

Bottlenecks in the Transformation of Eastern Europe

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We are approaching the tenth anniversary of the 1989 revolutions in Central and Eastern Europe, and so you might ask: Why is he still talking about the transformation in Eastern Europe? The reason is simple: We are still in the midst of the transformation and, in some respects, the pendulum is swinging back. In many cases, what was done was accomplished imperfectly because the needs and the nature of the transformation were poorly understood. While political institutions can be reformed relatively quickly (after all, we have models to follow), the reform effort did not transform the political culture. As a result, there is now a tendency to feel nostalgic for the old days, reflected in a renewed popularity of the former communist parties. The economic systems were reformed to a certain degree, however, as I shall explain below, the inherent, but more subtle, obstacles in transforming a backward economy are now revealing themselves. Moreover, although the legal system underwent significant modifications, it still does not function properly to meet the needs of, for example, a market economy.

In any case, transformation would be incomplete. The mere reform of political, economic, and legal systems does not constitute a genuine transformation. Instead of focusing on the specifics, I would like to focus on the neglected and, in my view, the most crucial and simultaneously elusive aspect of the transformation—the transformation of the normative order, which is based on the value order. My discussion of this historic transformation will center primarily on the relationship between the normative order and the legal order.

I first want to emphasize something which is sometimes not entirely understood in the United States. The legal order involves a

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great deal more than mere legislation in the form of legal directives issued by state authorities. Another aspect of the legal order's proper functioning is represented by the extra-legal normative systems that originate, in contrast to legislation, from the people. Extra-legal normative systems are often the product of either implicit and voluntary agreements or of the natural and spontaneous generation of rules of human conduct created by the hearts and minds of the people. It is essential to bear in mind that, for an official legal system or legal order to function properly, it should be in harmony with the relevant society's normative order.

Perhaps my point can best be illustrated by comparing two countries: the Czech Republic and the former East Germany. Prior to the 1989 revolutions, both countries had relatively similar economic and political situations as well as similar legal systems. Nonetheless, it was widely believed that because East Germany was to be incorporated into West Germany, then a fully-operating western country with the largest and strongest economy in Europe, East Germany would have a much better chance of success with its transformation. East Germany would not need to transform its economic, political, and legal systems but rather simply adopt those already established in West Germany. In addition, East Germany received a colossal amount of quality assistance during its transition. For example, in one year, approximately DM 140 billion were spent on reviving East Germany's economy, in sharp contrast to the approximately Kc4 billion that the Czech Republic received during its transition.

Further, East Germany had a prepared legal order and was already accustomed to the law of West Germany that was to be applied under these new circumstances. Essentially, East Germany acceded to West Germany's established legal order, requiring merely that it begin applying the existing law that already went through years of fine tuning in West Germany. Moreover, East Germany's legal order had far more civil law continuity with the pre-communist system than the Czech Republic had between its own old and new legal orders. The basic structure of East Germany's *Bürgerliches Gesetzbuch* (BGB) legal order remained valid and stable throughout the communist era. This sharply contrasts with the Czech Republic, which put into practice such poisonous ideas as the separation of commercial and

family law from civil law and, even worse, the classification of civil law relations under the 1964 Czechoslovak Civil Code into three groups according to the configuration of parties: 1) actions between two citizens; 2) actions between a citizen and a state organ; and 3) actions between state organs.

West Germany also assisted the transformation of the East German legal order by replacing East Germany's legal personnel. From the West came armies of fresh, well-educated, hard-working, ambitious, and determined lawyers and judges, all fluent in the language and trained in the legal system—something other post-communist countries could only dream about. Therefore, when filling the important positions of legal order—judges, law professors, and lawyers—the East Germans swept away the old, corrupted, and compromised legal personnel. Their ability and training were suspect to begin with, and their loyalty to the new regime could never be fully relied upon. The East Germans replaced them with fully-trained, competent, uncompromised, and trustworthy personnel. The new personnel, in fact, knew the German legal system better than the people they replaced. With these and many other factors in mind, most predicted a smooth, quick, problem-free, and highly successful transformation in East Germany.

So much for predictions. Paradoxically, the new legal system does not function properly in East Germany, despite all of the advantages East Germany seemingly enjoyed. Countering contrary expectations, the transformation in East Germany did not fare markedly better than the transformation in the Czech Republic.

The transformation of the legal system in the Czech Republic occurred under considerably less favorable circumstances. The true inner political struggle in the Czech Republic was fought between those on the left, strong advocates of legal continuity including some I view as crypto-communists, and those on the right, the ruling government coalition led by economists who shared a thinly-disguised, deep contempt for law. When the debate between these two opposing camps plays out, there is little wonder that reform of the legal system continues to be a great obstruction to successful transformation. Within both camps, the idea that reform of the law presents no special difficulties or obstacles prevails and is enthusiastically supported, even by the former communists. For

example, both camps believe that learning managerial skills and technical rules about how to run businesses solves all commercial law problems. In light of my discussion of the normative order, this belief is hopelessly flawed. In order for businesses to function in conformity with western models, businesses must first learn the basic principles: do not steal (respect others' property); do not envy (fair play and respect for business partners); and do not lie or cheat (keep your promises).

