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SYMPOSIUM

LEGAL SYSTEMS IN TRANSITION: NEW DIRECTIONS FOR EASTERN EUROPE

*The Fourth Annual Federalist Society
Lawyers Convention Symposium*

INTRODUCTION

PROSPECTS FOR THE RULE OF LAW

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The year 1991 marks the bicentennial of the American Bill of Rights. For the nation's legal community, including the Federalist Society, this event has provided the occasion for spirited reconsideration of many of the most important questions asked, and answers provided, by our Constitution's framers concerning the eternal problem of securing and maintaining ordered liberty. Of course, American scholars are free to speculate about these questions from within the comfort of a functioning market order and a stable constitutional system. The respective peoples of the emerging democracies of Central and Eastern Europe have no such luxury. In the aftermath of the Glorious Revolutions of 1989, the many countries now shaking off the tyrannical yoke of communism face a real-world "constitutional moment," in which they must choose—perhaps all too quickly—the ideologies and institutions best suited to protecting their hard-won liberty.

Accordingly, on November 30 and December 1, 1990, the Federalist Society gathered together scholars and officials from Central, Eastern, and Western Europe and the United States in order to assess the state of and prospects for the emerging legal order in post-communist Europe. We are

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proud to publish the proceedings of that historic conference in the *Cumberland Law Review*, and we are grateful to the editors for making these proceedings available in an impeccably professional and expeditious manner.

The discussions that follow range broadly over the questions facing the new democracies: how to structure governmental institutions, both horizontally and vertically; how to secure property rights and establish a functioning market economy; how to deal with the long-brewing environmental problems and ethnic and cultural tensions that are now coming to the fore; and, perhaps most importantly, how to replace party-dominated totalitarianism with a system governed by the rule of law. This latter question has been a particular source of concern for sympathetic observers of democratization, and because it raises theoretical and practical problems that are not always recognized, we think it worthy of brief mention here.

It is easy to insist that establishing the rule of law in Central and Eastern Europe is an important precondition to effective political and economic reform.¹ It is much more difficult to define this "rule of law" that should be established. "The rule of law" has proved to be one of the most elusive concepts in the lexicon of jurisprudence. Attempts at concise definition seem invariably to fail, resulting instead in lists of attributes supposedly characteristic of the rule of law (such as generality and prospectivity), typically accompanied by a warning that not all of these attributes must always be present for the rule of law to be achieved.²

We suspect that the absence of a clear definition of "the rule of law" is an inevitable result of the fact that "the rule of law" is not an identifiable set of precepts or a decision-making algorithm, but is instead a *habit of mind*—a way of dealing with problems that has more or less characterized the Western legal traditions for the past millennium. Instances of the application of the rule of law can be recog-

¹ Margaret Thatcher, for example, has cautioned that an effective rule of law is "the essential underpinning of democracy." Speech by Margaret Thatcher to the Aspen Institute (Aug. 5, 1990).

² We have in mind the classic treatments of the rule of law found in A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (8th ed. 1915); I. F. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* (1973). For a more recent, but no more precise, attempt at definition, see Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989).

nized, but the concept itself cannot be reduced to a verbal description, because it embodies centuries of accumulated knowledge, practices, wisdom, and error, which no single mind can comprehend or process. The rule of law, in other words, is what F.A. Hayek has termed a *spontaneous order*: It is a complex, abstract institution that has emerged as an unplanned consequence of the actions of countless people aiming at ends other than the establishment of the rule of law.³

If this description of the rule of law is accurate, it has serious and somewhat disturbing consequence for the nations of Central and Eastern Europe. A spontaneous order, by definition, cannot be established by plan or decree. One can plan or decree institutions that will foster the development of spontaneous orders, but the orders themselves must be allowed to emerge (or fail to emerge) from the unplanned play of social forces. It may therefore be impossible to "establish" the rule of law the way one might "establish" a parliamentary governmental structure. In this respect, the problems of moving from a communist legal system to a system governed by the rule of law are analogous to the problems of moving from a socialist to a market-oriented economy. It is easy to move from a free market to socialism; one needs only a mechanism for issuing decrees, the troops to back them up, and a well-developed taste for human suffering. Moving from socialism to a free market, however, is a much more difficult task, precisely because a free market is a spontaneous order. The emergence of markets can be facilitated, but not planned. Similarly, we strongly suspect that the emergence of the rule of law can be facilitated, but not planned. If that is true, then it becomes very difficult to give useful advice to nations desiring the undeniable benefits that flow from systems organized around the rule of law. And if the rule of law is a precondition for a successful market order, the consequences are graver still.

We hope that scholars, both here and abroad, will give serious thought to this problem.⁴ If the participants in this symposium are representative of the caliber of thinkers

³ See generally 1 F. HAYEK, *supra* note 2, at 36-52.

⁴ We note that the Spring 1991 issue of the *University of Chicago Law Review* includes a symposium entitled "Approaching Democracy: A New Legal Order for Eastern Europe." 58 U. CHI. L. REV. 439 (1991).

presently devoting attention to the problems of Central and Eastern Europe, we are hopeful of a solution, and optimistic about the prospects for liberty.