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(VENICE COMMISSION)

RULE OF LAW AND TRANSITION TO A MARKET ECONOMY

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a. Introductory statement by Professor Helmut Steinberger, Vice-President of the European Commission for Dem

"Let me welcome all of you on behalf of the European Commission for Democracy through Law to this Seminar on the Rule of Law and Transition to a Market Economy. Our Commission, the European Commission for Democracy through Law or Venice Commission, was created by a Partial Agreement between most member States of the Council of Europe.

I would like to thank our generous hosts, in particular Mr Djerov and Mrs Botusharova, as well as the New Bulgarian University and the University of Blagoevgrad, for organising the Seminar and receiving us with great hospitality. It will be a real pleasure for us and for all participants to have an occasion both for discussing important problems with our Bulgarian colleagues and for getting to know your beautiful country.

This Seminar is part of the UniDem programme of the Venice Commission. UniDem stands for Universities for Democracy. It has as its aim to bring together Universities of Western Europe and Central and Eastern Europe and to re-establish the academic contacts between the West and countries which have a long tradition of scholarship but were isolated for political reasons. In the UniDem framework we have had a conference in Istanbul for the Commonwealth of Independent States and seminars in Moscow and in Warsaw. Today it is our privilege to be in Sofia. This seminar here is linked to the previous seminar in Moscow which dealt with the relationship between constitutional law and the economy. This time we want to use in the first working session the results of the Moscow seminar as the basis for further reflection and then proceed in the other working sessions to examine in more detail some problems which are of particular relevance in Bulgaria at this very moment.

All the reports, I presume, will clearly show that there are no easy solutions in this area and that no foreign expert will be able to say that a certain problem can be solved in such and such a way and then everything will be perfect. But I think that the seminar, with its participation of scholars and practitioners from a number of countries, can contribute to a common reflection on these questions and I hope that those among us who have a position, a burden, of responsibility in Bulgaria, and elsewhere, will be able to draw upon this common reflection when they have to take decisions in their own respective countries.

I think we all share a common aim. Bulgaria, and other countries, which have already successfully accomplished the transition from one party rule to pluralistic democracy - and as a sign of the success of this transition, Bulgaria has become a member of the Council of Europe - have to succeed in the transition from a centrally-planned command economy to a market economy. This transition is necessary since the market economy is based on the same values of freedom of the individual as pluralistic democracy and since it is, in the long run, certainly the most efficient economic system.

It is, in the long run, also the most democratic system, because in a competitive market economy it is the consumer who decides by his purchasing power what products will be produced, what investment will be made. He is the decisive steering factor. However, we are all aware that the transition towards a market economy is fraught with difficulties and it implies heavy sacrifices by large parts of the population. If one is not very careful, the disillusionment of many people with the early results of the transition to a market economy might lead to a rejection not only of the market economy but also of the newly established democratic system. It is therefore most appropriate that an organisation like the Council of Europe and, as its part, the European

Commission for Democracy through Law, which has as its main aim the furthering of pluralistic democracy under the rule of law, is trying to contribute also to the building of a market economy.

I hope that at the end of this seminar all Bulgarian friends and the friends beyond, will have the impression that this has been a useful undertaking for tackling the problems of economic transition and thereby at the same time a contribution to the consolidation of the democratic system.

b.Introductory statement by Mr Alexandre DJEROV

Mr Djerov, Vice-president of the European Commission for Democracy through Law and Chairman of the Legislative Committee of the Bulgarian National Assembly, Dean of the Law Faculty of the New Bulgarian University and Professor at the Law Faculty of the University of Blagoevgrad, said that it was a great pleasure for him to welcome the participants to this first seminar of the European Commission for Democracy through Law in Bulgaria. The Bulgarian National Assembly and the two Bulgarian Universities concerned were honoured to host one of the most prestigious international bodies set up three years ago under the aegis of the Council of Europe. The Bulgarian specialists and lawyers put great store on the contribution the Venice Commission had made during the brief time of its existence to the constitutional and legislative reforms in the countries of Eastern Europe which had recently emerged from totalitarian rule. The important topics discussed within the Commission and the experience of its members were of particular value to the countries wishing to attain the high standards of the Council of Europe.

When Bulgaria had drafted its own Constitution, it had been able to benefit from the Venice Commission's contribution which was mainly aimed at strengthening the democratic institutions, guaranteeing respect for human rights, protecting minorities and furthering local self-government. In these areas quite a few Central and Eastern European countries, including Bulgaria, had achieved considerable success. Economic reforms had proved much more difficult and they needed much more time than political reforms. Therefore the focus on the constitutional basis of the economic system in the period of transition to a market economy was to be welcomed. The areas to be discussed, restitution, privatisation and fiscal legislation were of prime importance to Bulgaria.

He had no doubt that the Commission could make a substantial contribution to the discussion of these problems. He wished to conclude by wishing everybody a very pleasant stay in Bulgaria.

FIRST WORKING SESSION

Chaired by Professor Helmut STEINBERGER

THE CONSTITUTIONAL BASIS OF THE ECONOMIC ORDER DURING A PERIOD OF TRANSITION FROM A PLANNED ECONOMY TO A MARKET ECONOMY

a. The constitutional basis of the economic order during the period of transition from a planned economy to a market economy
Report by Professor Michel HERBIET

b. Constitutional Foundations of the Economic System during the Post-totalitarian period in the Republic of Bulgaria
Report by Ms Snezhana BOTUSHAROVA

c. Summary of the Discussion

a. The constitutional basis of the economic order during a period of transition from a planned economy to a market economy - Report by Professor Michel HERBIET, Liège, Belgium

Introduction

Almost four years ago a process of transition was initiated in the economies of most of the countries of central and eastern Europe. The planned and bureaucratic economy has completely collapsed, but it is not yet possible to claim that it has been replaced for the future by a market-regulated economy.

It is a delicate period for the political and economic authorities to administer and a difficult period for the people to live through.

It therefore appears that the rapid introduction of an adequate legal and institutional framework is a priority for the establishment and proper functioning of a market economy; however, it is impossible to ignore the fact they this is a difficult obstacle to overcome.

This is therefore the right time to hold a UniDem Seminar on the topic "The rule of law and transition to a market economy" and the issue which I have been asked to address during this introductory session appears even more interesting since it has never really been raised in the same terms in our western countries with their liberal tradition.

It may seem an impossible task to study "the constitutional bases of the economic order during a period of transition from a planned economy to a market economy" in a few minutes in so far as the issues addressed are fundamental and the answers formulated can only be uncertain and debatable.

It is always difficult, and even risky, to share the experience of third countries, such as those forming the Council of Europe, because it is by no means a question of attempting to apply formulae or make precise proposals. The very most that one can do is to begin with certain remarks and attempt to make certain observations.

What is of fundamental importance is to highlight certain essential parameters on the basis of which a stable society may be built.

Investors - whether national or foreign - look for laws which are complete and effective and which are likely to meet their aspirations; they expect those laws to be really applicable and to be applied. They are not interested in having a generous Constitution which grants them rights and freedoms which receive little or no protection. It makes little sense to set out positive freedoms - for example, economic and social rights - which require very concrete efforts from the community if the State is not provided with the necessary means. Hence my caution in addressing this topic.

The transition to a market economy implies a number of wide-ranging amendments and reforms which may appear as "shock therapy" for which the population is not always well prepared.

Following the rejection of the communist system, the various States of the Eastern Bloc are now faced, when they undertake various economic reforms, with the problem of ascertaining whether or not it is advisable to adopt rules applicable to the future economic order and, if so, how to determine their scope and define their hierarchical level.

In that respect, note should be taken of the remarks of de Laubadère and Delvolvé, [1] according to whom "every economic order necessarily has a legal formulation: it must be organised and function in accordance with legal rules".

It is thus important to formulate as soon as possible the bases of new stable rules appropriate for regulating social relationships in the framework of a market economy, to introduce the principles of that economy and to protect as effectively as possible the rights and freedoms of citizens and legal persons in their capacity as owners, entrepreneurs and contracting parties.

What are the fundamental legal conditions of an order based on a market economy? Must these matters be regulated within the rigid framework of the Constitution and, if so, to what extent? Is it not preferable for them to derive from the ordinary legislature and from simple regulation?

So many essential questions must be asked.

But what is covered by the concept of a planned economy and what is now meant by a market economy?

Those are the questions which I shall now attempt to answer quickly.

I. From planned economy to a market economy: the scope of this development.

The essential characteristics of the planned economy were the common ownership of the means of production and centralised State planning.

The Constitution actually declared that socialist ownership was the basis of the economic order of the country, [2] that ownership taking various forms: State ownership, which meant the common property of all the people, ownership by the collective farms and that of the other co-operative organisations and unions. It left no room for any form of private property apart from the personal property of citizens acquired with the proceeds of their labour (items for their own use, personal items and dwelling houses).

Extremely detailed economic and social development plans, aimed at implementing precise objectives, organised the economic management of the country independently of any link with the logic of the market and according to purely bureaucratic and authoritarian type methods. [3]

The State thus assumed responsibility for all stages of production and distribution on the territory of the country.

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1 Droit public économique, Précis Dalloz, Paris, Dalloz, 1986, no 59.

2 See to that effect DANILOV, The legal dimensions of the economic model in the present Constitution of the Russian Federation and in the new draft Constitution, in The transition to a new model of economy and its constitutional reflections, European Commission for Democracy through Law, Proceedings of the UniDem Seminar in Moscow, Strasbourg, Council of Europe, 1993, p. 21.

3 DANILOV, op. cit., p. 22.

The transition to a market economy implies a radical reform at the economic level which needs to be expressed at the legal level in the form of a new body of legal rules introduced to ensure that economic activity proceeds smoothly. It should also be noted that the market economy constitutes the economic foundation which is indispensable for the achievement of the conditions necessary to establish a new type of relationship between the European Community and the countries of eastern Europe based on close co-operation.

The fundamental principle underlying this type of economy is that "the State ensures, by means of the appropriate structuring of the economic system and establishing of the 'fundamental data', that the pursuit of their individual economic interests by the economic units - especially private households and private companies - does not conflict with the objectives of the national economy or society as a whole". [1]

The challenge therefore lies in "getting by with a minimum of restrictions which place limits on freedom whilst achieving national economic objectives". [2]

Once this principle has been stated, the market economy requires a legal framework capable of ensuring the implementation of a specific form of organisation which must be provided with appropriate institutions and be capable of serving both the interests of economic operators and the general interest, which, as I am aware, is an essentially evolutionary concept.

It would be extremely optimistic to believe that individual interests and the common good could be harmonised spontaneously and automatically.

This framework can be established only by adopting legal rules which determine each person's powers and scope for action.

II. What are the fundamental elements of the legal framework of the market economy?

Without wishing to be exhaustive, I shall identify the principle elements:

1. First of all, the recognition and protection of the various forms of ownership.

The provisions which establish State ownership of all the means of production must be revised. Since socialist enterprises are constituted on the basis of a monopoly, they must be stripped of their monopolies and split up to form enterprises of average size, since these are regarded as providing the best support for a market economy. It is in this context, too, that the privatisation of public assets comes into play.

Private ownership of the means of production must become the principal form of ownership, although this does not preclude other forms of ownership.

The State has a duty to create the conditions favourable for the development of various forms of ownership - whether private ownership (where assets are owned by natural or legal persons),

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1 KARSTEN, The legal framework for the development towards a market economy, Paper submitted to Parliamentary Conference, Progress of economic reform in central and eastern Europe: Lessons and perspectives, Council of Europe doc AS/CONF/HEL 93/3, p. 1.

2 KARSTEN, op. cit., p. 2.

public ownership (State, municipal or para-State ownership) or even collective ownership - and to ensure that each of them has the same level of protection.

2. Another fundamental element, the establishment of freedom of economic activity.

This implies that everyone is free to take up and exercise the occupation of his choice and to do so notwithstanding the restrictions placed on that freedom by laws or regulations. In this freedom lies the basis of the activity which individuals wish to take up and of the rights on which they may rely in that respect as against the public authorities when the latter wish to regulate that freedom. This principle infers autonomy of economic activity, freedom of establishment or to set up in business, freedom of exercise and operation; it also infers freedom of labour. [1]

3. Third element: contractual freedom.

Independence of will means that everyone is free, without restrictions other than those laid down by law, to become involved in the exchange of services as he sees fit. The role of the contract cannot therefore be ignored, since it is destined to become the "cornerstone" of economic regulation and the means whereby a balance is achieved in the national economy through the forces of competition.

4. Another basis of the market economy certainly appears to be the principle of free competition which allows the various economic operators to pursue their economic activities "in a system of competition which must not be hindered by either regulations or by benefits coming from the public authorities". [2] This principle has as much to do with relationships between individuals themselves as with their relationships with the public authorities.

With more particular regard to the application of this principle to the public authorities which pursue activities of a commercial or industrial nature, it appears that it should be interpreted not as prohibiting any activity of this type by public persons - because they would in theory be excluded from such activities - but as imposing a duty to compete on equal terms: there is, in fact, no objective reason to object to the direct intervention of the public authorities in the economy provided that they do so under the same conditions and according to the same rules as those which apply to individuals. Let us note henceforth that this principle is the subject of many restrictions.

5. Freedom of association, too, must be numbered among the fundamental elements of the market economy.

This freedom includes not only the freedom to establish associations or companies and to belong to them without any interference on the part of the authorities but also the freedom for associations, once established, to develop their activities and to increase their resources subject to the reservations laid down by law. [3]

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1 DE LAUBADERE and DELVOLVE, op. cit. Nos 143 and 144.

2 DE LABAUDERE and DELVOLVE, op. cit. No 155.

3 See on this point RIVERO, Les libertés publiques: 2. Le régime des principales libertés, Thémis, PUF, Paris, 1983, p. 376.

This freedom also includes the freedom to form unions, in other words the freedom to create a union, freedom of action for unions and freedom to belong to a union.

Certain writers, such as Karsten [1] and Brand [2] emphasise other component elements of the market economy which are perhaps more economic in nature, even though the legal implications are clear. Thus:

- The setting-up of an effective pricing system appears to be quite indispensable in order for economic agents in the private sector to be able to act in a way that benefits the economy.

  In calculating prices all cost factors, including those affecting the environment, for example, must be included. This implies a positive step by lawyers who can help achieve this condition.

- The regulation of the monetary mechanisms.

  The transition to a market economy requires a restrictive and stabilising monetary policy capable of curbing inflation and absorbing excess liquidity.
  It is often suggested that an independent central bank should be set up with responsibility for establishing and maintaining monetary stability by implementing well-ordered monetary mechanisms.

- The regulation of relationships with foreign countries by removing restrictions on foreign trade.

  It is therefore essential to act as quickly as possible to put an end to State monopolies in external trade and to introduce a realistic exchange rate.

- It appears essential to develop an effective taxation system and eliminate the system of State subsidies aimed at artificially reducing the price of certain goods.

  These rules should be adopted in conjunction with a strict budgetary policy.

  The State will then be in a position to ensure that its budget is financed by income in the form of taxes which must not however impede or penalise the economic performance of private undertakings.

This legal framework for the market economy should also include, in particular, provisions relating to the accounts of undertakings, marketable securities and financial markets and the conditions for foreign investment.

While the legal framework combining the above-mentioned fundamental elements must ensure that the market economy lasts, it must also be able to influence the economic procedure inherent

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1 The legal framework for the development towards a market economy, op. cit., p. 8 et seq.

2 Vers l'économie de marché: les étapes nécessaires, Extracts published in "Problèmes économiques", No 2189, 5 September 1990, p. 10 et seq.

therein from the aspect of higher overall objectives, not just economic but also social objectives, which play a direct part in the social and economic progress of society.