Why, then, is the transformation of the German legal order rockier than expected? To answer this question, one must dig a bit deeper into legal theory and consider the different aspects of the legal order previously mentioned. In my view, an answer can be found, in part, by considering three approaches to the concept of law.

The first, and most rudimentary, approach is what I call "linguistic formalism" or analytical or conceptual jurisprudence. Linguistic formalism is a dogmatic approach to law that deals only with law in books and law on paper. The linguistic formalism model limits the law to that which is defined in statutes and regulations and interprets law according to strict linguistic criteria considering only the actual, literal meaning of the words used. Linguistic formalism does not consider the purposes for which the law was adopted.

The second, a sociological approach, usually referred to as "legal realism," attempts to describe actual behavior of legal subjects through observation. Legal realism considers real-life relations and not mere relations on paper. Rather than analyzing legal relations and institutions in the abstract, legal realism investigates how laws are enforced and how legal norms are implemented in practice.

The third, a psychological approach, considers not just legal texts or the conduct of state officials, but, more fundamentally, "legal consciousness"; that is, how law penetrates the hearts and minds of the people. Legal consciousness considers how knowledge about law spreads, how it is learned, and how it is internally accepted by people.

In my view, the West German legal system failed to take hold in the East because it conflicted with the informal normative system in East Germany. The people of the former East Germany still do not accept the new legal order and, in many ways, view it as imposed upon them against their will. In order for a legal system to function,

the state must be able to rely on the fact that, in the vast majority of cases, people will voluntarily comply with the rules. This, in turn, underlies the importance of achieving harmony between informal normative systems, or morality, and law. Such harmony can only occur, if at all, when the state actually practices what it preaches: a problem which I shall consider further below.

Given the need for harmony, one can see how crucial the legal consciousness model is. We should direct more attention to how changes in legal consciousness occur. This transformation is still underway because dealing with the psyche of the people requires a great deal of time, much like a marathon. First and foremost, it is vital to teach people that the law is a good thing and worth learning. This psychological approach emphasizes the importance of a positive environment to motivate people to accept the law as part of their own personal culture.

A strong lack of acceptance, indeed hatred, of law was inherited from the communist regime. Our social engineers made a colossal mistake in attempting to resolve all the problems of society by market engineering and privatization, that is, by easy technical rules. While one can partially substitute the informal normative systems with legislation, it is too expensive, both financially and administratively, too awkward, and too labored.

Therefore, I want to concentrate on the following two items: first, how the rules of human conduct are learned and spread; and second, how people are motivated to obey them. In thinking about these concepts we must keep in mind the two aspects of legal consciousness: sheer knowledge of the rules; and a positive internal attitude toward them, that is, the inner acceptance of agreement with the rules. There are several relevant factors helpful for learning the rules and several different avenues for spreading their acceptance.

First, the state, to give the crucial signal, must act as a role model during the transformation process. Generally, people do not learn about the law from reading statutes or law books, rather, they learn about the law indirectly from the decisions made by state authorities. People will judge the law positively or negatively according to the state authorities' actions: No factor influences the people's attitude towards the legal order more than the state's own attitude toward the legal order it is advocating. If the state acts cynically and

hypocritically by solemnly declaring rules and then blatantly disregarding them in practice, behavior typical of totalitarian regimes, then the state signals to the people that the legal order binds only the people, while leaving the state and state officials free to act as they wish.

Accordingly, after the revolution in the Czech state, the most important signals from the state concerned decommunization, lustration, and restitution. The Czech state decommunized by adopting the Act on the Lawlessness of the Communist Regime, which condemned the communist regime as criminal and illegitimate, and made clear that those who committed crimes on behalf of the state are still subject to punishment. Lustration ensured that unreliable people, such as former secret police informers, could not hold sensitive state offices. Finally, restitution involved the immense and complicated process of returning to the people the property stolen by the communist regime. Through these means, the state made a sincere attempt to openly declare that its past behavior was wrong and then, to a certain extent, to correct the wrongs it committed. The implementation of this legislation, although imperfect, provided an important signal to the society that in turn influenced the development of basic societal values.

The second avenue for spreading the normative order is through civic associations. I define civic associations as groupings that occupy the social space between the family and the state. They are the milieu, the fertile soil, for the growth and spontaneous development of the rules of human cooperation and coexistence. In essence, people learn these associations through contact and interaction with others. In contrast to legislation, which is the product of the sovereign will, orders from a superior, and the resulting exercise of power over subordinates, these informal rules are the spontaneous products of people. If the state and the people mutually accept and support these rules, thus creating a harmonious and productive society, then it is not necessary to enforce, through traditional legislative methods, every normative behavior.

I speak of civic associations in a very broad sense to encompass more than charitable and educational organizations. There is a wide spectrum of such organizations that range, in terms of formalization, from associations that are almost of a public law character, such as a

bar association, to the most unstructured types of common social gatherings. Informal associations, such as recreational groups or organizations directed toward a particular hobby, in particular, serve the function of developing the normative order. For example, a group that gathers during free-time, like a clique or a band, fits into this latter category. During the formative teenage years, such bands play an absolutely central role in socialization.

