") *system* whose contents and extent were defined by the ruling Communist Party.[13] At the same time,, any possibility of international review of observance of human rights was emphatically denied and treated as an intolerable intervention in internal affairs of a sovereign State.

Basing on the assumption of sovereignty of the people—in its specific interpretation—the Constitution of a socialist State constructed the system of State agencies according to the principle of uniformity and unity of State authority which replaced the separation of powers, admitting and providing at the same time for a separation of competences between the individual agencies of that authority, uniform by definition as they were. The concept of unity of power—contrasted with the supposedly non-democratic doctrine of separation of power in any interpretation whatever—corresponded in its practical consequences with the monocentric nature of the political system (see Points 2 and 3 above). Based legally (formally) on the paradigm of unconditional superiority of the parliament (which was in fact, let us remember, just a facade for the Communist Party that controlled it) in the system of State agencies, and politically—on the leadership of the Communist Party which concerned all State agencies—the unity of power ruled out any possibility of disputes between the separate agencies as to the interpretation and application of the Constitution. All doubts in this sphere were to be resolved by the parliament as carrier of the supreme State authority, formally unrivalled in this capacity. * *

[12] Alas, this practice still continues, which is demonstrated by changes in the Polish Constitution introduced in March 1990 for the sole reason to adjust the reading of the Constitution to the local government reform, carried out at that same time by means of ordinary statutes.

[13] W. Soko1ewicz, "Über die sozialistische Auffassung von den Grundrechten und-pflichten," *Jahrbuch für Ostrecht,* 1978, Vol. XIX./2, pp. 11 Iff.

It stands to reason with this interpretation of the Constitution that the admissibility of judicial, that is extraparliamentary review of constitutionality was denied for a long time in the doctrine of law, and also in legislative practice; this trend was most marked in East Germany.[14]

2.5. What is worth noting and remembering, however, is that also under autoritarian socialism separate institutions emerged, as well as procedures, that served democracy, rule of law and constitutionality, both within and, so to say, as a consequence of the political system of that time, and against it in a way, as a result of activities of reformers who deliberatly aimed at weakening and then removing that system's non-democratic features.

On the other hand, the values and practical importance of those institutions for the individual's legal situation in society and State could not manifest themselves to the full until later when the system as a whole was changed (see below, mainly Point 3), the market economy introduced and foundations of a pluralist parliamentary democracy created.

And thus, as far as democracy is concerned, a variety of forms of social control over bureaucracy were established, such as for instance the general institution of the citizen's complaint against any decision of a State agency or official. Further, sometimes rather fragmentary institutions of the local, workers', and professional self-management were established; certain possibilities were created for the voters to select the candidates nominated in parliamentary and local elections;[15] and above all, some attempts were made to stimulate somewhat, to the extent possible in the conditions of those times, the activity of parliaments, through the adoption, among others, of some of the traditional forms of parliamentarianism (parliamentary commissions, interpellations, etc).[16] In the sphere of the *rule of law,* the supervisory functions of the prosecutor's office were extended with varying results; the administrative proceedings were regulated to provide for protection of the rights of the citizen concerned; and even the judicial control over administrative decisions was extended, whether by common courts (e.g. in the GDR and USSR), or by special administrative courts

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[14] W. Soko1ewicz, "Constitutionality—Precondition of the Rule of Law. A Certain Dilemma of a Socialist State," in : W. Maihofer, G. Sprenger (eds), *Revolution and Human Rights*, ARSP Beiheft No. 41, Stuttgart 1990, p. 190*ff*.

[15] For a broader presentation of those changes, see W. Sokolewicz, "Podstawowe zasady prawa wyborczego i ich ujęcie w konstytucji" [The Basic Principles of Election? Law and Their Constitutional Formulation], *Państwo i Prawo,* 1937, No. 10, pp. 77*ff*.

[16] See e.g. W. Sokolewicz, "The Contemporary Polish State-Structures and Functions," in : L. S. Graham, M. K. Ciechocińska (eds), *The Polish Dilemma. Views from, Within,* Boulder, Col. 1987, pp. 48—49.