As is emphasised by certain writers and in several basic laws which choose a market economy system, the economy must be social in the sense that the State must regulate economic life in the interest of individuals and society.

The legal framework must establish or maintain economic and social rights in order to make the State a social State guaranteeing equal and fair opportunities for everyone and also making it possible for both the individual and society to prosper. As is declared in, for example, Article 9 of the proposed Constitution of the Federation of Russia, economic relationships must be formed on the basis of a social partnership between the individual and the State, between worker and employer and between producer and consumer.

Within that framework, the State must intervene to compensate for the inadequacies detected by taking measures capable of significantly improving the situation:

- The public authorities must therefore develop a framework of social protection including, inter alia, policies to promote employment, training and health.

- In the economic sphere, the public authorities are therefore frequently led to assume the role of entrepreneur, industrialist, trader or financier in the form of intervention by public undertakings pursuing activities often in competition with the private sector, either under a special legal system which includes broad exceptions to the general law - which cannot fail to cause distortion in competition - or under a system of pure private law.

At this stage of my reflections, one remark is worth mentioning: the establishment of a legal framework combining the various fundamental elements which have just been described, as Professor Karsten rightly points out, [1] although it would constitute a necessary condition, is not for all that a sufficient condition. "The economic units must also make use of the possibilities offered to them; the appropriate behaviour, especially entrepreneurial behaviour, cannot be created by legal means alone".

Following that attempt to identify the basic principles of a market economy, it is now time to take a further step and to identify the legal rules which, in my view, appear the most important, so that they can be incorporated in the hierarchy of internal rules at the highest level, that is to say at the constitutional level; the other rules, whose economic impact is sometimes considerable, will then come solely within the scope of law or regulation.

III. What role is to be reserved for the Constitution in the economic sphere?

During the UniDem Seminar organised in Moscow on 18-19 February 1993, those taking part in the discussion which closed the work of the first session, devoted to the "constitutional bases of the economic order", had certainly identified the problem: the essential question is whether the economy must be regulated within the rigid framework of the Constitution and, if so, to what extent, or whether it would be preferable for it to be regulated by means of ordinary laws and regulations.

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[1] Op. cit., p. 7.

According to Professor Rivero,[1] three authorities have been given express powers, in most States, to lay down general rules: the constituent assembly, the legislature and the executive in the exercise of its power to make regulations.

Which of these authorities is to be entrusted with the task of adopting the legal conditions for the establishment and functioning of a market economy?

The significance of the question relates to the hierarchical nature of the legal rules according to the organ from which they emanate, the highest rule being binding on all the authorities belonging to a lower level. This means that the higher a rule is placed in the hierarchy, then, at least in theory, the greater its chance of actually being protected.

A. What role must be reserved for the Constitution ...?

Every Constitution is the immediate expression of the fundamental legal values received by the political community; it establishes the relationships between those governed and the government, between the power and those subject to it; it is the basis on which all legitimacy and lawfulness rests.

It is the Constitution which combines all the fundamental rules concerning the structure of the State, its organisation, its activities, the structure of society in relation to the State in such a way as to subject the political power to rules which are as precise as they are detailed. [2]

The Constitution is the basis for Government activity and also its limit: all acts and laws of the State must maintain a positive relationship with the rules of the Constitution, in other words they must be consistent with the Constitution.

It is often the case that the Constitution simply lays down the fundamental principles (for example, the principle of a fundamental freedom) while leaving the detailed organisation of the system of those principles to the ordinary legislature.

However - and I shall return to this in a moment - it may also be the instrument on which the authorities base their action, where it sets out programmes, issues instructions and defines objectives to be achieved.

The majority of constitutions are therefore often both organic and programmatic, although the respective force of these elements may vary. [3]

B. ... in the economic sphere?

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1 Les libertés publiques, T.I/ les droits de l'homme,Thémis Droit, PUF, Paris, 1987, p. 168.

2 MIRANDA, The constitutional basis of the economic order, in The transition to a new model of economy and its constitutional reflections, European Commission for Democracy through Law, Proceedings of the UniDem Seminar in Moscow, op. cit., p. 8.

3 It is thus generally considered that liberal Constitutions are more organic while those of authoritarian countries are more programmatic; on the other hand, certain Constitutions seek to strike a balance.

In a State which is based on the rule of law, the Constitution is necessarily the basis of the legal-economic system of the State; [1] it contains the fundamental principles which govern the relationships between the public authorities and the economy. [2]

Since its value is higher than all other sources of internal law, it must ensure stability and foreseeability in a free market.

Is it required to fix the aims and general principles which determine the direction taken by the economy, to define the roles of the public and private sectors and the respective spheres of State regulation and the free market?

Apart from the institutional aspects which I have just underlined, the Constitution does often determine certain economic solutions and the rules applicable in that sphere. In so far as it defines the powers given to the public authorities, it reveals the possibilities and the limits of economic intervention.

However, the most important function of the Constitution in the economic sphere - as was emphasised at the UniDem Seminar in Moscow in February 1993 [3] - "is to provide for a clear, rule of law oriented framework. State intervention had to be based on the principle of legality and any arbitrariness had to be excluded."

None the less, it is impossible to deny the somewhat modest role played by the Constitution of many countries in the economic sphere. Is the Constitution not in fact an inappropriate regulatory instrument to accommodate the principles which govern the operation of the market?

I agree with Mr Tromm [4] that the Constitution is not "the kind of legal instrument through which to substantively deal with the dynamics of market forces" or lay down rules suitable for directly and effectively [5] sustaining an economy based on free competition. By its very nature, it lacks the flexibility necessary for the legislative or administrative regulation of market conditions. "There is, so it seems, every reason for the draftsmen of a Constitution to exercise restraint when it comes to formulating constitutional conditions regarding economic activities". [6]

In fact, it appears very difficult at present, during a period of transition when everything is changing rapidly - but is that not always the case? - to fix detailed rules in the Constitution. I do not believe, therefore, that the Constitution should be the legal instrument which lays down the rules which govern the activities of economic operators on the market; only the ordinary

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1 DE LAUBADERE and DELVOLVE, op. cit., No 59.

2 MIRANDA, op. cit., p. 14.

3 Op. cit., p. 49.

4 Freedom of economic activity - Constitutional guarantees and limitations, in "The transition to a new type of economy and its constitutional implications", Proceedings of the UniDem Seminar in Moscow, op. cit., p. 51.

5 TROMM, op. cit., p. 52.

6 Ibid.

legislature, which is in the best position to take account of the changes which have come about, should be empowered to legislate in this sphere.

C. What basic principles must therefore be introduced in the Constitution?

The Constitution should contain the foundations of a complete new system of rules applicable to economic life, which will be put into concrete form by the adoption of a body of legislation which ensures the protection of these fundamental freedoms and rights and equality in market conditions, which presumes that the legislation will be the same irrespective of the economic operator (national or foreign).

It is here, in my view, that a distinction should be drawn between classic rights and freedoms, often know as "first generation" rights or "negative freedoms", and fundamental economic and social rights, said to be "second generation" rights, which may be analysed as positive freedoms requiring very specific efforts on the part of the community.

The traditional distinction between classic freedoms (civil and political rights) and economic social rights is, in general, based on the role conferred upon the public authorities in relation to the achievement of these different categories of rights.

- Civil and political rights are essentially rights which guarantee the freedom of the individual vis-à-vis the authorities; they may have a socio-economic component (for example, the freedom of trade and of industry). They therefore require those who govern to refrain from adopting provisions or from taking action which restrains those rights. They do not confer on the citizen the power to require the authorities to grant certain advantages or perform certain services.

These freedoms are to some extent an "inalienable and sacred patrimony". These rights are real subjective rights whose definition and guarantee have a positive character. In recognising these classic rights, the authorities accept that each citizen enjoys a certain number of freedoms and that the authorities may interfere in the exercise of these freedoms only in exceptional, well-defined cases. The sole restriction capable of impeding the exercise of these rights arises from the fact that each individual must be able to benefit from them.

- On the other hand, economic and social rights are completely different in nature. They are liable to change frequently because rights of this type are relative and contingent.

The very fact of declaring these rights lays down objectives for the authorities. It defines a programme for them to follow, it places them under a duty to act, to give something or to take positive steps to ensure that the rights recognised can actually be enjoyed. It also recognises that citizens have the right to require the intervention of the authorities. The authorities are responsible for creating the environment in which everyone may make the maximum use of his capacities, both individually and collectively, in order to achieve his full potential as an individual and as a member of society.

Economic and social rights are based on the acknowledgement that de jure equality is purely formal but that it does not automatically lead to de facto equality (true equality). "If first generation rights are to have practical application and thus be of advantage to the least favoured, a minimum protection must be envisaged at the social and economic level. The fundamental

second generation rights must allow everyone, not just those born in a privileged circle, to enjoy civil and political rights". [1]

This leads to the theory that the group, the community, has certain responsibilities to the individual and that there is a duty on not only the public authorities but also the citizen to collaborate in the social and economic improvement of the society in which he lives.

Although, in order to implement these rights, the Government is required to take the initiative for laws or regulations in order to achieve the given purpose, it is unable to do everything at once or for everyone at the same time. Government action requires choices to be made and priorities to be set. These rights are, to some extent, "promises made to the citizen" and "instructions to the Government" although it will not generally be possible to rely on those rights as against the Government; in fact they do not often have binding force.

Their content depends on the economic situation and the degree to which they are developed; they can be achieved only gradually, depending on the resources of the public authorities.

They are guaranteed only to the extent to which the public authorities adopt adequate provisions to implement them and see that they are observed. I would point out, however, that the public authorities have wide discretion to determine the measures to be adopted according to the needs and resources of the authorities and the individual.

With regard to their binding force, and more especially their direct effect and direct application, the nature and content of each right and the way in which it is expressed are significant. Furthermore, account must be taken of the intention of the draughtsman.

These elements show whether a particular right can only be achieved progressively through legislative initiatives and implementing measures or, on the other hand, whether the provision in question, because of its content, can be directly binding on all.

Certain rights may also lay down a rule affecting the relationships between citizens (for example, the fixing of conditions of employment, the right of employees to be informed and to take part in the management of the undertaking, etc.).

1. Traditional rights and freedoms in economic matters.

It should be noted at the outset that these are generally well protected, not only because they appear in the Constitution but also because there is often a procedure for ensuring that the legislature and the executive comply with the Constitution.

In many countries compliance with the rules of the Constitution is ensured by the courts (courts of the judicial order, or the Council of State), the Constitutional Court as a rule being the higher organ responsible for ensuring that the laws are constitutional.

What basic principles affecting economic activity should be laid down and ensured by the Constitution?

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[1] Report by Mr HOSTEKINT on the proposal to amend Title II of the Belgian Constitution by inserting Article 24a on economic and social rights, Doc. Parl., Ch., 218/3-91/92 (S.E.), p. 5.

I have identified a number:

- The right of ownership (private or public): however, its use must be subject to the interest of society.

  Therefore the forced expropriation of an asset on grounds of public utility, in return for fair and prior compensation, must be reserved and organised by the law or in accordance with the law.

  The same applies to all restrictions on the right of ownership for reasons associated with the objectives of certainty, health, the proper development of sites, environmental protection or duly justified general interest.

- Freedom of trade and industry imply free economic initiative and its corollary, free competition; however, this freedom may not be regarded as absolute.

  In a good number of cases, the law - whether in the economic sector or in other sectors - will limit the freedom of action of the individuals or undertakings concerned and will thus necessarily have an effect on freedom of trade and industry. The legislature would infringe this freedom only where a measure adversely affected the principle - whether directly or indirectly - or restricted this freedom unnecessarily or where any restriction was clearly disproportionate in relation to the aim in view. [1]

- Contractual freedom, also known as the principle of independence of will, implies that everyone is free to contract or not to contract, to choose whom to do business with and freely to determine the content of the agreement.

  This principle, however, is subject to numerous restrictions or exceptions which are justified by the desire of the legislature to protect a party regarded as more vulnerable or sometimes by considerations to do with public order.

- freedom of association, including freedom to form associations and companies with a legal personality distinct from their founders or members.

  The only associations to be prohibited by the Constitution should be those whose activities are aimed against sovereignty, the territorial integrity of the country and the unity of the nation, which incite racial, national or religious hatred and the violation of the rights and freedoms of citizens, or those which help to achieve these objectives by violence. [2]

  Any other preventive measure should be prohibited save where specifically authorised and duly reasoned by the legislature.

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[1] See, in this connection in Belgium, several decisions of the Court of Arbitration, in particular Decision 55/92 of 9 July 1992 and Decision 10/93 of 11 February 1993.

[2] See in this connection Article 44, § 2 of the Constitution of the Republic of Bulgaria, 12 July 1991.

- The principle of equality before the law and non-discrimination between the various economic agents, whether public or private.

  This constitutional rule does not make it impossible for a difference in treatment to be established by the legislature between certain categories of persons provided that the criteria for distinguishing between them may be objectively justified and are reasonable. These same rules also mean that categories of persons who are in a completely different situation as far as a particular measure is concerned cannot receive the same treatment unless there is objective and reasonable justification for such treatment.

  Whether or not there is such justification must be assessed in the light of the aim and effects of the measure and also of the nature of the principles in question; the principle of equality would be infringed, according to the Belgian Court of Arbitration [1] for example, where it is shown that there is no reasonable relationship of proportionality between the methods used and the aim in view.

May these basic principles be limited? and if so, by whom?

Determining the status of a freedom necessarily involves defining its limits because, as Mr Rivero states, [2] life in society precludes the possiblity of unrestricted freedom.

Academic writing and case-law have always accepted that individual, limited restrictions may be placed on the traditional rights and freedoms provided that this is done by the legislature and that the restrictions are justified by the maintenance of public order or the general interest.

It is therefore generally accepted that the pursuit of certain activities or of certain rights may be governed by the law or in accordance with the law: this is in fact an indispensable guarantee of the freedom of all.

However, any undermining of these freedoms can clearly not call into question their very existence; at the very most they can be aimed at controlling and regulating the way in which they are exercised.

Therefore a law cannot simply eliminate a constitutionally guaranteed freedom or have the effect of making it impossible to exercise in practice.

Any legislation (in the wide meaning) which restricts that freedom will be justified only if it is made necessary by current circumstances; it must also be effective, appropriate for the actual requirements and the seriousness of the situation and it must not amount to an excessive erosion of the freedom (the principle of proportionality).

It therefore appears that, at the level of constitutional law, any measures by the legislature aimed at generally and absolutely preventing the exercise of a given freedom must be prohibited; this would not be the case if the legislation in question were an exception to the general rule and the effects which it produced were of limited duration, so that it ceased to produce its effects as soon

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1 See on this point, in particular, C.A. No 10/91, 2 May 1991, paragraph 2.B.1.

2 Les libertés publiques, 1- Les droits de l'homme, op. cit., p. 196.

as it proved no longer necessary because the circumstances which gave rise to its adoption had disappeared.

I shall return to this question when I examine the techniques whereby the legislature controls these basic constitutional principles.

2. Economic and social rights.

In general, these rules are guaranteed to a much lower degree than the traditional freedoms, while experience tends to show that they are only rarely inserted in the express provisions of the Constitution. [1]

It should also be noted that the recognition of these fundamental rights, which are, in particular, the right to work, to health, to security and social protection or to a favourable environment, is in no way connected with the fact that these rights are expressly set out in the Constitution.

Experience shows, to the contrary, that there is no correlation between this fact and the actual level of protection and benefits. A country may have progressive, even avant-garde, economic and social laws without those principles appearing in the Constitution. Citizens are often better protected in this area by the laws and other rules adopted by the Parliament which they have elected.