Civic associations are one element that make free societies markedly different from totalitarian societies because, in the latter, the state is very jealous and suspicious. The state recognizes the influence, and therefore power, that such civic associations wield. The communists did not stamp out civic associations, as is commonly misperceived. Rather, the communists co-opted civic associations and allowed just a single, unified, and hence, fake association under strict state and party control. Therefore, it is important to remember that the Czech Republic, like other post-communist nations, is a virtual desert in terms of civic associations. The communist era left in its wake a very atomized society. In contrast to the 1989 situation, the Czechs were far better poised to overcome this problem in 1968, when a large portion of the people had experienced life in a free society and old civic organizations spontaneously revived without difficulty. Public officials tend to misconceive the critical importance of civic associations for spreading acceptance of the law. They feel that, in many cases, civic associations serve a function that belongs to the state, but that they do so without democratic legitimization and therefore should be regulated. In my view, this belief is a grave error.

A third way the normative order spreads is through the family. A general misconception exists that the family is the most important sector. However, the newest research demonstrates that its importance is limited to a basic socialization function. For example, the parents' love and touching of an infant is irreplaceable and without it the child suffers from deprivation syndrome. However, the absolutely critical years for social development, what are called the formative years, are the teenage years. During these years, young people rebel against parental influence and begin to follow the role models provided by their peers, heroes from sports, and characters from literature. The most recent studies contradict the view that the quality of teachers is the most significant factor in development

during these formative years. On the contrary, the teenager's friends exert the most influence over her behavior, making it important that she have positive role models among her friends. For this reason, the location of the school, or the type of people among whom the teenager will surround herself, is far more important than the quality of teachers.

Similarly, I believe the advantage of attending top universities is not that the professors are top in their field, or even Nobel Prize winners, but rather that students are placed among other students of the highest caliber. Vital study abroad programs at top universities demonstrate this advantage by bringing together diverse intellectuals from across the globe.

The fourth avenue that spreads the normative order in the modern world is the media. I speak of the media in the broadest possible sense, including not only television and the press that have immense direct influence on our daily lives, but also more profound cultural expressions such as those found in literature, films, and even children's fairy tales. The importance of this sector is apparent considering the necessity of harmony between informal and formal normative systems. The values conveyed in the media, especially in literature, constitute an irrational and non-cognitive milieu of conveying norms. Media shares a close connection with people's emotions and so it teaches values in a stronger and much more effective way. To put it succinctly: The stirrings of the heart call forth the stirrings of the mind. In fact, a personal sense of justice, an irrational even emotional reaction to wrongdoing in the world, is the point where we can see clearly the connection between art, beauty, and law. They touch each other precisely at that point where myth or literature provides people with their deepest, most instinctual understandings. Of course, this coming together can be misused as the focus for propaganda.

In 1990 a few professors at the University of Chicago Law School expressed great skepticism regarding the feasibility of any transformation in Central and Eastern Europe. They cited not only the great hardships involved in rapid economic restructuring and the lack of available finances, but also the fact that new democratic institutions are not generally conducive to undergoing such hardships. They argued that when people participate in the decision-

making process, they will not be willing, in the long run, to suffer hardships such as widespread unemployment, inflation, and other deprivations that are necessary to achieve genuine economic transformation. They reasoned that after a certain period of tightening their belts, people will simply revolt against transformation and elect those who promise easier ways to reform the economy. However, financial assistance can overcome these inherent difficulties as evidenced, for example, by the Marshall Plan.

The main point I wish to make is that economic transformation can be accelerated by replacing old financial capital with imported new capital: that is, by receiving assistance from sources like the Marshall Plan and the International Monetary Fund (IMF) from abroad. However, because it is so connected to the local culture, we cannot do the same for moral capital. Of course, legislation can serve as a substitute for informal, moral rules. Indeed, the replacement of morality with law is a trend occurring around the world and while workable in part, the placement has its limits: namely, it is financially costly and brings about serious repercussions in the form of alienation. When voluntary rules are replaced with the enforcement of hard legislation, the people's aforementioned negative attitude toward the law, namely hatred and alienation, increases. Alienation from the law is among the most unfortunate legacies of the communist regimes and is in sharp contrast with the people's personal identification with the legal system.

It is impossible for the transformation in Eastern Europe to occur in a relatively short time unless we concentrate on the hearts and minds of our society. The people themselves must change, which is most likely to occur only with changing generations. However, the danger is that if we do not focus intensively on the education of the young generation now, the transformation will take even longer. For this reason, I conclude that it is better to send the young Eastern European students to the West than to have legal experts come to Prague to explain the legal rules of a particular subject. As I said, transformation requires more than just learning the rules. Exposure to the entire complex of culture and life in a foreign society and the natural contact with foreign contemporaries, or learning by osmosis, is an unparalleled experience and cannot be substituted merely with lectures about new rules.