(Poland). The office of the Ombudsman was created, unprecedented in this part of Europe—the Polish Spokesman of Civic Rights, established in 1987. In the sphere of *constitutionality,* there was a gradual increase, though not without obstacles and set-backs, of the appreciation of the role of the Constitution as a primarily legal act; this resulted in the possibility being allowed for of submitting the constitutionality of law to extra-parliamentary review exercised by a constitutional court (tribunal). While initially that possibility was reserved for federal States only, with view to control the constitutionality and consistence with statutes of the federation as far as the laws of its components are concerned (this was the case in Yugoslavia, where the practice of constitutional courts soon took another direction for that matter; and in Czechoslovakia, where, however, the tribunal provided for in 1968 constitutional law was never actually created)—later on, a more general and fundamental need for judicial review of constitutionality was recognized which found its expression in the establishment of constitutional tribunals in Poland (1982, 1985), and recently also in Hungary (1989).

3

3.1. The break of the Communist Party's political monopoly was decisive for the whole of transformations. The monocentric system was thus replaced with pluralism in which political parties, movements and associations enjoy practically equal rights and compete with one another for social support. The Communist Party's special role was at first gradually reduced in practice and then lost its legal guarantee through changes in the wording of the relevant provisions of constitutional law. The constitutional clause that granted to the Communist Party the privilege of playing its "leading role" was replaced with the principle of freedom of formation of parties.

In all countries, political pluralism is still in the making. The basic political division—into those for and against the authoritarian socialism—is being gradually replaced with a differentiation of optional programmes. As far as the purely formal plane is concerned, instead, no explicit criteria have been elaborated as yet to distinguish such forms of political organization as parties, movements, and associations. What is more, a question appeared in the course of works aimed at a legal regulation (institutional-? ization) of the new pluralistic political systems—a question which is admittedly theoretical but has important practical effects—whether there is at all the need, nay the possibility, for that distinction in the face of

the present universal reduction of the role of parties as compared to that of political (social) movements which have a different organization. In fact such movements, anti-authoritarian in nature, perform more or less successfully the functions of political parties in most East-European countries. Their legal status remains unclear.

3.2. The repudiation of the authoritarian system and its replacement with a democratic one takes a variety of courses: it is either evolutionary, the changes being more or less radical and consistent (Bulgaria as opposed to Czechoslovakia, Poland, Hungary, as well as the GDR, the latter country's peculiarity taken into account), or revolutionary with all the consequences of that course (as in Rumania where the former autocratic regime verged on tyranny).

In all countries of the discussed region, free elections are taking place in 1990, with the aim to shape democratically the supreme national representations. An exception here is Poland where partly free parliamentary elections took place as early as 1989, resulting in a defeat of the Communist Party, still in power at that time, and leading to the formation of a Government which, despite its coalition make-up, is in fact dominated by the movement of Solidarity. The elections are to provide a democratic legitimation for State authority exercised by anti-autocratic political forces, and to result in the shaping of parliaments the composition of which would reflect the actual preferences of society. In practically all countries of the discussed region, the newly-elected parliaments are to perform the function of the Constituent Assembly (stressed to a varying extent): they are to prepare and pass an entirely new Constitution as foundation of the democratic order under the rule of law. The hitherto valid legal regulations of the system—those, of the constitutional rank included—are largely fragmentary and temporary. It is worth mentioning here that even before the elections, the parliaments—in their former composition or partly reconstructed according to a pre-electoral mode (as was the case in Czechoslovakia)—in many countries introduced changes in the executive authority (the President and Government in Czechoslovakia, changes of Government in the GDR and Hungary), appointing members of the former anti-Communist opposition to the top offices. The subsequent elections confirmed that direction of changes in principle. There were, however, two important exceptions. As a result of a number of circumstances the discussion of which exceeds the scope of the present paper, the democratic legitimation in Bulgaria and Rumania was obtained by political forces that are admittedly anti-authoritarian but not anti-Communist: quite the contrary,

those forces descend from the former Communist Parties, now reformed, and make no effort to disguise their Leftist tendencies.

3.3. Not everywhere, and not to the same extent in all countries concerned, the turn *from* autocratic socialism is one *towards* market economy and similarly conceived pluralistic parliamentary democracy respecting the rule of law. Admittedly, a step was taken in all countries concerned which was aimed at manifesting their will to break with the heritage of authoritarian *Realsozialismus:* a renouncement—as if to supplement the changes already introduced in the system and anticipating the future ones — of the State's constitutional characterization as socialist (the exception here is the USSR which is however a somewhat different problem). That renouncement, however, does not determine in itself the directions of policy of the democratically appointed Governments, and does not exclude the possibility that they might legally choose a strategy of development which would be convergent e.g. with the principles of democratic socialism. The adoption of that strategy is not rendered impossible, either, by the constitutional formula of a *democratic Rechtsstaat,* adopted in 1989 first in Hungary and then in Poland, and also in Bulgaria in 1990. It is worth mentioning here that this formula should be interpreted as proclaiming a democratic State and a *Rechtsstaat,* the two elements treated as equivalent and autonomous, though mutually related as regards the merits. The feature of democracy is by no means to limit that of the *Rechtsstaat* like before, when (see Point 2.2. above) "socialist democracy" was tantamount to a limitation of democracy as such. Quite the contrary, the democratic nature is to consolidate and guarantee the *Rechtsstaat.* Some Constitutions in their modified version openly suggest the Social Democratic option (that is, one of a democratic socialism): this is the case with the Hungarian Constitution which openly requires that the State should be guided by the principles not only of bourgeois democracy but also of democratic socialism, or with the Polish one which states that the democratic *Rechtsstaat* is to implement the principles of "social justice."