It is dangerous to believe - as Professor Mast emphasises [2] - in the omnipotence of the words of the constitution; it is better never to lose sight of the fact that a right actually granted is worth more than a right declared. It is one thing to recognise rights and another to implement them and observe them.

Are we thus to conclude that there is no point in their being set out in the Constitution?

I do not think so; however, great care should be exercised.

Care should be taken that too many rights and obligations do not appear in the Constitution, since "the protection of fundamental rights should retain a certain purity and unconditionality" [3] and also to refrain from declaring in that text certain values relating to common interest which, while no doubt being very deserving of respect, are not shared by the whole of society.

It would therefore be better to introduce into the Constitution only the fundamental economic and social rights which will allow everyone to take full advantage of the classic freedoms which must be observed at all times.

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1 They are sometimes to be found in the Preamble to a Constitution; the delicate problems of legal interpretation raised by that technique are well known.

2 "Faut-il constitutionnaliser les droits économiques et sociaux?", in "La reconnaissance et la mise en oeuvre des droits économiques et sociaux", Brussels, Centre interuniversitaire de droit comparé, 1972, p. 529.

3 Hearing with Professor HARSCHER, in the Report by HOSTEKINT on the proposal to amend Title II of the Constitution by inserting Article 24a on economic and social rights, op. cit., p. 7.

If too many economic and social rights are included in the Constitution there will also be a risk that Parliament's room for manoeuvre will be reduced in a way that was not contemplated, in so far as the democratically-elected representatives of the Nation would no longer be able to decide freely and with the flexibility envisaged in the relevant rules.

It may also be noted that the countries which have included in their Constitutions a "sort of list" of economic and social rights implying benefits have great difficulty in putting these rights into concrete form at the legal level. "Almost nowhere have case-law or academic writing succeeded in fully integrating these rights into the concept of fundamental right'. The impression is therefore given that these fundamental rights have, at a certain time, been included in the Constitution for political reasons, while they were not fully recognised at the legal level". [1]

Finally, it should be noted that economic and social rights seem to have been introduced into the Constitution with some prospect of success only to the extent to which there is already a legal fabric which allows the objective of the principle to be achieved.

In the light of those reflections, what great principles should be introduced into the Constitution in the form of economic and social rights, and according to what detailed rules?

It would appear preferable to state first of all the actual principle that these rights as a whole are recognised before then going on to determine minimum rules, not in order to restrict these rights but in order to avoid making vain promises which might not be kept for economic or other reasons and to confer upon these rights the greatest legal effectiveness. It is actually harmful to grant citizens rights which they will subsequently be unable to exercise.

The actual principle of each of these rights should also be included: there is no need to burden the text of the Constitution with a detailed definition, since most of these rights already have a certain legislative recognition.

The proclamation of these rights constitutes a hard core with normative effect to be respected at all times.

Certain of these rights could, moreover, be formulated in a negative sense: "No-one shall be deprived of ... such and such a fundamental right save where and according to the rules laid down by the law".

This method provides a concrete guarantee and ensures maximum effectiveness at the legal level.

The "hard core" which a modern State should devote in its Constitution to economic and social rights consists of fundamental rights such as:

- the right to work;
- the right to health;
- the right to social security;
- the right to security of existence;
- the right to suitable accommodation;

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[1] Hearing with Professor PIETERS, in Report by HOSTEKINT on the proposed amendment of Title II of the Constitution, op. cit., p. 13.

- the right to a favourable environment;
- the right to leisure.

Once the principle of each of these rights has been laid down, it is for the ordinary legislature to assume responsibility for defining the nature and content of these rights, to ensure that they are protected, to regulate their exercise and to adapt these rights at all times and with flexibility to the dynamic development of society.

IV. What place is to be reserved to the legislature in the economic sphere?

The role of the legislature in economic matters is fundamental yet not unlimited.

It is to the legislature that the constitutional authority leaves the detailed control of the system of fundamental principles in the economic order which it has adopted.

Whatever the aim in view - the organisation of the economy, the maintenance of public order, consumer protection or integrity in commercial relationships - and whatever the form of the measures adopted - regulation, declaration, authorisation, prohibition - any administrative regulations which restrict economic rights and freedoms, in however small a way, whether in the form of simple order or adopted on the basis of enabling legislation, must be based on a law. Is not the law actually the expression of the general will?

This law may be very wide in scope and be aimed without distinction at public security, public health or public peace in all spheres; it then deals with questions of common interest relating to the general activities of citizens. It is also often specific and individual in the sense that it is itself meant to regulate - or to enable the Executive to regulate - specific spheres [1] and given economic activities [2] regarded as a function of the national economy and therefore in the general interest; this law then directly affects the organisation of production, distribution or services.

However, these inroads and restrictions clearly cannot call into question the very existence of these rights and freedoms; the very most that they can do is to seek to control or regulate the way in which the rights and freedoms are exercised.

What, then, are the techniques which the legislature may employ to regulate public freedoms?

Where the State intends, through the intervention of the legislature, to control the exercise of a basic principle, in particular an economic freedom, it is faced with two broad options: either it decides to intervene directly in the economy by becoming an industrialist, trader or financier - either itself or via an intermediary - or - whether its aim is economic or not - it regulates the exercise of an occupation or activity, for the most part by requiring authority to be obtained; [3] here the State does not intend to take the place of private initiative whose activities remain free in theory, but it has recourse to methods of indirect interventionism: it lays down rules for an ever-increasing number of economic activities, subjecting them to registration or a licence or prohibiting them.

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1 For example, pricing matters, trade practices, etc.

2 The activities of insurance companies, banks, travel agencies, road transport, etc.

3 State intervention sometimes takes the form of encouraging a certain activity, but I shall not go into that aspect here.

The major feature of this second aspect of intervention by the public authorities - the only one which I shall deal with here - is that the State unilaterally and forcibly [1] shapes economic activity "by acting from the outside upon the conditions of production, distribution or consumption, and in this way obliges private undertakings to comply with the objectives - whether economic or not - fixed by the Government". [2]

The unilateral and forcible methods may be reduced to two broad systems:

1) the repressive system, which allows economic activity to develop according to the citizen's own determination and intervenes only to curb excesses; however, "this freedom may in most cases be exercised only within limits previously set by the legislature, under penalty of criminal sanctions". [3]

This system is dominated by the technique of controlled regulation, which is characterised by the fact that the legislature confines itself to regulating in advance the economic activity of individuals and to subjecting it to certain conditions; the authorities subsequently check that these conditions have been complied with by carrying out a control aimed at suppressing infringements. This type of intervention only poses limited restrictions on economic freedom, since no prior intervention by the authorities is necessary before an activity can be exercised. [4]

2) What is undoubtedly less favourable to economic freedom is the preventive system which subjects the exercise of an activity to registration with or a licence from the public authorities and in certain cases purely and simply prohibits the activity (the system of prohibitions). It is aimed not so much at punishing abuses after the event but at preventing them from occurring; to this end, it enables the exercise of an economic activity to be subject to a prior administrative control.

The number of procedures which come within the preventive system includes, in ascending order of the extent to which they interfere with economic freedom, prior registration, [5] licence [6] and prohibition. [1]

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1 I am deliberately not going to address in this study the unilateral processes of the incentive type or the means based on agreement.

2 FLAMME, De la police du commerce à l'économie dirigée, R.I.S.A., 1956, p. 111.

3 LIVET, L'autorisation préalable et les libertés publiques, Paris, L.G.D.J., 1974, p. 15.

4 This technique of regulation encompasses the majority of provisions which are aimed at protecting the health of consumers and in particular at regulating the manufacture of, export of and trade in foodstuffs, including the determination of their composition, their description, the information which should be indicated; the same applies to the provisions relating to trade practices concerned with trade information or the regulation of the various types of sales; also the provisions concerning economic regulation and prices with particular regard to the fixing of maximum prices. Many other examples could be given.

5 For example: opening an outlet for fermented drinks, taking underground waters in average quantities, operating slag heaps.

6 The activities and occupations subject to this type of restriction is no longer counted: it applies in particular to insurance companies, banks, private savings banks, capitalisation companies and other establishments

Without wishing to embark upon a detailed analysis of the legal nature of the various techniques, I still consider it interesting to identify the points on which they agree and those on which they disagree and to make a number of observations in that respect: while the system of prohibition, once adopted, eliminates all freedom of action by private economic operators in the sphere in question and in relation to the activities concerned - in this sense, it resembles the licensing system which implies that an activity is legally and automatically prohibited, while none the less making it possible for the authorities to lift that prohibition on the conditions and according to the rules adopted by the law or in accordance with the law - it remains true that recourse to this technique presupposes a system of economic freedom. On this point there is a clear analogy with the system of registration; however, this system does not confer upon the authorities a "power of prevention", even though it may serve as a catalyst for much more straightforward interventionist techniques such as the need to obtain a licence in advance or prohibition.

Registration, which is a hybrid technique, belongs to the preventive system in so far as it facilitates the prohibition and supervision of an activity; it resembles the repressive system in that it prepares and opens the way for punitive sanctions, thanks to the information obtained.

The technique of licensing means that an economic activity or an occupation can be exercised only after formal permission has been obtained from the public authorities. To the extent to which approval or a licence constitutes a necessary prerequisite for the exercise of an activity or the creation of an organism, [2] they represent a significant restriction on economic freedom, a restriction which is even more significant because the authorities are often given a wide discretion in the procedure for granting or refusing a licence and the administrative courts show what is sometimes excessive reluctance in reviewing the lawfulness of decisions taken within the framework of that technique of regulation.

This process resembles registration, in that it makes the exercise of the freedom subject to a preliminary step by the authorities; however, it differs from registration in that it implies a preliminary control by the administration over the activity, which may be carried out only after it has first been ascertained that it complies with the provisions in force and following intervention by way of permission from the authorities in the form of a unilateral decision applying to an individual case. It must none the less be stated that once the licence has been issued, the exercise of the activity is still subject, pursuant to the law, to a more or less extended control of the repressive type which has the effect of reinforcing and perpetuating, if there were still need, the encroachment on the economic freedom.

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taking cash deposits, travel agencies, hotels, taxis, transport of persons and goods for payment, radio-communication stations, door-to-door sales, etc.

1 Thus the legislature may prohibit or authorise the Executive to prohibit certain commercial practices (for example unfair competition, chain sales and itinerant sales), the production, manufacture, import and distribution of certain products and the provision of certain services.

2 I am therefore not concerned with licences and approvals which, according to the relevant provisions, are optional - that is to say which, without being necessary or a prerequisite to the exercise of an activity or the creation of an organism, confer on the person to whom they are granted a range of advantages which may be financial (grants) just as much as legal in nature (the enjoyment of certain prerogatives of the public authorities) - since these do not really have an adverse effect on the economic activity.

Since this rapid overview of the various methods of indirect interventionism placed at the disposal of the legislature is drawn in broad strokes, it is indispensable, in my opinion, before envisaging the role of the regulatory power in the economic sphere, to outline the legislative techniques used which show certain special characteristics.

Alongside the "laws properly so-called" - in other words those by means of which the legislature directly regulates, in a general and permanent fashion, questions of common interest - which are sufficient in themselves and which in order to apply require only purely executory decrees, there exist what are know as attributive laws which confer on the Executive or other authorities powers which the Constitution did not expressly intend them to have. They themselves are subdivided into "framework laws" and "laws conferring special powers".

- "Framework" laws

In these texts, which are generally very brief, the legislature is content to set out the main themes and governing principles which are to be observed by the executive power to which the legislature entrusts the task of adopting detailed rules on the subject.

These laws, which are very common in the economic sphere, are particularly concerned with the protection of the health of consumers, the control of foodstuffs, trade practices, especially in relation to the description and composition of products, and the status of travel agencies or hotel establishments; many more examples could be added.

- Laws conferring special powers.

These laws confer on the Executive, often for a limited period, the power - sometimes very limited - to adopt certain measures which normally come within the competence of the legislative power, in particular the power to amend, repeal or replace existing legislation; they may thus be analysed as a true delegation of power from the Legislature to the Executive.

Recourse to this process allows the Government to implement essential reforms extremely quickly and in this way to ensure the economic and financial balancing of the country by the adoption of measures which would normally have required intervention by the legislature.

I now turn to the role of the Executive in the economic sphere.

V. The significance of the regulatory power in the economic sphere

Whatever the fundamental role recognised to the legislature a moment ago in these matters, the regulatory power recognised to the administration in this sphere must not be regarded as insignificant.

While the classic liberal theory displayed a certain distrust of the Executive and thus tended to reduce as much as possible the intervention of the regulatory power in the sphere of public freedoms, [1] the particularly wide part occupied by the regulation as an internal source of economic public law must be emphasised.

[1] On this point, see RIVERO, Les libertés publiques, 1- Les droits de l'Homme, op. cit., p. 186.

The reason is simple: surely the matter requires a particular flexibility imposed by the needs of economic life which the law cannot always achieve. The relevant provisions must actually be able to develop and they must be capable of being amended easily and quickly; it is a fundamental necessity for economic life.

What, therefore, is the scope for administrative action at the regulatory level in this sphere and what are its limits?

While it comes within the powers of the legislature, under the Constitution, to lay down the basic rules which govern the conditions on the market and to regulate, inter alia, production, trade and the professions accordingly, the answer needs to be more qualified with regard to the administrative authorities who have the power to make regulations, whether they are part of the national Government or of other subordinate bodies such as the local authorities, the decentralised and specialised bodies and even private individuals charged with tasks in the general interest.

There is one essential principle : any administrative regulations adopted in this sphere, at whatever level, must be based on the law.

A regulation which imposed on private economic operators any restrictions on the fundamental principles laid down in the Constitution which were not provided for by statute or pursuant to statute would be tainted with illegality and as such could be annulled by the administrative courts as being ultra vires.

There is therefore always a requirement for enabling legislation irrespective of the role assigned to the Executive :

- sometimes the administration is content with simply implementing the law.

  What is its power then?

  It is well settled in case-law that in this case the Executive is recognised as being empowered to extract from the principle of the law and its general wording the consequences which, according to the spirit prevailing at the time when it was adopted and the aims which it pursues, derive naturally from it.

- sometimes the enabling measures adopted by the Legislature go beyond merely implementing the law insofar as it proceeds by way of a law conferring special powers or a "framework" law.

  It then gives the Executive room for manoeuvre which may prove very significant when the legislature is content to state the principle of the regulations or of the limitation without specifying the content or the rules. The executive then has a very wide choice as to the means; it will choose the mode of regulation which it deems most appropriate taking account of the objectives fixed by the legislature (controlled regulation, registration, licence, etc.).

This tendency to give a certain additional emphasis to attributive laws and the regulatory decrees adopted to implement them as sources of economic law is not without danger.

Doubtless, as I have emphasised, the legal rules must, in this sphere, display a certain mobility and confer on the authorities the power to act quickly, to adapt to changing economic circumstances. The authorities will therefore have considerable freedom of action and wide discretion.

However, this necessary relaxation of the principle of legality should go hand in hand with a more precise determination of the aims pursued by the legislature[1] and the methods which might be employed,[2] which would allow both the administrative courts and the judicial courts to adopt a stricter approach when they review the regulatory activity of the authorities.

As I have just observed, the regulatory sources of public economic law are not solely concentrated in the rules adopted at Central Government level; they may also result from regulations adopted by decentralised, specialised public bodies, local authorities and sometimes even private professional bodies.

There is nothing particularly remarkable about such a phenomenon insofar as one of the features of the regulatory authority in economic matters[3] is to "go quite low down in the administrative hierarchy" in order to be in a better position to deal with economic reality. This is also emphasised by Mr Gaudemet when he notes that "the acts which lay down the rules of economic authorities occupy, for the most part, the lowest levels of the hierarchy of legal rules, which allows them great flexibility, since the form taken then makes them easy to amend".[4]

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1 I detect that the objective of administrative action is not generally fixed by the law or is not precisely fixed.

2 Means which are often left entirely to the discretion of the authorities.

3 See on this point DE LAUBADERE and DELVOLVE, Droit public économique, op. cit., pp. 107 and 118.

4 GAUDEMET, Réflexions sur le droit administratif économique, Etude en hommage au Professeur LOPEZ-RODO, 1972, p. 135.

b.Constitutional foundations of the economic system during the post-totalitarian period in the republic of Bulgaria - Report by Ms Snezhana BOTUSHAROVA, Ph.D. (Law), Deputy Chairman of the National Assembly

1. A characteristic feature of the post-communist states is the transition to a market economy linked with the institutionalisation of private property and the guarantees for its existence, as well as with the decentralisation of the management of the economy. The Constitution of the Republic of Bulgaria, which was adopted on July 12, 1991, contains provisions embodying those two basic economic criteria.

The constitutional provisions are highly important for establishing the legal foundations of free market relations and mechanisms. The Constitution in itself is not a sufficiently flexible legal instrument for managing a dynamic market economy. Thus, an examination of the constitutional foundations would necessitate reference to other laws that further develop these foundations and make them more concrete. By their very nature the constitutional foundations do not possess the adaptability of the legal and administrative regulation of market conditions.

The success of a free market mechanism depends not only on the legal rules which regulate the economic system, but also on the existence of an environment that would maintain favourable conditions, such as financial and social stability, equal market opportunities, an adequate tax policy which is attractive to foreign investors, legislation protecting against unfair competition, etc.

International conventions, agreements and other instruments are also very important for accelerating the transition to a market economy.

Thus, the role which the Constitution can and actually does play is in establishing the basic rules and principles for the structure and functioning of the state, and the hierarchical relations between the different state institutions. These rules are of an institutional and procedural nature, but they also create the so-called "legislative integrity", the absence of which would make the transition to private property, free economy and the guaranteeing of human rights unthinkable.

The Constitution establishes the basic principles and rules according to which the state should be managed, and distributes the competencies of the different branches of government and their responsibilities. At the same time it provides for the legal protection of the individual members of society in the conditions of a market economy.

2. The constitutional framework within which the transition is made under the current Bulgarian Constitution has certain specific features.

First of all, the state which is being created (according to the preamble) is ruled by law and is social. These principles are reflected in the constitutional texts but are pursued in even greater detail in legislation of the National Assembly. A state may be referred to as being social after the completion of the change of the economic system and the stabilisation of market relations.

Secondly, the Constitution is the supreme law (Art. 5, para 1) and its provisions are directly applicable (Art. 5, para 2). The direct applicability of the constitutional provisions points to the need to pay greater attention to the constitutional basis of the economic system.

Thirdly, international treaties are a part of domestic law and have priority over any norms of domestic law which contradict them.

For the purpose of making a more accurate assessment of the constitutional framework, it would be appropriate to refer to Decision No 7 of the Constitutional Court of the Republic of Bulgaria. The importance of that decision comes from the cohabitation of the new Constitution and new legislation based on it on the one hand, and on the other, a vast number of laws and decrees which are old but still in force, many adopted by now nonexistent state institutions

Under the current Constitution, in order to become domestic law and to be implemented, international treaties must be ratified in the manner established by the Constitution, i.e. by the National Assembly adopting a law, which should then be promulgated in the State Gazette and entered into force. It is in this manner that the provisions they contain become sources of rights and obligations for subjects of domestic law. This has become the practice with the adoption of the new Constitution. Examples: the Act on Ratification of the Council of Europe Statute of May 5, 1949, the General Agreement on the Privileges and Immunities of the Council of Europe of September 2, 1949 and the Supplementary Protocol on Privileges and Immunities of the Council of Europe of November 6, 1952, the Act on the ratification of the Convention on the multilateral guaranteeing of investments and the Protocol on the establishment of the International Finance Corporation.

According to the Constitutional Court's interpretation, already existing international treaties become part of domestic law if they have been ratified and have entered into force in the Republic of Bulgaria, even if they had not been promulgated whenever such promulgation had not been required at the time of the ratification. In this case, however, they do not have priority over domestic law.

Apart from the founding principles of the market economy, which will be dealt with in the next section, guarantees are also provided for each citizen. One of these guarantees is equality before the law (Art. 6 of the Constitution) and the inadmissibility of limiting rights or granting privileges based on race, ethnic belonging, sex, origin, religion, education, political affiliation, personal, social or property status.

Equality before the law is formulated as a fundamental constitutional principle which lies in the foundations of the civil society and the state. It is a principle underlying the entire legal system and a basis for interpreting and applying the Constitution as well as for law-making activity. At the same time, equality before the law is also a basic right of all citizens. It is further dealt with in a number of specific provisions, some of which refer to citizens' economic and social rights. Equality before the law also presupposes equality regarding all other legal acts and not merely equality before the law in the narrow sense as an act of the National Assembly.

The basic economic and social rights of Bulgarian citizens should also be highlighted as part of the constitutional foundations of the economic system: the right to associate (Art. 12), the right to employment (Art. 16, Art.48), the right to own and inherit property (Art. 17, para 1). It is the obligation of the state to provide for the implementation of the constitutional right to employment. The state is also responsible for providing conditions that enable persons with physical or physiological disabilities to exercise their right to employment. The right to strike and the right to social security and social aid have also been reflected in the Constitution.

3. The constitutional framework of the economic system could also be outlined through the following elements:

1) property;
2) land and its special protection;
3) free enterprise (protection against abuse by monopolies, against unfair competition and protection of consumers, as well as protection of investments and of the economic activity of Bulgarian and foreign citizens (Art. 19);
4) taxes (Art. 60).

In practical terms, there are two basic issues which are the cornerstone of the transition: privatisation and private ownership of the means of production.

The Constitution of the Republic of Bulgaria establishes the principle that the right to possess and inherit property is guaranteed and protected by the law (Art. 17), as well as the principle that private property is inviolable.

Forcible expropriation may only be undertaken under special conditions which are clearly defined. For example, nationalisation may only be effected to address state or municipal needs on the condition that it is impossible to address these needs in another manner and only if fair compensation has been ensured in advance of the expropriation. Such a decision may only be taken by the legislature in the form of a law. These constitutional principles are historically well-known and are being restored during the transition to a market economy.

In Bulgaria the process of creating a free market economy started with the restitution of property confiscated or nationalised by the communist regime. The relaxing of the control of the state, better protection of private property and the restoration of historical justice were facilitated by profound amendments to the Property Act, the Inheritance Act, the State Properties Act, the Ownership and Use of Farm Land Act, the Restoration of Property Rights over Certain Stores Act, the Workshops and Warehouses Act, the Restoration of Property Rights over Expropriated Immovable Property Act, the Act on Restoring Property Rights over Certain Properties Nationalised under the Territorial and Municipal Development Act, the Planned Urban Development Act, the State Properties Act and the Property Act, the Act on Restoring Property Rights over Immovable Property of Bulgarian Citizens of Turkish Origin Who Applied for Travel to Turkey and Other States during May-September 1989, the Act on Restoring Property Rights over Property and Assets of the Catholic Church on the Territory of the People's Republic of Bulgaria under Decree 88 of the Presidium of the National Assembly of March 12, 1953.

A study of restitution in Bulgaria indicates that by October 31, 1992 51,245 restitution applications had been filed under the restitution laws and 45.9 per cent of all expropriated properties had been restituted. About 82 per cent of these properties are in cities and only 18 per cent are situated in villages. The most frequent objects of restitution are stores, pharmacies, restaurants and administrative buildings - about 70 per cent. Between 60 and 70 per cent of warehouses, health institutions, bus depots, day-care centres and bakeries have already been restituted. Restitution rates are somewhat slower with the restoration of property rights over cultural premises, garages, plots of land inside cities. Only a third of these have been returned to their owners. One of the reasons for that is the temporary moratorium over their restitution.

Studies show that the price of the restituted properties is considerably lower than their actual market price.

The conclusion to be drawn from this is that restitution could have been much quicker if there had been clear legal provisions dealing with those assets where ownership is contested in court and results in a slowing-down of the restitution process. The adoption of a regulation on the application of the restitution laws would facilitate the procedure of restoring ownership of those assets which have been expanded, i.e. in cases where the state has invested in the reconstruction of the original facilities.

The other basic manner of transforming state property is through privatisation. There is no constitutional framework in respect of privatisation. The process is slow and difficult regardless of the fact that several governments have proclaimed privatisation as their main goal.

Privatisation is based on the Transformation and Privatisation of State and Municipally-owned Enterprises Act of 1992. The state institutions responsible for privatisation are the Council of Ministers and the Privatisation Agency. The National Assembly should adopt annual privatisation programs developed by the Privatisation Agency and approved by the Council of Ministers. The first of these programs was not adopted since it was rejected by the commissions of the National Assembly.

According to data from the Privatisation Agency, there are now 4,500 state-owned enterprises. Under the draft program for 1993, privatisation procedures should be started for 318 enterprises, which include 150 companies. 218 enterprises, including 98 companies, for which a privatisation procedure is already under way, will be sold. At this time over 90 per cent of all enterprises are owned by the state. In Bulgaria the executive adopted concrete instruments for carrying out the transition based on combining monetary and structural approaches. Prices were freed, interest rates were raised to reduce borrowing, inflation was placed under control, the increase of wages in budgetary institutions was harnessed, and the exchange rate of the Bulgarian lev with respect to the US dollar was maintained within certain limits. The structural approach necessitates the restructuring of state-owned industry under programs specifically developed for each industrial sector.

The Constitution of the Republic of Bulgaria makes a distinction between private and public property. However, there is still no legal differentiation between the two, nor is there clear differentiation between the regime applying
to the different units of state property and the property of municipalities.

Those ownership rights which belong exclusively to the state are clearly indicated, and include mineral and other resources, all beaches, national roads, waters, forests, national parks and archaeological preserves as defined by law ("Art. 18 para 8). The state retains sovereign rights over the continental shelf, the radio frequencies, etc. The state monopoly over railways, national posts and telecommunications networks, nuclear energy, the production of nuclear products, armaments, explosives and strongly toxic substances is established by law. This is the monopoly of the state. Concessions on any of the above will be granted under legal acts. Parliamentary debates on the State Properties Act are expected soon.

Differentiation between state-owned and municipally-owned property was made by an amendment to the Property Act and the Local Government and Local Administration Act of

1991. This has greatly enhanced the municipalities' management of their assets and has strengthened their authority.

Particular attention was paid to land. The Constitution provides for special protection of land which is defined as the basic national wealth. Arable land can only be used for agricultural purposes. Its use may be changed exceptionally following legal guidelines and only if the need to do so has been proved. The Ownership and Use of Farm Land Act of 1991 has proved to be one of the most strongly contested legal acts and it has often been amended as a result of the dynamic changes of the parliamentary majority.

The adoption of this Act paved the way for free enterprise in agriculture and for competition among producers. Political interests, however, are slowing down the introduction of the principles of the market economy in agriculture. The latest data provided by the Ministry of Agriculture shows that 6,164,012 decares of land have so far been returned to their owners and land restitution plans are ready for a further 3,971,974 decares, amounting to a total of 10,135,986 decares. This constitutes 21.32 per cent of all land to be restituted.

The most important economic result of the Act is that it provides for a return of the land in its real boundaries at the time when it was expropriated and collected in cooperatives in 1946. At present, 41 per cent of all farm land is cultivated privately.

The difficulties of applying market mechanisms to agriculture result from attempts to bypass the Act through efforts to preserve the former cooperatives or to establish new cooperatives without distinguishing between the land contributions of members, as well as from attempts to slow-down the process of distributing the land.

The principle of free economic initiative has also been reflected in the Constitution. Besides this it is necessary to establish laws which provide all citizens and corporate entities with equal conditions for pursuing economic activity by ensuring protection against the abuse of monopolies, unfair competition, by protecting consumers and the investments and businesses of Bulgarian and foreign citizens and corporate entities.

Clearly, the market-oriented restructuring of the economy and the unfolding of free enterprise require guarantees for conditions that are conducive to fair competition among producers. The first economic law adopted in 1991, the Protection of Competition Act, aims to encourage competition and make Bulgarian goods and services more competitive. An independent and specialised state institution - the Commission for the Protection of Competition - has been established to pursue the implementation of the Act. There is also a law against black marketing which has proved to be inadequate.

The newly adopted Trade Act establishes the legal meaning of a number of terms and the dynamics of trading by dealing with the various types of contracts. Its chapter addressing bankruptcies is yet to be adopted. No transition to a market economy would be possible without those provisions. The Economic Activity of Foreign Nationals and the Protection of Foreign Investment Act (1992) and the Cooperatives Act (1991) are already in force.

Taxes are another vital aspect of the market economy. The Constitution requires citizens to pay taxes and fees established by law. The principle of establishing the amount of these dues is based on proportionality of income and property (Art. 60). A fair standard for setting tax

amounts was sought. Tax breaks and tax increases may only be instituted by law. The tax system is based on a legal foundation.

The provisions of the Constitution reflect amendments to the old Income Tax Act and the Local Taxes and Fees Act. The Tax Administration Act, the Tax Procedure Act and the Value Added Tax Act were recently adopted. Other tax legislation is currently under debate. There is a prevailing view that the legal foundations of a new tax system are being laid which is compatible with market conditions and encourages private enterprise.

4. The powers of the main state institutions - National Assembly, Council of Ministers, President, local self-government and administration - are placed in hierarchical order depending on their type and pursuant to the constitutional framework of the economic system in the post-communist period in Bulgaria.

It can be summarised in conclusion that the legal, political and social problems related to the transition to a market economy and the priority given to private initiative are to be resolved both by the legislative and the executive in accordance with constitutional principles.

c. THE CONSTITUTIONAL BASIS OF THE ECONOMIC ORDER DURING A PERIOD OF TRANSITION FROM A PLANNED ECONOMY TO A MARKET ECONOMY

Summary of the Discussions

1. The sources of economic law

It was pointed out that for the member States of the European Community, Community law is of ever increasing importance as a source of economic law. Community law prevails over conflicting national law. In Belgium it is even recognised that it prevails over the Belgian Constitution.

The constitutions of most Western countries contain few provisions on the economic order. In Germany it is recognised that the legislature has wide powers of decision concerning the economic system as long as it respects the first generation rights (traditional fundamental freedoms) contained in the Grundgesetz. The Grundgesetz provides in particular for a general freedom of conduct and for specific freedoms like the freedom to choose one's profession, etc. Restrictions of these freedoms are admitted only for a motive which is legitimate under the Constitution, if proportionality is respected (i.e. the restriction must be necessary to attain the aim pursued and it has to be the mildest means to attain this aim) and if the essence of the fundamental right is maintained. Following the unification treaty which foresees a revision of the Grundgesetz, it has been proposed to include second generation rights (social and economic rights) in it. It seems likely that only the principle of the protection of the environment will be included, not as a right but as a programmatic principle the execution of which will be left to the legislature. Within the German legal system, even such a programmatic principle can have practical importance since the courts tend to interpret ordinary legislation in the light of such principles. There is therefore a danger that the courts might take too many decisions better left to the politicians. Another argument for prudence in this area is that for example the right to work does not create jobs on its own but requires the state to control the labour market. If the State seems unable to fulfil the expectations created by the proclamation of such rights, this may lead to dissatisfaction with the Constitution.