It has to be admitted that this problem is merely of theoretical importance in all countries but Bulgaria and Rumania. In most countries under discussion, there are neither the social nor the political nor—above all—the psychological conditions for the acceptance of any principles or slogans which would offer even a distant association with the past period of *Realsozialismus* and planned economy. The disappointment with the effects

[17] This notion is interpreted differently by S. Yoshino in his above-mentioned paper, which has induced me to make the above remarks.

of the former policy concerns socialism in all of its possible manifestations. After the economic collapse brought about by socialism in its form of *Realsozialismus,* hopes for improvement of the living standards are linked with market economy in its most liberal version. Until that economy reveals its weak points and proves to yield not only successes but also various side-effects burdensome for society, no programmes that bring socialism to mind—even the most civilized and democratic version of that system—stand the chance to gain acceptance of broader circles of society, and thus to be implemented as State policy in the system of parliamentary democracy.

In these circumstances, the renouncement of the State's constitutional characterization as socialist should be considered permanent and justified.

3.4. The change of the system also finds its legal expression and confirmation in the sphere of State symbols: the name of State, the national emblem, and national holidays. The pace and extent of corrections of the legal regulations were influenced by public opinion which in Eastern Europe has a great reverence for the national and State symbols. The question was, on the one hand, to provide a symbolic confirmation of the regained full sovereignty of State and of a reversal to national traditions, and on the other hand, to stress the transformation of State perceived in class categories, which was in practice tantamount to a State of a single party (the Communist one, of course) into one of the whole nation, a State as the national value. The official name of State was changed, all elements of its class characterization removed: the Hungarian *People's* Republic was renamed Republic of Hungary, the *Socialist* Republic of Rumania—Rumania, the Polish *People's* Republic—Republic of Poland, and the Czechoslovak *Socialist* Republic—Federal Republic of Bohemia and Slovakia. Also the changes of the national emblems took a similar direction: restoration of what was traditional and removal of elements related to the Communist ideology, or restoration of elements that had been considered contradictory to that ideology (like the crown on the Polish eagle's head). The traditional national holidays were reestablished (in Poland, Czechoslovakia and Hungary), and anniversaries associated with the introduction of the *Realsozialismus* order after World War II—abolished as national holidays.

Those changes took place in the atmosphere of a great interest on part of public opinion, and sometimes gave rise to disputes which concerned not exactly the general trend but rather the often secondary details. The importance of such changes was above all that they established the conviction in social consciousness that a qualitative and irreversible trans-

formation had taken place; that the renouncement of socialism is final and so is also the restoration of the State's full sovereignty.

3.5. Practically all of the post-Communist States tend towards the acceptance of the formula of a democratic *Rechtsstaat* which combines the values of democracy, rule of law and constitutionality with those of freedom and equality; the differences here concern the pace, forms, and articulation of those trends. The pluralist political democracy has become a fact.

Political transformations are accompanied by restructuring of the legal order. What originates during the period of changes that are sometimes called revolutionary, are but conditions for the introduction of rule of law in the sense adopted in this paper (see Point 1.2. above). The present days still hardly favour an establishment of rule of law in the full sense. Public opinion as well as the main political forces concentrate rather on the elimination of all that used to be the contradiction of legality and rule of law in the past.[18] This is done above all by means of guarantees of truly *independent judicial decisions,* such as for example the ban on the judges' membership of all political parties (which is sometimes questioned, however, as a restriction of their civic liberties), or the appointment of an agency for the judges' specific self-selection and self-appreciation, the National Council of the Judiciary in Poland. At the same time, *the police apparatus is being reconstructed,* that of the political police in particular. This was initially done with greater force in the GDR, and somewhat less vigorously in Czechoslovakia, Poland and Hungary; the relevant news from Rumania are rather undependable. But it was in Rumania of all countries that the spectacular trial of N. and E. Ceausescu was staged during revolutionary events, highly doubtful as regards its procedure from the point of view of consistence with the principle of rule of law. It remains for future historians to appraise to what extent the preference given to the interest of the revolution over the general moral principles, and with the generally accepted principles of judicial procedure, was justified in that particular case.