The Belgian Constitution contains even fewer provisions concerning the economic order. It not only does not contain economic and social rights but not even a general freedom of trade and industry.

In Romania, the Constitution also contains a chapter on the economy and public finance besides a chapter on fundamental rights.

Bulgarian participants expressed a certain preference for a core of stable rules on the economic order which should not be subject to steady amendments by the varying majorities in Parliament.

It was pointed out that at the European level the European Convention on Human Rights and the European Social Charter are a basis both for first and second generation rights.

The extent of the regulatory powers of the executive varies widely between Western countries. In Germany the executive has regulatory powers only if it has an express authorisation by a law. The content, purpose, and scope of the authorisation must be set forth in the law. This legal basis must then be mentioned in the ordinance.

By contrast in France the executive has a regulatory power of its own under article 37 of the Constitution.

In Belgium laws attributing competences to the executive have been widely used in the economic field and ordinances based on these laws have even precedence over general laws.

2. State intervention in the market

Subsidies are a widely used means of intervening in the market both in Western Europe and in the countries in transition to a market economy. In Bulgaria for example there are specific subsidies for newly set up private companies.

In the West it is increasingly recognised that it is useless to try to keep alive economically no longer viable companies by subsidies. However subsidies may be justifiable in the case of a restructuring of sectors of the industry like the steel industry. In Community member States subsidies have to be in line with the provisions of the Treaty of Rome and to be negotiated with the Commission of the European Community.

A very drastic intervention in the market by the State is price regulation. In Belgium the State has the power to set maximum prices or a "normal price" on the basis of cost plus reasonable profit. The State even negotiates with the economic actors reference prices for certain products like fuel which are then indexed. There is a tendency towards liberalisation but the State at least keeps the requirement to be notified of price increases in order to be able to react, if appropriate, rapidly.

In other countries price regulation is particularly common as far as monopolies like the tobacco monopoly or the railways are concerned.

It should also be borne in mind that requests for State intervention and protection do not come only from the national economic actors. For example in Poland General Motors has asked the Government for protection against imports from the European Community as a condition for large investments in the country.

SECOND WORKING SESSION

Chaired by Mr Godert W. MAAS GEESTERANUS

THE LEGAL PROBLEMS OF RESTITUTION

a. The legal problems of Restitution - Restitution of Property in (East) Germany
Report by Professor Helmut STEINBERGER

b. The legal problems of Restitution
Report by Mr Alexandre DJEROV

c. Summary of the Discussion

Restitution of property in (East) Germany[1] - Report by Professor Helmut STEINBERGER, Director of the Max-Planck Institute for Foreign Public and International Law

Professor at the University of Heidelberg, Vice-President of the European Commission for Democracy through Law

Introduction

Compared with the situation in the other former communist states of Eastern Europe, the question of restitution of property in the former German Democratic Republic (GDR) is somewhat more complex.

This is mainly due to four special circumstances. First, any measures to regulate the restitution of property - at least until German reunification had taken place - had to be agreed upon not only by the authorities of the Federal Republic of Germany but also by the then still existing GDR. Second, major takings of property had occurred in the then Soviet occupation zone of Germany under the authority of the Soviet occupation power between 1945 and 1949 and the Soviet Union showed a keen interest in ensuring that these acts would not be nullified after German reunification. Third, the GDR had before reunification taken certain legislative steps to render restitution of formerly confiscated assets possible; these steps were not always completely in line with the approach which the Federal government took after reunification. Finally, the GDR itself had never taken any measures whatsoever to compensate persons who were persecuted for political or racial reasons between 1933 and 1945 and whose property was confiscated during that period. Thus the need to compensate this group of persons existed together with the general problem of compensation for persons who were divested of their property after 1945 by the GDR authorities.

In order to help better understand the current situation, a brief outline of the historical development of this area of law is appropriate.

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[1] For a general survey of the issue of restitution of property in (East) Germany see generally O. Passavent/ G. Nösser, The German Reunification - Legal Implications for Investment in East Germany, Int. Lawyer 1991, p. 875 et seq. (887 et seq.); A. Elinger, Expropriation and Compensation: Claims to Property in East Germany in Light of German Unification, Emory Int. Law. J. 1992, p. 215 et seq.; and Peter E. Quint, The Constitutional Law of German Unification, Maryl. Law Rev. 1991, p. 539 et seq. (541 et seq.).

Part 1: Historical Development of the Question of Restitution

I. Regulation by the Federal Republic of Germany before reunification: the Equalisation of Burdens Law (Lastenausgleichsgesetz) of 1952

Long before reunification took place, the Federal Republic of Germany in 1952 enacted the Equalisation of Burdens Law and related legislation[1]. According to the provisions of this law, persons, who in 1945/46 had to leave the former German territories which came under Polish or Soviet authority or had to leave either the Soviet zone of Germany as a result of World War II or the GDR and whose property was confiscated, were partly reimbursed for their financial losses. These compensation payments, however, will have to be reimbursed to the German state if these persons will be able in the future or already have been able to regain their property in the former GDR[2]. If these persons qualify for compensation under the forthcoming new compensation law[3], the payments made in former times will be set off against the reparation amount due under the new provisions.

II. Developments in the wake of reunification

Already before formal reunification between the two German states took place, the GDR itself, after the revolution of 1989/90, took the first steps towards restitution of previously expropriated private property.

a) Verordnung über die Anmeldung vermögensrechtlicher Ansprüche (Decree on the Registration of Property Claims - Registration Decree)[4] of July 11, 1990[5]

This decree established that certain claims may be made, inter alia claims for real property, rights in rem to pieces of real property, movable property, and enterprises and their property which were situated on the territory of the GDR. It dealt in particular with claims for assets seized under GDR laws, concerning in particular assets of aliens and of persons who had left the

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1 For a survey of the relevant legislation with particular reference to transnational aspects see K. H. Schaeffer, Internationale Aspekte des deutschen Lastenausgleichs, AVR 1985, S. 102 et seq.

2 For details see below.

3 For details see below.

4 GBl. DDR 1990, I, Nr. 44 at 718; for details see W. K. Wilburn, Filing of U.S. Property Claims in Eastern Germany, Int. Lawyer 1991, p. 649 et seq. (653 - 655).

5 GBl. DDR 1990, p. 718 as amended by the Second Decree on the Registration of Property Claims of August, 21, 1990, GBl. DDR of August 21, 1990.

GDR without permission[1]. Sect. 1 (4) of the decree stipulated, however, that claims to assets by aliens which had been settled on the part of the GDR by means of intergovernmental agreements and expropriations which had taken place under the authority of the Soviet occupation power were excluded from the scope of application of the decree[2].

b) Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen (Joint Declaration between the Governments of the Federal Republic of Germany and the GDR on the Settlement of Outstanding Issues of Property Rights) of June 15, 1990

Since the beginning of 1990, the government of the GDR insisted that at least some of the expropriations which had occurred on the territory of the GDR should not be reversed and that accordingly in that respect restitution should not take place[3]. On March 27, 1990, the Soviet

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1 See Sect. 1 (1) of the decree, which refers inter alia to the "Verordnung über die Verwaltung und den Schutz ausländischen Vermögens" of September 6 1951 and the several "Anordnungen über die Behandlung von Personen, die die DDR verlassen haben".

2 Paragraph 1 II c). The GDR had concluded such lump sum agreements with :

- Denmark (Abkommen zwischen der Regierung des Königreichs Dänemark und der Regierung der Deutschen Demokratischen Republik zur Regelung vermögensrechtlicher und finanzieller Fragen vom 3.12.1987, text in G. Fieberg/ H. Reichenbach, Enteignung und offene Vermögensfragen in der ehemaligen DDR (vol. II, 1991), 5.5.);

- Austria (Vertrag zwischen der Republik Österreich und der Deutschen Demokratischen Republik zur Regelung offener vermögensrechtlicher Fragen vom 21. 8. 1987, ÖBundesgesetzblatt v. 12. 1. 1988, S. 128 ff.; text in Fieberg/ Reichenbach, ibid. under 5.4.). As to the legality of this treaty under Austrian constitutional law see the decision of the Austrian Constitutional Court of June 25, 1992, VIZ 1993, p. 360 et seq. and B. Heß, Der Ausschluß österreichischer Berechtigter vom Vermögensgesetz, ibid, at p. 331 et seq.;

- Finland (Abkommen zwischen der Regierung der Republik Finnland und der Regierung der Deutschen Demokratischen Republik zur Regelung vermögensrechtlicher und finanzieller Fragen vom 3. 10. 1984, text ibid., 5.2.); and

- Sweden (Abkommen zwischen der Regierung des Königreichs Schweden und der Regierung der Deutschen Demokratischen Republik vom 24. 10. 1986, text in Fieberg/ Reichenbach, ibid. under 5.3.).

3 For a detailed survey as to the position of the GDR government see G. Schuster, Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1990, ZaöRV 1992, S. 828 ff. (998 - 1000) and H. Steinberger, Germany Reunified: International and Constitutional Problems, Brigh. Young Law Rev. 1992, p. 23 et seq. (35-37).

government declared that it, too, would consider it to be inadmissible that the acts of the Soviet occupation authority or acts committed under its authority in the years 1945 to 1949 would be called into question by the reunified Germany[1].

Influenced by this statement, both German governments on June 15, 1990 issued a joint declaration, which stipulated :

> "1. Expropriations on the basis of the law or jurisdiction of the occupying powers (1945 to 1949) can no longer be reversed. The Governments of the Soviet Union and the German Democratic Republic see no possibility of reconsidering the measures taken at that time. The Government of the Federal Republic of Germany takes note of this in view of the historical development. It [i.e. the government of the FRG] takes the view that a final decision as to the question of possible public equalisation payments must be reserved for a future all-German parliament.
>
> 2. Property held in trust and similar measures ... are to be lifted.
>
> 3. As a matter of rule, ... expropriated real property is returned to its former owners or their heirs."[2]

c) Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens - Treuhandgesetz - (Law on Privatisation and Reorganisation of State-Owned assets - Trusteeship Law) of June 17, 1990

In order to cope with the difficult task of privatising previously state-owned property and enterprises and to restructure its economy, the GDR created a new administrative entity, the so-called Treuhandanstalt, which held and holds title to all state-owned companies in the territory of the former GDR. The task of the Treuhandanstalt with its headquarters in Berlin and several regional branches is to privatise former state-owned companies, to make real property available for investment, to render companies as competitive as possible and finally to liquidate businesses that cannot be otherwise restructured[3].

d) Gesetz über besondere Investitionen in der DDR of June 26, 1990 (Law on Certain Investments in the GDR)

This law, which was also enacted immediately before German reunification took place, provided that - notwithstanding any claim as to restitution of property - expropriated property could be validly sold by the existing management if the property was needed for specific and urgent investment purposes. In such cases the investor would have to apply for an investment priority certificate ("Investitionsvorrangsbescheid"), which would have the effect of a later restitution being excluded. This law was later incorporated into the Unification Treaty[4] and thus continued

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1 TASS of March 27, 1990; text to be found in Schuster, supra note 8, at 1001.

2 Full German text to be found in Bulletin der Bundesregierung of June 19, 1990, p. 661 et seq.

3 For details as to the organisation and the function of the Treuhandanstalt see Passavent/Nösser, supra note 1, at 881 - 887.

4 Annex II, Chap. III, B, I, Nr. 4 Unification Treaty.

in force after October 3, 1990 - the day of formal reunification - as part of the law of the Federal Republic of Germany.

e) Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz) - Law for the Settlement of Open Property Questions (Property Act) of June 29, 1990

Soon after the above-mentioned joint declaration, the then still existing GDR enacted the Property Act, which - as a matter of principle - provided for restitution of property which had been confiscated after 1949[1]. Like the Law on Certain Investments, this Property Act then became part of the Unification Treaty[2] and continues to be in force as part of Federal law. In particular, the law provided in its Sect. 3 (3), that where a claim for restitution was made according to the registration decree, the owner had to desist from selling the property or from entering into long-term agreements concerning the property in question.

The original version of the Property Act itself[3], however, did not contain any specific norms facilitating the selling of property to possible future investors. In order to accommodate urgent needs to foster investments and to make restitution no longer a barrier for economic development in the former GDR, it has however since then been amended on several occasions[4].

III. Treaty on German Unity of August 31, 1990[5]

Soon after the two German governments had issued the joint declaration on property issues, the Treaty on German Unity was signed and the accession of the former GDR to the Federal Republic of Germany became effective on October 3, 1990. Art. 41 in connection with Annex III of this Treaty reiterates the joint declaration on property issues, which thereby forms an integral part of the Treaty. Under Art. 41 (3), the Federal Republic of Germany is under an obligation not to enact legislation which would run counter to the contents of this declaration. Furthermore, in connection with the signing of the Treaty on the Final Settlement in respect of Germany of September 12, 1990 (the so-called 'Two plus Four Treaty')[6], the foreign ministers of both the Federal Republic of Germany and the GDR in a joint statement referred to this joint declaration and to the obligation of the Federal Republic of Germany under Art. 41 III of the Treaty on German Unity.

Moreover, according to Art. 41 (2) of the Treaty on German Unity, a former owner of expropriated property can be granted compensation rather than restitution if the property is

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1 For details see below.

2 Annex II, Ch. III, B. I, Nr. 2 Unification Treaty.

3 But see the Law on Certain Investments in the GDR, above.

4 For details see below.

5 Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertrag, Bundesgesetzblatt 1990, II, S. 889 et seq.; Federal Republic of Germany - GDR: Treaty on the Establishment of German Unity, (partial) English text in ILM 1991, p. 457 et seq.

6 Bundesgesetzblatt 1990 II, S. 1318 et seq.

required for urgent investment purposes, i.e. in particular if the investment in question will create or safeguard jobs.

In connection with these provisions on the non-restitution of certain property, the Treaty on German Unity also provided for changes in the Basic Law in order to make it compatible therewith in particular so far as the constitutional guarantee of property is concerned[1] and in order to allow compensation to remain under full market value[2]. These changes were then challenged in the German Constitutional Court. By a decision of April 23, 1991, the Constitutional Court held that these new constitutional provisions are compatible with the limits which each and every constitutional amendment has to abide by under Art. 79 (3) of the Basic Law, i.e. the principle of human dignity and the principle of the rule of law ("Rechtsstaatsprinzip")[3].

The court stressed in particular that both the government of the USSR and the government of the GDR had made the non-restitution of certain groups of assets a condition for German reunification and that therefore the government of the Federal Republic of Germany had to agree to these exclusions in order to reach the overall constitutional goal of reunification[4]. The Court

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1 Art. 14 of the Basic Law stipulates:

"(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be determined by statute.

(2) (...)

(3) The taking of property shall only be permissible in the public weal. It may be effected only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected."

2 See Art. 135 a (2) Basic Law as amended, whereby liabilities of the GDR or its legal entities as well as liabilities of the Federation as such connected with the transfer of property of the GDR and to liabilities arising from measures taken by the GDR may not be discharged to their full extent. See also the new Art. 143 (3) of the Basic Law whereby Art. 41 of the Unification Treaty shall remain valid insofar as it provides for the irreversibility of interferences with property in the territory of the former GDR.

3 Bundesverfassungsgericht vol. 84, p. 90 et seq.

4 According to the preamble of the Basic Law, as it stood at the time, the entire German people was called upon to achieve in free self-determination the unity and freedom of Germany. As to the importance of this "reunification clause", see Bundesverfassungsgericht vol. 36, p 1. et seq. and Bundesverfassungsgericht vol. 84, p. 90 et seq. (127).

did indicate, however, that some form of compensation to the former owners of the expropriated property would be required by the constitution according to the principle of equality[1].

IV. Developments after reunification

Soon after reunification, it became clear that the relevant norms on restitution would be one of the main barriers to fast economic development in the former GDR. For this reason, several laws were enacted which had as a goal to attract investment to the territory of the former GDR, create jobs and reduce subsidies by overriding the owner`s right of restitution in these cases and converting it into a right of pure compensation. The first of these legislative measures was the Investment Acceleration Law of March 1991.

a) Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen (Hemmnisbeseitigungsgesetz - Investment Acceleration Law) of 22 March 1991

The Investment Acceleration Law, originally to remain in force until the end of 1992, inserted in the Property Law a new Sect. 3 a, the so-called "super priority procedure". This law enabled both the Treuhandanstalt and other public authorities to make land and buildings under their administration available for investment purposes, even if they were subject to restitution claims. Furthermore, the above-mentioned Investment Law of 1990 was changed so as to allow for the granting of investment priority certificates not only in cases where property was to be sold, but also where it was to be leased to an investor.

b) Zweites Vermögensrechtsänderungsgesetz (Second Investment Priority Law) of 14 July 1992

The various procedures for granting investors priority over restitution claims were superseded by and combined in Sect. 2 of the Second Investment Priority Law. It set a final deadline for the registration of restitution claims which had to be filed by 31 December 1992. Under the new law, the pre-existing investment priority procedures were merged into one. The authorisation in the form of an "investment priority certificate" will now be given by the municipality (Gemeinde) or county borough (Landkreis) in which the property is located, if the person with power of disposition over the property is an individual. In other cases, the certificate is issued by the body itself which has the power to dispose of the property in question.

The delivery of such an investment priority certificate annuls the right to reconveyance and transforms it into a simple right to compensation. Furthermore, as soon as the Property Office[2] is informed of the investment priority application, the restitution procedure is suspended for a period of up to three months[3].

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1 For a more detailed discussion of the decision see Quint, supra note 1, at 548.

2 For details as to the restitution procedure to be followed see below.

3 For details see D. Southern, Restitution or Compensation: The Land Question in East Germany, ICLQ 1993, p. 692 et seq.

Part 2 :
Current State of the Law and likely future Developments

I. Extent of entitlement to restitution

As mentioned above, the government of the Federal Republic of Germany right from the beginning of the process of reunification took the standpoint that - as a matter of principle - all previously expropriated land and business assets should be restituted to their former owners. Accordingly, Sect. 1 in connection with Sect. 3 of the Property Law stipulate that assets which either had been confiscated, expropriated or taken by the authorities of the former GDR or which had been lost by persons persecuted for political, religious or ethnic reasons between 1933 and 1945 are in principle to be restituted. This general principle has, however, by now been excluded for major categories of cases. Such an exclusion extends to the following situations.

The first and most important exclusion of restitution concerns the class of persons whose property was confiscated prior to the establishment of the GDR on the territory of the former GDR including the Soviet sector of Berlin[1] from 8 May 1945 to 6 October 1949[2] under the authority of the Soviet occupation power. According to the case-law of the German courts, it has to be presumed in that regard that any confiscatory act which took place in that period was indeed taken "under the authority" of the occupation power, which held supreme control of the territory[3].

In order to accommodate specific situations, where assets had first been forcibly sold by persecuted persons between 1933 and 1945 or where persons had to leave Germany leaving their assets behind, and where these assets were later confiscated under the authority of the occupation power, restitution is not excluded in accordance with Sect. 1 (8) of the Second Investment Acceleration Law[4].

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1 Kammergericht NJW 1991, p. 321 et seq. (322).

2 In this regard the start of the confiscatory measure is the relevant date, see VG Berlin ZOV 1992, p. 114 et seq. (116), cited by B. Messerschmidt, Die Entwicklung des Vermögens- und Investitionsrechts 1190-1992, NJW 1993, p. 1682 et seq. (1685).

3 Kammergericht Berlin, VIZ 1992, p. 65 et seq. (66). A different situation may exist, however in respect of foreign assets, since the Soviet occupation power had ordered that such foreign property would be only put under sequestration as a kind of trusteeship, but should not be formally confiscated.

4 Before this change in legislation became effective, the question whether restitution is excluded in such situations was unsettled; see on the one hand KG Berlin VIZ 1992, p. 65 et seq. (66 et seq.), and on the other Messerschmidt, supra note 27, at 1685 (with further references).

A second group of persons encompasses claimants who had already been compensated by the GDR for the loss of their property under the relevant laws of the GDR itself without being discriminated against[1]. In these cases neither restitution nor further compensation will take place according to Sect. 1 (1 b) of the Property Law[2].

A similar situation exists in respect of aliens who had been either de jure or de facto expropriated but where the GDR had concluded lump sum agreements with the respective home countries[3]. In this respect it is noteworthy that after German reunification had taken place, the Federal Republic of Germany negotiated another such compensation treaty with the United States. Under the provisions of this treaty, US citizens who had been expropriated by the GDR authorities could choose between compensation under a program of the US Foreign Claims Commission on the one hand and German restitution proceedings on the other hand[4].

Moreover, restitution is also excluded where any of the above-mentioned investment priority procedures has been followed[5].

Finally restitution is replaced by compensation, where:

(1) Natural persons, religious associations or public foundations bona fide acquired the land or rights in rem in regard to the said land before 18 October 1989[6]. This exception does not apply, however, where the acquisition did not take place in accordance with the relevant provisions of the GDR law, or if it resulted from an abuse of power, duress or deceit.

(2) The property concerned had been privatised by the authorities of the GDR after 1989[7].

(3) The land at issue had been used for the construction of apartment or residential premises.

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1 As to the question where there has been discrimination as to the amount of compensation under GDR standards see OVG Berlin VIZ 1992, p. 113 et seq. (115).

2 This concerns, in particular, land which was expropriated on the basis of the Aufbaugesetz of 6 June 1950 in connection with the Compensation Law (of the GDR) of April, 25 1960 [see in this regard OVG Berlin VIZ 1992, p. 113 et seq. (115) and BezG Potsdam ZOV 1992, p. 166 et seq. (168)] as well as land used for military purposes, in particular in immediate vicinity of the border with the Federal Republic of Germany and the Western sectors of Berlin.

3 See above.

4 For details, also as regards the prior negotiations between the GDR and the USA, see Wilburn, supra note 4, at 649 - 650.

5 For details see above.

6 For details see Sect. 4 (2 and 3) of the Property Law.

7 For details see Sect. 4 Property Law.

(4) The real estate in question had been significantly transformed by substantial expenditure, the new usage being of public use, in particular where it had been incorporated into a business and could not be returned without substantially prejudicing this business[1].

II. Compensation as an aliud to restitution

Where restitution is excluded under one of the foregoing categories, compensation as an alternative to restitution of confiscated land and other assets is available. Such compensation is further due where the claimant instead of claiming restitution himself opts for compensation, which is possible by virtue of Sect. 8 of the Property Law (Vermögensgesetz).

However, the question to what extent such compensation should be paid forms the core of a political dispute which has not yet been completely resolved. Thus, at present, the Federal government has only submitted a draft law dealing with the issue[2], which still needs the approval of both chambers of the Federal parliament. Therefore, any conclusion in this regard must necessarily be still somewhat tentative. It is foreseeable, however, that a compensation fund will be created, which will be funded by a levy of approximately 30 percent of the actual market value of land restituted to the former owners, which will be levied at the earliest by 1995.

The compensation due as far as land is concerned will be most probably based on 1.3 times the 1935 rateable value/ assessment value (Einheitswert). Compensation for businesses will be calculated according to the assessed value in 1935 for up to a maximum possible limit of 250 000 DM, while compensation for cash and securities will be most probably computed at a rate of 50 % of the nominal value in GDR Marks. The eventual amount due, which will be non-interest bearing, will possibly be set off against reparation payments the Federal Republic of Germany had already made with regard to the assets in question under pre-existing West-German legislation[3]. Compensation payments will however be reduced on a sliding scale, whereby amounts of more then 100 000 DM will be reduced by 50 %, payments of more then 500 000 DM by 70 % and payments of more than 10 million DM by 100 %.

Payments of compensation are scheduled to begin by the year of 1996 within the limits of available funds, but it is somewhat uncertain whether this schedule will indeed be maintained.

It has to be noted, however, that any such compensation along these lines, if enacted, will have to stand the test of its compatibility with the Basic Law before the Federal Constitutional Court.

III. The restitution procedure

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1 For details see Sect. 5 Property Law and the commentary of Fieberg/ Reichenbach.

2 Entwurf eines Gesetzes über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen und über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage (Entschädigungs- und Ausgleichsleistungsgesetz - Draft Law on Compensation).

3 See above.

In order to handle the restitution claims, Open Property Offices (Ämter für offene Vermögensfragen) were created all over the territory of the former GDR. There are now 216 local offices, one Land Office in each of the six new Bundesländer including Berlin[1] and one Federal Open Property Office.

Restitution claims had to be presented by the end of 1992 to the local office, where the claimant last lived[2] or to the office where the property to be restituted is located. Victims of Nazi persecution and non-resident aliens, however, could register their claims with the Federal Minister of Justice in Bonn. Finally claims brought by corporate bodies and corporations had to be made to the Land Property Office of the respective Bundesland.

After having ascertained the exact facts of the case, the property office will normally issue a provisional decision (Vorbescheid) to either reject the claim, uphold it or find that the claimant can only claim compensation but not restitution. In case the claim is not acknowledged the individual can bring an appeal (Widerspruch) to the Land Property Office, where an independent appeals commission (weisungsunabhängiger Widerspruchsausschuß) decides. Finally the claimant can have resort to an appeal to be decided by the Administrative Court (Verwaltungsgericht).

In a situation where restitution has been granted the owner can apply to the local Land Registry (Grundbuchamt) to be registered as owner, which will then take place unless an investment certificate has been sought or granted in respect of the property in question[3].

Once a restitution claim has been lodged with the Property Office, the person with the power of disposition over the property, which in most cases is either the Treuhandanstalt or a public authority, can neither sell, lease or rent the land unless an investment priority decision or investment certificate has been granted in respect of the property[4].

IV. Unsettled issues

Notwithstanding all the legislative efforts which have been already made to settle the question of restitution of property, certain questions nevertheless still remain open. Among these is the question what will happen to rights in rem in respect of buildings, i.e. where according to the existing GDR laws persons had acquired property in the form of buildings while the property of the real estate remained untouched. Under the Unification Treaty such property rights in respect of buildings continue to exist[5]. Therefore, a conflict arises between the rights of the owner of the land and those of the owner of the buildings. The Draft Law on the issue now under

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1 Brandenburg, Mecklenburg-Vorpommern, Thüringen, Sachsen, Sachsen-Anhalt and Berlin.

2 Or where the deceased last lived if his heirs are the claimants.

3 See above.

4 See above.

5 See Anl. I, Chap. III, Art. 233, Sect. 1 - 8.

consideration by the legislature[1] tries to solve the issue by granting the owners of the buildings a right to choose between a continuance of a pure right in the building itself or a right to acquire the real estate beneath.

A second rather complicated issue relates to the status of the so-called Landwirtschaftliche Produktionsgenossenschaften (LPG), where farmers had on a more or less voluntary basis entered their land into cooperatives in order to become shareholders in the cooperative. In this regard the question now arises how these cooperatives could, if at all, be dissolved and the land and other assets redistributed. This issue is even more complicated since the cooperatives did not only own land formerly owned by their members but had also received expropriated land. As a consequence, pending a possible restitution of such expropriated pieces of land, the Treuhandanstalt is frequently a shareholder in such cooperatives.

Conclusion

By the end of 1992, over 1.1 million applications concerning restitution of property in the former GDR had been made, comprising over 2 million separate claims[2], the large majority of which relate to land and buildings. By the end of June 1992, only 8.5 percent of the applications had been decided[3]. The number of investment priority decisions has been rather limited[4], which leads to the effect that much land has been taken out of the market and explains why an orderly real estate market can hardly develop in the new Bundesländer.

Furthermore, it is doubtful whether investors will develop the disputed property unless they are sure it belongs to them nor will banks finance investments unless mortgages can be registered, which leads to the conclusion that the still unsettled restitution process can be considered as a major obstacle to investment.

Another concern of a more social nature is that, since all the claimants are either from the western part of Germany or from abroad, the restitution process may deepen the division between owners of assets in the west and asset-poor earners and unemployed persons in the east[5].

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1 Entwurf eines Gesetzes zur Änderung sachenrechtlicher Bestimmungen - Sachenrechtsänderungsgesetz (Law on amending provisions concerning rights in rem), BRat-Drs. 515/93.

2 FAZ of 24 Jan. 1992.

3 See FAZ of 1 Oct. 1992.

4 See Southern, supra note 26, at 698, which speaks of 300 such applications approved and 300 to be approved in Saxony by the middle of 1992.

5 Southern, supra note 26, at 698.

b.The legal problems of restitution - Report by Mr Alexandre DJEROV

President of the Legislative Commission of the Bulgarian National Assembly,
Vice-President of the European Commission for Democracy through Law, Dean Of the Law Faculty of the New Bulgarian University and Professor at the Law Faculty of the University of Blagoevgrad

On 9 September 1944 the Bulgarian Communist Party seized power with the assistance of the Soviet Army. The application of the Soviet legal system began immediately.

One of the basic principles of Soviet doctrine is that private property must not exist, as it gives autonomy and independence to those who own it, and this is embodied in the thesis that the ownership of private property leads to the exploitation of one man by another and to the accumulation of wealth which did not originate in work.

The alienation of real property belonging to citizens was carried out by legislation and with systematic consistency.

In order of publication, the first act was the Legislative Decree on judgment by a Peoples' Court of those Responsible for the National Catastrophe. This Decree created special Courts, which handed down sentences quickly and proceeded to seize all the property of those convicted. It affected those who were members of parliament or government ministers between 1941 and 1944, as well as high-ranking officers, intellectuals and well-known artists.

The second act in this area is the Law of Expropriation of Large Covered Urban Properties. Under this law, and in accordance with the proposals of committees of party militants, all real property in the cities was expropriated by decree of the Council of Ministers in cases where one family owned more than one property. Under the terms of the law large city properties meant the possession by one family of more than one property in sections of the town reserved for building. Villas, hotels, hospitals, clinics, baths and other types of property were all entirely confiscated and in many cases the Council of Ministers carried expropriation beyond the boundaries of urban built-up areas.

From 1947 onward all private industries and mines, regardless of size (even the smallest) were expropriated under the law nationalising private industries and mines; seizures included warehouses, machinery, shops, offices, apartment buildings, villas etc. wherever they were, if they served the business or were in any way connected with its activities.

Cinematography became a State monopoly under the Cinematography Law of 1948, which nationalised all cinematographic enterprises and cinemas, along with the machinery, installations, lighting and all the objects which were required to operate such businesses.

The printing law expropriated all the real and personal property of private enterprises connected with printing.

All warehouses which were built or used to store grain were expropriated, along with their installations and equipment.

The Law on the State Monopoly for Petroleum Products expropriated all real and movable property which by its nature, use or purpose served private petroleum or similar enterprises.

The Law on the State Monopoly for Alcohol and Sweetened Spirits nationalised all real and movable property connected with the production and sale of alcohol and spirits.

The Law on the State Monopoly for Tobacco fulfilled the same purpose for tobacco production.

At the time Bulgaria was an agricultural country. The Communist regime denied the right to private property and expropriated it, so it was altogether natural that it should take over agricultural land. Around 1956 all agricultural land was forcibly included in collectives, called agricultural co-operatives, along Soviet lines. All agricultural workers were therefore obliged to establish and belong to these co-operative organisations. This act, by the force of the law, meant surrendering the agricultural inventory and all unregulated land holdings to the co-operative. The land became the property of the co-operative even if it was not so described or declared. The regulations forbade construction, even temporary, on land previously unbuilt, in order to prevent private individuals in the towns and villages from owning agricultural land; it could therefore be incorporated into agricultural co-operatives without delay.