3.6. A legal consolidation of the introduced political changes is to be made in new Constitutions, prepared in all States of the discussed region, though at different speeds. Those Constitutions will no doubt proclaim the pluralistic and democratic nature of those countries' respective political systems and define in each case the specific model of organization

[18] This involves a re-interpretation of the whole of those countries' postwar history, including its most dramatic moments such as the Hungarian Insurrection of 1956 or the ruthless suppression of the opposition in Poland in the years 1944—1948.

of State authorities, conclusively chosen from among the numerous existing options. In the meantime, as has already been mentioned above, fragmentary changes are introduced that are absolutely indispensable for the separate reforms and define the most general and symbolic direction of those reforms (in Poland, such changes were introduced in April and December of 1989, and in March of 1990; in Hungary, they took place in November, and in Czechoslovakia—in December of the last year; in the latter case, the change was to make it possible to elect A. Dubchek, who was not yet deputy at the time, to the office of Chairman of the Parliament). Despite those fragmentary changes, a great deal of the revolutionary reforms go beyond the still valid tenor of the literally interpreted constitutional provisions which impairs for the time being not only the political import of the basic statutes in the countries concerned and the respect toward it on the part of the authorities and citizens, but also the legal weight of the Constitution. Its direct application as a normative act by courts, and also by cinstitutional courts in countries where such bodies have been created, is thus hindered.

4

4.1. The repudiation of authoritarian socialism, in Central and Eastern Europe is connected with a universal acceptance of the values of democracy, rule of law, and constitutionalism. The degree of that acceptance verges on a national consensus. This opinion finds a confirmation and consolidation in the new constitutional formulations where the above-mentioned values are granted the weight of the *legal principles* of the post-Communist political systems. In Poland, for example, among those who declare for "parliamentary" democracy, free democratic elections, political pluralism, and the rule of law, also the successor of the Communist Party can be found : the Social Democracy of Republic of Poland, created after the Party's dissolution. The new political and legal systems will no doubt base on those values, substantiating them and providing the guarantees of their observance throughout the system of law.

4.2. The establishment of many-party systems that represent the principle of political pluralism will progress, based on the assumed freedom of creation of parties and their equal rights in the competition for votes during the elections. The only measure of their actual influence, as well as the index of the degree to which they should participate in the exercise of power, would be their success or defeat in elections. Everywhere in the discussed region, the problem will emerge of adjustment to

the new conditions of the "historical" parties based on the ideological and political divisions from before World War II on, the one hand, and of new movements, hitherto united by their common negation of authoritarian socialism which may now be expected to undergo partitioning. Against this background, a legal problem arises : of the needs, scale, and forms of legal regulation (institutionalization) of political parties (already introduced in Czechoslovakia and Hungary, and to some extent also in Poland). The question is how to guarantee the freedom of formation of parties and at the same time to protect the young democracy against the threat of radicalism, whether leftist or rightist. It seems that the legal regulation of this sphere will have to result from a compromise between the interests of broad social movements, "open" as regards ideology and philosophy, aiming at the preservation to some extent of political and organizational coherence on the one hand, and the aspirationsi of the still weak classical (in the European sense) parties, characterized by ideological and philosophical inner uniformity but lacking a broader social base on the other hand. The dispute will have to be settled between advocates of different modes of legalization of parties (registration vs. notice), different ranges of State supervision over the existing parties (judicial vs. administrative supervision), and different admissible methods of financing of parties (from national only or national/international sources ; freedom vs. prohibition of profitable economic activity of parties). We still lack sufficient premises to answer the basic questions : will it prove possible to contain the whole of society's political activity in the legal and organizational form of a political party ? and, what will be the actual extent of the now declared political pluralism ?

While the adoption of democracy as the basic principle of political system of the East-European post-Communist societies is uncontroversial, the question of that democracy's institutional forms will have to be settled in the future Constitutions. Is it to be, as some would like, an exclusively (or nearly exclusively) representative democracy, or will the need be recognized for development of its other extrarepresentative manifestations from local governments to national legislative initiatives and referendums ? Disputes also concern the organization of supreme State authorities. The possible choices range from one extreme solution to the other : from the balance of power between the legislature and the executive, with its democratic authorization acquired in general elections, to parliamentary democracy in the strict sense, with the Parliament's absolute superiority over the executive. In the situation where both .a well-developed party system and a stable political life are missing, the problem of priority of democracy vs. that of effectiveness becomes particularly acute, the more so as the rebuilding of the economy towards

the market requires an energetic Government able to act effectively. Such a Government, in turn, can only be appointed (or approved) by a Parliament in which a distinct and stable majority has been shaped with a definite joint programme. A conflict arises here between the ambitions of small political parties to parliamentary democracy and such pragmatic reasons ; that conflict is reflected in discussions on the elections law as a dispute between the advocates of a full vs. a limited proportionality of the electoral system. Also discussed is the *structure of Parliament:* uni- vs. bicameral. Leaving the case of Czechoslovakia aside (where the bicameral parliamentary structure results from the country's federal system), the Senate as the other chamber was introduced in Poland and Rumania, though for different reasons. What remains doubtful is : what is to be the actual difference between representation in that chamber, and the one in the "first" one? what different interests is the Senate to represent? and consequently, how should the principles and mode of election of senators be formulated ? Further, is the other chamber really indispensable for rationalization of the parliamentary legislative process ? And, finally, the fundamental question : which parliament, the uni- or the bicameral one, is more adequate to the ideal of democratic State ? (this question, obviously, does not concern a federation which gives rise to different problems as regards the political system).

4.3. It may be expected that law will become stabilized and the formal guarantees extended of its observance by the citizens and application by the public authorities. Taking into consideration the already developed pre-eminence of the universal values (stressed several times by M. Gorbachev) and the future progress of European integration with the participation of countries of the Eastern region, one may expect an increased influence of international law and the standards it contains on domestic law of those countries. Adopting the standards accepted in the international (including the West-European) community with regard to human rights, for example, the discussed countries will probably also adopt the measures of control of the observance of those standards as provided by international law. This way, the possibilities will be opened up for a much broader interpretation of the rule of law, and for consolidation of the individual's status in relation to community, and also of that of smaller communities and groups in relation to the nation (people) as a whole. What will no doubt acquire special importance is the problem of securing rights to *national* (ethnic) *minorities* in a way so as not to jeopardize the territorial integrity of countries which—let us state this once more—are particularly sensitive to sovereignty after a long period of national and political dependence. Yet the international community seems to expect that those countries

not only respect the individual rights of those who feel affiliated to the national (ethnic) minorities, but also effectively safeguard the recognized rights of those minorities as *communities.*[19] This is just one of the many reflections of the nationalistic issue, swollen in Eastern Europe, and the underestimation of that issue by the separate States of that region may greatly contribute to their political destabilization.[19] [20]

4.4. The preparation of the new Constitutions will be decisively influenced by new, democratic and anti-totalitarian political forces. It would be both desirable and proper that they should express the idea of a broad national agreement and the "great compromise." For that reason, while defining the ways of exercising public authority in the State precisely and carefully, they should not determine beforehand the specific contents and directions of State policy in the sense that, in the sphere of economy for example, they should not rule out any of the possible options : neither the liberal nor—much less so—the interventionist one, although it might perhaps be advisable, to the extent at all feasible in the Constitution, to specify the minimum as well as the maximum range of State intervention. For this reason, when drafting the separate regulations, the legislators should see to it that the minority, submitting to the will of majority according to the rules of democracy, should not be totally helpless and void of all practical possibilities of vindicating its rights. Also from this point of view the actual accomplishment of the principles of democracy, rule of law and constitutionality in post-Communist States of Eastern Europe can be appraised. Only a complex formulation of those principles will bring those countries closer to the fulfilment of ideals of freedom, equality of justice in a variety of relations : between the individual and State, between the separate social groups, and between each of those groups and society as a whole and State subordinated to that society.

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[19] This trend is manifested in the activity of the Commission for Human Rights which is part of the UN. See A. Michalska, "Ochrona mniejszości etnicznych w świetle praktyki Komitetu Praw Człowieka" [Protection of Ethnic Minorities in the Light of Activity of the Commission for Human Rights], *Państwo i Prawo,* 1990, No. 6, pp. 26*ff*.

[20] This problem has been discussed extensively by Z. Brzeziński, "Eastern Europe—Postcommunist Nationalism," *Foreign Affairs*, Winter 1989/1990.