Finally it should be noted that there was also a law expropriating forests owned by citizens.

A decree of the Praesidium of the National Assembly enabled all the Catholic Church's property to be seized.

Real property which had not been expropriated by the laws cited above was seized under laws promulgated by the Communist regime. Thus citizens who were deprived of their businesses and who were therefore unable to work and pay taxes were victims of sentences under the terms of which all their goods were confiscated. Persons owning property in the country were obliged to pay ground rents to the State in the form of agricultural products. In this way those who owned bulls, buffalo etc. were obliged to pay levies in the form of milk. In the event of non-payment, the Courts ordered the seizure of their property.

Citizens whose political views did not coincide with the received doctrine were brought before the Courts and accused of black market activities, which led inevitably to the confiscation of their real property.

Thereafter, families were forbidden to own more than one dwelling, again under a law relating to citizens' property. The owners of shops and workshops were obliged to sell them to the State enterprise which had forcibly taken over the site, at prices fixed by the local authority.

The preceding summary bears witness to the cunning of the regime in its efforts to dominate the Bulgarian citizen and to make him totally dependent on the State and on the salary which it had fixed for every worker and every civil servant.

When the Communist regime fell on the 10 November 1989 the ordinary Bulgarian citizen owned only one dwelling, a house not exceeding 60 m^2, a garage, a car and a few small furnishings. All the rest belonged to the State.

For this reason when the time came for the transition to a market economy ways had to be found of creating private property. This could only be accomplished by legislation. The National

Assembly faced these problems and it was incumbent upon it to resolve them. The Government had drafted no law in this area.

Privatisation and the restitution of property was the road to be followed.

The question was which of the two legal modalities - restitution of property or privatisation - should come first. If priority had been given to privatisation, all the land would have been sold at knock-down prices, after which there would have been nothing to restore to former owners who were deprived of their property after 1944.

It was therefore decided to proceed first to the restitution of property, that is to say, to return what they had been deprived of to former owners or their heirs, and thereafter to the privatisation of property which belonged solely to the State.
The pro-Soviet regime had nationalised property at various times and under various laws, so the National Assembly decided that restitution must also be effected by laws which took account of specific problems. It was not possible to deal in the same way with property in town and in the country, with forests and industrial businesses. There was even a different approach to various types of urban property.

The first law on restitution was the law restoring the ownership and enjoyment of agricultural land. The National Assembly voted this law at the beginning of 1991.

We must give priority to that part of our country which consists of agricultural land because of its importance to the national economy. This is an autonomous resource which retains the characteristics of its specific use. The most important part of the text is Article 10, with 10 sections. This text restores possession of all agricultural land owned before the creation of communist collective operations to the owners or their heirs. The paragraphs of this article deal with the special cases which the National Assembly has distinguished in order to achieve the object of the law. All these texts deal with agricultural land which was seized as such and which has remained so to this day.

The regulations meet with difficulties in determining the status of land which was in agricultural use when it was expropriated but which was later included within the building limits of built-up areas. If these lands are registered but undeveloped on the day the law takes effect, they revert to their owners or their heirs. Registered land which has been sold to third parties or which has subsequently been built on cannot be restored to its former owners. It remains the property of those who obtained the right to enjoyment of it and who built on it legally.

During the years of the Communist regime the boundaries between former properties were suppressed and the boundary lines were destroyed. There are no registered particulars for many of them. Consequently it is virtually impossible to locate former property on the land's surface. It should be remembered that we lack the means to carry out a rapid photographic survey of all our agricultural land, and this complicates the restitution of property even further.

In the meantime dams, industrial enterprises, motorways and other public works have been built on land outside the urban areas and these occupy part of the former agricultural land, or, more precisely, the lands to be restored at present. The State cannot find the money to compensate the dispossessed owners. This circumstance has also been taken into consideration, and the law provides that when property reverts, every municipality is obliged to make a corrective

adjustment between the land as it existed on the day the co-operatives were formed and the pieces of land existing today on the area to be returned.

The body responsible for restoring agricultural lands to their owners is the Municipal Property Commission. Such commissions have been established in every commune. The procedure for restoring property is relatively simple. Claims accompanied by written proof of ownership are lodged by all those who owned land or by their legal heirs. The commissions study the claims and give a decision. Appeals against the commissions' decisions are settled by the High Courts. The administrative and judicial procedure guarantees citizens' rights and anyone who is affected has every opportunity to establish and defend his rights.

Another law relating to restitution is that restoring the ownership of certain shops. According to the 1973 law on citizens' property, all citizens who owned shops, workshops, warehouses and the like were obliged to sell them within a given period to the Socialist organisation occupying them at prices fixed by the State if they were not engaged in activities justifying the possession of such property. Under the terms of laws in force at the time the ordinary citizen had no right to undertake trade or other activities independently, as they were in the hands of State-owned co-operatives. Under the restitution law citizens who were obliged to sell their property to State enterprises twenty years ago have the right to recover ownership simply by repaying the purchase price they were paid.

The principal restitution law relating to towns is the Restitution Law of 21 February 1992 which restores ownership of certain nationalised real property. This law acts in two ways.

The first concerns "large covered urban property". Under the terms of Article 1 of the Restitution Law, all real property in urban areas which was expropriated as "large urban property" is restored to the owners or their legal heirs subject to two combined conditions: if they are the property of the State, of municipalities or of public bodies and if they still exist in the same dimensions as when they were confiscated, that is to say, if they have the same aspect as they had on the day they were expropriated.

The second sense of the law has a wider aspect. Confiscated property for the production and sale of tobacco and tobacco products, alcohol, wines and spirits, cinematographic and printing businesses, product storage warehouses, industrial enterprises and mines is restored to owners if the conditions set out above are met.

It is the second law in terms of the volume of property restitution involved. Here, too, possession is restored ex lege, which involves no further procedure whatsoever for restitution. However, if ownership is contested, and naturally such cases arise, the dispute is settled by judicial means.

As the dwellings restored by this law are occupied by tenants housed by the State, most of them individuals, often retired or underprivileged, the law provides a three-month period during which the former tenancy remains in force and the tenants retain their rights under the same conditions as before restitution (a fixed rent). Once the three-month period has expired, the owner may suspend the tenancy if he wishes. This is also the case for restored property which is occupied by creches, nursery schools, schools or hospitals.

In 1953 the Decree of the Praesidium of the National Assembly seized the movable and immovable property of the Catholic Church. In the context of restitution of ownership the Catholic Church's property was restored by a law of the 24 December 1992, on the same

principles as the other restitution laws: the property must be owned by the State, municipalities or public organisations and it must exist in the same dimensions as when it was seized.

We should also clarify another law. This is the law of 21 February 1992, which makes restitution of property expropriated for urban needs; this has a rather more specific purpose.

Under present Bulgarian law all land may be expropriated for proposed urban development works, in order to demolish the existing buildings to make way for planned development. However, there are cases in which property has been expropriated for work not subsequently carried out. In Bulgaria's grave financial situation it is difficult to envisage construction of the project at the moment. This law, therefore, provides an opportunity for citizens whose property has been expropriated to lodge a request for cancellation within six months of the date on which the law comes into force. If this is possible under the conditions mentioned above (the work has not been done) the Mayor is obliged to restore the property to the citizen who has been deprived of it, or to his heirs. The administrative act is effected on the compulsory condition that the injured party repays any compensation which he has received. In this way the former situation is re-established, and this is perfectly reasonable, equitable and financially justifiable.

In 1989 when the changes commenced, there was an absolute predominance of State ownership in Bulgaria. A market economy is impossible without private property. We have therefore chosen the course of restitution, and this has created a volume of private ownership which is by no means negligible in the minimum of time. This is unequivocal, at least with regard to housing, shops and workshops. In addition to the other positive effects of restitution, we should mention that the appearance of the towns has changed completely and that the dusty State shops have been replaced by the well-lit facades of private shops which abound with European and Bulgarian goods. This external result is not just pure form. It is necessary for a European town. At the same time the Bulgarian citizen can buy any article that a citizen of any other country can buy in his own shops. Previously he had to travel abroad or to engage in complicated financial transactions in order to acquire what he needed. The development of private ownership has benefited not only those solid Bulgarian citizens who have had property restored to them but also those who call on their services. Finally we should remember that this private ownership will generate tax revenue for the State.

c.The legal problems of restitution
Summary of the Discussions

A number of the former communist countries have adopted the principle of restitution. Apart from Germany and Bulgaria, special reference was made in the discussion to Romania (agricultural land, church property) and Slovenia.

The main motivation of adopting restitution seems to be political. Private property is the corner stone of a democratic society and of a market economy. To put it into the words of the German scholar Dürig, it is "frozen freedom". Restitution is a clear signal to society that the principle of private property is again respected. Restitution is therefore more than a means of favouring the special interests of the former owners. Restitution can also be part of the general process of privatisation and it can serve to create a new middle class.
From the legal point of view, the basis of restitution is the assumption that the taking of the property of the private owners was illegal and not a legitimate expropriation. Under the legal order of the communist countries, the taking was of course legal. If one considers the nationalisations as illegal, restitution is a means to re-establish the integrity of the legal order. It

has also to be taken into account that nationalisations have been a step by step process and that they have had very different forms according to the time and to the country. Therefore one may arrive at distinctions as to the legality or not of the nationalisations.

Restitution has soon met with problems in the various countries. These problems are partly practical, in particular as far as land is concerned. Often it is difficult to establish the former borders of the various pieces of land. Possibly other buildings have been built on the land or it may have been used for public purposes like roads, schools, etc.

Other problems are of a more political nature. In Germany most of the claimants live in the West and restitution may therefore be regarded in the East as a form of colonisation. In other countries there are tensions between people working the land now and former owners living in the cities and having no intention of returning to their land. In many of the former communist countries there have been large estates which it may not be desirable to re-establish. In Eastern Germany these estates were already nationalised immediately after the war under Soviet control. During the negotiations for the unification of Germany it was agreed with the Soviet Union to leave these nationalisations untouched.

The main problems linked to restitution are however economic. Since the restitution claims cannot all be settled immediately, a large number of claims remains unsettled and has proved an impediment to privatisation and investment. Without legal certainty there is no hope of obtaining the investments necessary for the modernisation of the factories and therefore the pending restitution claims can be in conflict with the interests of the workers in the various firms concerned and may lead to unemployment. It may therefore be argued that in the interests of the workers and in order to attain the political objectives of restitution, it is better to give priority to privatisation which also makes people owners. The symbolic function of restitution may also be achieved by putting into the new constitutions, like the Bulgarian one, clear language on the protection of private property.

The arguments both in favour of and against restitution have merit and there can be no uniform solution which should be applied in all the countries. It is certainly not in contradiction with the principle of justice to introduce restitution. On the other hand, the same can also be said of the Czechoslovak model of privatising via vouchers without restitution. Restitution can only compensate for losses of property, it cannot compensate other losses, for example suffered by opponents of the totalitarian regime who have been deprived of educational and job opportunities.

An alternative remedy is compensation. But this is also fraught with difficulties, starting with the evaluation of the lost property. Is the basis the value at the time of the taking, the present market value, how should the value be assessed, etc.? Then the former communist countries suffer from severe budgetary constraints and this makes full compensation practically impossible. In Slovenia former owners can choose compensation instead of restitution but they do not want to do so since compensation is granted in the form of bonds from a fund which are not guaranteed by the state. Its value is therefore questionable.

A specific problem arising in many countries like Romania and Slovenia is church property. The Slovenian law had excluded property previously owned by legal entities from restitution with the exception of property of the church. This rule has however been declared unconstitutional by the constitutional court.

THIRD WORKING SESSION

Chaired by Prof. Alexandre DJEROV

THE LEGAL ASPECTS OF PRIVATISATION

a. Legal questions of privatisation in Central and Eastern European countries
Report by Professor Attila HARMATHY, Budapest

b. The legal aspects of privatisation
Report by Mr Ilko ESKENAZI, Former Prime Minister of Bulgaria

c. Privatisation as a fundamental socio-economic reform
Statement by Mr Teruji SUZUKI, Tokai University, Tokyo, Japan

d. Summary of the Discussion

a. Legal questions of privatisation in central and eastern european countries - Report by Professor
Attila HARMATHY, Deputy Secretary General of the Hungarian Academy of Sciences, Budapest

1. Privatisation is one of the favourite topics in legal literature nowadays. The notion of privatisation itself is much discussed and there are several definitions[1]. The notion of privatisation was discussed at the XXIst Colloquy on European Law of the Council of Europe as well. According to the general report of the Colloquy privatisation means replacing exclusive rights of the State by rights of private economic actors either totally or partially[2]. In the following the word privatisation will be used in this meaning.

2. In the case of fundamental, revolutionary political changes one of the most important questions is whether the principle of continuity is accepted or denied. On the basis of legal history it has been pointed out that political and legal answers to the question are not necessarily identical[3]. After 1989 in Central and Eastern European countries the same question has been put. The most spectacular change took place in Germany where the legal system of the former GDR has been replaced "in one big step". Even this change cannot be considered, however, as a legal discontinuity. As far as property is concerned a Common Declaration of the two German States

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1 T.C. Daintith, Legal Forms and Techniques of Privatisation, in Legal Aspects of Privatisation, Strasbourg, Council of Europe, 1993, p.p. 50-51.

2 A. Harmathy, General Report, in: Legal Aspects of Privatisation, Strasbourg, Council of Europe, 1993. p.p. 199-200.

3 O. Beaud, La révolution française et le droit, Ouverture: L'histoire juridique de la Révolution française est-elle possible? Droits, Revue Française de Théorie Juridique 1993, 17, p.p. 5, 13.

and the Treaty on Unification became the legal basis for restitution claims by expropriated owners or their heirs[1].

In other countries of Central and Eastern Europe the continuity is stronger than in Germany. This means that although political leaders of the former regime have lost their position the system has not disappeared from one day to another, the legal rules enacted during the previous era have remained in force (the former member-states of the Soviet Union [except Russia] may be exceptions) and the majority of the personnel of state administration have retained their posts. This situation has several consequences. In the field of property relations it had to be decided whether measures of nationalisation were lawful or not and depending on the answer whether restitution of the property that had been taken from the owners or some kind of compensation should take place. History and legal means of nationalisation were not the same in the countries concerned, so the solution of the problems of restitution, or compensation, is different too. Restitution and compensation are not dealt with in this paper, but reference has nevertheless been made to them, because only that part of state property which is not subject to restitution can be privatised.

3. Privatisation is not a small, isolated legal question of a short period in countries of the former Soviet block. It is closely connected with the general problem of the functioning of the market economy and with the role of the State in the economy. Several countries of the European Communities have had experience of privatisation in recent years. The differences in the economic and political systems are, however, well known. Just to hint at the importance of the structural difference I mention that while the value added by state-owned enterprises was between 4 and 17% in West-European countries, the proportion was 65 to 97% in the COMECON countries, and while employment in state-owned enterprises was 5 to 15% in West-European countries, it was 70 to 94% in the socialist countries[2].

The above data show the difference in the economic structure. The structure is, however, a consequence of the system. There is a vast literature concerning communism and the communist system, which will not be dealt with here. I simply refer to some basic characteristic features of the system: the party-state's monopoly of any kind of power and the central role of ideology[3]. The system was hostile to private activity in general and to private property (at least on means of production) on the basis of ideology and at the same time considering private economy as a possible source of power or an attempt to escape central control. In this context nationalisation has reasons differing from those of West-European states. If nationalisation in socialist states can be understood as an element of the system, the opposite phenomenon to nationalisation, privatisation, can be explained in the framework of the change of the system. Privatisation is, therefore, a part of the change in the official ideology, of the transformation of the political system; it is closely connected with creating a market economy, a new economic system.

I. Changes in the rules of the property system

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1 N. Horn, The Lawful German Revolution: Privatisation and Market Economy in a Re-Unified Germany. The American Journal of Comparative Law 1991, 4, p.p. 728-729, 733-734, 741.

2 E.S. Savas, Privatisation in Post-Socialist Countries, Public Administration Review 1992, 6, p.p. 573-574.

3 Similar opinion can be found in the new book of J. Komai, The Socialist System, The Political Economy of Communication, Princeton, 1992, pp. 33, 60-61.

i. General political changes: changes at the Constitutional level

4. Traditional analysis of political economy has been criticised because it divorced economic empirical study and theory construction, empirical explanation and policy issues particularly on a comparative basis[1]. A similar situation can be observed in papers and books on privatisation. Privatisation is often analysed from an economic, sometimes from a legal, point of view. It is not typical to consider the effect of politics on privatisation. In my opinion, however, privatisation in the former socialist countries cannot be understood without its political background, without considering the political system in which privatisation is carried out. This paper speaks in general about privatisation in Central and East-European countries. The reader is reminded, however, of the "collapse of the myth that the systems of Eastern Europe would achieve homogeneity among themselves and with that of the Soviet Union"[2]. Political, social and economic systems of these countries are different in many respects. Differences in the starting point of the socialist regime have become apparent recently, too. Nevertheless, there are some common features and the paper will try to focus upon the common elements without forgetting about the differences.

As a result of the changes since the end of the 1980's, Central and East European states are creating democratic political systems. This means transforming the whole system and working out the new roles of the Constitutions. From our point of view, the key issue is the role of the State in the economy and the concept of the market in the given political system (and in the prevailing ideology).

5. Since the end of the 1960's economic reforms have been introduced in the European socialist countries. An important element of the reform was the acceptance (to a different extent in different countries) of the market in duality with central planning. The idea of market did not mean, however, in any of these countries, the admittance of private property and private undertaking without serious restrictions, the practice of free entry of new entrepreneurs and the bankruptcy of loss making enterprises, nor did it embrace financial markets[3]. The very narrow concept of market was to be replaced after the collapse of the previous regime. It is not clear, however, what kind of market should be created. After the fall of the Soviet Union "the whole Commonwealth was embraced by economic chaos" which was not foreseen by those who wanted to create a market economy by freedom of prices[4].

In all Central and Eastern European Countries the question was put whether a liberal market concept, accepting only the "invisible hand", should be accepted or whether the state should intervene in the economy. If the second variant is realised, the question is, whether there is any model which should be taken as an example; e.g. whether the French or the German approach would be better suited, or no model can be found. It is understandable that after a period of

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1 F.G. Castles, Introduction, Puzzles of Political Economy, in: The Comparative History of Public Policy, ed. F.G. Castles, London, 1989, pp. 3-5.

2 G. Ajani - B. Dallago - B. Grancelli, Introduction, in: Privatisation and Entrepreneurship in Post-Socialist Countries, ed. B. Dallago, G. Ajani, B. Grancelli, Basingstoke-London, 1992 (repr. 1993) p. 4.

3 A. Chilosi, Market Socialism: A Historical View and a Retrospective Assessment, Economic Systems, 1992. 1. pp. 176-177, 180-181.

4 O.S. Ioffe, Privatisation in the USSR and Commonwealth, Connecticut Journal of International Law 1992.1. p. 24.

strong centralisation and state intervention public opinion favours non-interventionism as a reaction against the previous system. Considering the German history after World War II one can say, however, that the creation of the "social market" needed serious measures to be taken by the state and well defined policies to be carried through by the state[1].

The decision on the market model is influenced by different factors in the history of the state and its present position and by the political situation. It has been pointed out in connection with development strategy that it is affected not only by structural characteristics but also by the government's social objectives and willingness to use various policy instruments[2]. The same is true for our topic. Public opinion may require for some time the disappearance of the state from the economy, while other factors bring the state back but its functions will be different from the previous ones.

6. In the Constitutions of socialist states it was usual to include some principles on the economic system and on the role of the state in the economy. Consequently the change in the economic system, the new approach to private undertaking and to private property make it necessary to change the Constitution and not only to express the new principles but, in accordance with the increased role of the Constitution, to influence the whole process of legislation and judicial and administrative practice.

The new system needs new institutions and new rules of behaviour. It is the state's important task to work out rules on the new institutions and the new rules of behaviour. Constitutions can contain only those rules which are of fundamental importance for the system. Private property and the freedom of private undertaking are decisive for a whole system. The Constitutional Courts of some of the countries concerned have been giving decisions on certain questions of the freedom of private economic activity and on the protection of private property since 1988. This shows that basic questions on private property and private activity are important constitutional issues not only in theory but in practice as well[3]. In the new system, the fact that private property and personality, which previously had no importance, receive special emphasis and that their importance is expressed at the level of the Constitution is a normal consequence of the change in the political system. A similar situation can be found in Germany after World War II, where the protection of personality as a general constitutional right was declared by the German Constitutional Court (proper rules on it had been missing in the Civil Code)[4].

7. The ways and circumstances of nationalisation were not identical in the countries concerned, so the ways, measures and techniques of privatisation are different as well. Constitutions cannot formulate detailed rules. Nevertheless, the change is to be expressed in the Constitution of Central and Eastern European Countries in principles protecting private property

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1 A. Müller-Armack, Genealogie der Sozialen Marktwirtschaft, Frühschriften und weiterführende Konzepte, Bern, 1974. pp. 8-12, 25-34.

2 H. Chenery - M. Syrquin with the assistance of H. Elkington, Patterns of Development, Oxford, 1975. p. 4.

3 The Hungarian Constitutional Court played an active role in finding the way of privatisation starting from the denial of making any difference according to the object to be privatised or reprivatised, see, the decision No. 21/1990 (X.4.) AB, continuing with the evaluation of the government's obligation in connection with nationalisation, see, the decisions Nos. 16/1991 (IV.20.) AB, 27/1991 (V.20.) AB and 28/1991 (VI.3.) AB.

4 Ch. von Bar, Deliktsrecht, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, hrg. Bundesminister der Justiz, Köln, 1981. Bd. 11. p.p. 1712-1713.

and renouncing the privileges of state property. When redefining the position of state property and private property in the economic system several questions must be answered. (It can be observed that privatisation raises different constitutional law problems in other countries, too. I would refer here to the French privatisation process, where the Conseil constitutionnel and the Conseil d'Etat dealt with these problems[1]).

The previous principle was the state ownership of the means of production and the state monopoly of the activities in the most important fields of the economy (finances, trade, etc.). The abolition of the principle expressed by socialist Constitutions leads to the question whether everything can be an object of private property or whether public utilities remain exclusive state activities and what are the fields of national interest where the public interest should prevail. It is to be considered, too, whether a state monopoly is to be maintained for serving the public interest and whether it is not acceptable to have control over private activity by retaining state ownership and granting by means of contract the right to pursue an activity for a specified period of time in certain fields under public control. Considering the vital interests of the nation it could be a question to be regulated by the Constitution, such as where the limits of the government's discretion are in privatising and what kind of control the Parliament has. Attempts have been made to find at least a provisional solution in Hungary but no general answer or tendency can be found in the countries concerned. Questions of privatisation are regulated in several Acts of Parliament or decrees but constitutional aspects cannot be considered as clearly worked out[2]

The idea of changing the economic system based on state ownership and central planning and of establishing a market economy based on private property is closely connected with another element of the functioning of the market. This element is competition. If the exclusive right of the state over the means of production or some kind of economic activity (to be realised by state economic organisation) is not the basic principle, then the principle of competition is to be accepted. The creation or the strengthening of competition is an aim which is always present in privatisation but its importance varies from country to country. It had an important role in the English privatisation process[3] and it is inevitably present in the former socialist countries where monopoly positions prevailed. Competition, being a basic element of the economic system, can be considered as a constitutional question.

In addition to what has been said above, I should like to call the readers' attention to a further question, namely the position of local governments. Under the previous legal regime of the socialist countries strong centralisation prevailed and local governments, being a part of the state

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1 L. Rapp, Les lois de privatisation et la "respiration" du secteur public, Revue Française du Droit Administratif 1987, mars-avril p.p. 158-161; J. Bourdon, J.M. Pontier, J.C. Ricci, Les privatisations en France, in: Les privatisations en Europe, sous la direction de Ch. Debbasch, Paris, 1989, p.p. 125-130.

2 In Germany the Treaty on Unification and some GDR Acts contain the relevant rules; see U. Drobnig, Die Privatisierung von Staatsunternehmen in Deutschland, Wirtschaftsrecht 1992. 12. p.p. 491-493. It is interesting to see that reports presented in the framework of the Privatisation Project of the Central European University containing detailed information on rules of privatisation of countries of Central and Eastern Europe do not deal with Constitutions and constitutional issues. The two volumes publishing the reports (The privatisation Process in Central Europe, and The Privatisation Process in Russia, Ukraine and the Baltic States) were edited by R. Frydman, A. Rapaczynski, J.S. Earle et al. (Budapest, London, New York, 1993). I think it is an indication of the fact that no clear answers to the above questions can be found in the Constitutions of these countries.

3 A. Dunsire, The public-private debate: some United Kingdom evidence, International Review of Administrative Sciences 1990. 1. pp. 34-35, 59.

administration system, did not have much independence. Local governments did not have property either (later, attempts were made to create property rights for them in some countries). Political changes after 1989 resulted in changes in the position of local governments too and in the recognition of their property rights. It was not enough, however, to recognise these rights; a redistribution of state property was needed. The state transferred some property to local governments. This was not a privatisation in the usual sense, nevertheless it meant changes in the owner (local governments getting independence), and a decentralisation in decision making. As the new position of local governments is to be reflected in the Constitution, their property rights can be a constitutional problem too. It is the more so if the idea of state property is connected with public utilities, as local governments' economic activity and their property is to a large extent in the field of public utilities.

ii. Rules on ownership

a. Rules on State Property

8. The problems mentioned at the constitutional level exist at the same time in rules of ownership as well and changes in constitutional rules will have a direct effect on civil law rules on ownership. At the level of civil law rules, several additional problems are to be considered at the same time.

One of the basic problems is identifying the owner. Before the socialist era the theory of a separate legal entity, the treasury (fiscus), was known and admitted. During the last forty years, however, a new concept prevailed in most countries. The State became a special subject of the law differing from all other kinds of subjects and the treasury disappeared. State enterprises were not considered as owners of the property under their control in the legal rules on state property or on state enterprises, although the legal position of state enterprises and of state property was much discussed. The reform of economic management brought about a measure of self-management in some countries. It became a complicated question clarifying who had the right to what in the case of the alienation of the assets of state enterprises. The problem became even more complex as the interest of local governments in enterprises of the territory of the local government's competence was taken into consideration.

It was clear in the previous regime, too, that it was not enough to maintain the principle of state ownership and to deny the ownership of state enterprises. The question was which state organ could act as owner on behalf of the state. Often even ministers did not feel themselves to be competent to make decisions. It is well known that important economic decisions were made by the Political Committee of the Party and after it the Council of Ministers gave a similar decision.

The situation was complicated by the fact that rules on state enterprises were not based on market concepts. State enterprises were, at least before the economic reforms of the 1960's, part of the state administration system. The regulation of state enterprises having an administrative law character made it more difficult to clarify under civil law rules who the owner of the property under the control of state enterprises was.

Privatisation cannot be carried out if the person of the owner is not defined. Here the interests of the State and those of the managers of state enterprises are in conflict. The State will not transfer the ownership of state property to directors of state enterprises or even to a larger group of managers. The first experiences of privatisation by managers who were not owners convinced

the State that decision making on privatisation should be centralised or at least controlled. Thus a centralisation (in relation to self-management expropriation or nationalisation) took place[1].

9. Centralisation as the first step towards privatisation may have as a consequence other conflict situations as well, not only between the State and managers of state enterprises. Another conflict may arise between the central state organs and local governments. An interesting element of the British privatisation was the contracting out policy imposed on local governments. It concerned the transfer of ownership by giving licences to private firms to run public utilities which were under the control of local governments. The policy of contracting out had different reasons but one of them was the central government's aim to reduce the power of local governments, mostly under the control of the opposition, and deprive them of a profitable undertaking[2].

10. There are other conflicts between the State on the one hand and trade unions and/or customers on the other in the case of privatisation. These conflicts concern the right of ownership and restrictions on it. It can be observed that customers who are beneficiaries of goods and services provided by state enterprises resist privatisation because of the fear of losing the services (the new owner will not maintain non-profitable services) or of price increases. Similar resistance occurs on behalf of the trade unions of the workers of the enterprise to be privatised[3], as it is probable that non-profitable enterprises will be closed and many workers will lose their jobs. In some of the socialist countries trade unions have got certain rights in connection with managing state enterprises which hinder privatisation. The State, declaring that its aim is to establish a democratic system, finds itself in a situation in which it will deprive trade unions of rights acquired under the previous regime if it wants to realise the privatisation. Customers had not acquired similar rights but their interests were protected from this point of view (questions which are economic ones belonging to the sphere of decision making of an entrepreneur become political problems in a planned economy with state enterprises rendering services to the population and the governments of several European socialist countries did not want to take the political risk) and this protection will be lost. Both workers and customers are not satisfied with the theoretical possibility that the market may create better position after some time. Thus the state is put under political pressure.

11. Objects of state property were not under the control of state enterprises or state organs in all cases. The legal position of several kinds of legal entities has not been regulated or has not been regulated clearly. As usual the absolute power, the state, did not like entities which could become independent from the state. Thus the State tried to keep them under control (e.g. in the case of associations) and in other cases there were no detailed rules on them (e.g. in the case of the so-called social organisations, like parties or in the case of churches). The overwhelming majority of the legal entities got not only financial aid from the state but property as well. In many cases the legal position of the property given to legal entities was not clear. As a result

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1 M. Nuti, Privatisation of Socialist Economies: General Issues and the Polish Case, in: Transformation of Planned Economies: Property Rights Reform and Macroeconomic Stability, ed. H. Blommenstein, M. Marrese, OECD Publication, Paris, 1991. pp. 56-60.

2 T. Prosser, La privatisation en Grande-Bretagne, in: Les privatisations en Europe, sous la direction de Ch. Debbasch, Paris, 1989, p. 114; see a similar remark at D. Heald, The United Kingdom: Privatisation and its Political Context, West European Politics, 1988. 4. p. 46.

3 R.W. Hahn, Regulation: Past, Present and Future, Harvard Journal of Law and Public Policy, Winter 1990. pp. 210-211.

there are now many problems because it is not easy to distinguish what was and remained the property of the state, and what was really the property of the Communist Party, of the trade union, of the youth organisation, of the women organisation, etc. This situation complicates the regulation of the property relations of political organisations. It seems to be, sometimes, like a new nationalisation and redistribution among the new entities (the new political parties and trade unions do not have any property).

There are other problems relating to the churches. Traditional churches had a large fortune that was nationalised. In countries where restitution has not been admitted but there is a need for the enlargement of the social and educational activity of the church the question is, what kind of legal solution is acceptable for transferring property to the Church without discrimination?

b. Some special problems of ownership

12. Ownership of immovables has been and is an important political issue. The differences of social and economic conditions among Central and Eastern European Countries could not be ignored when introducing the socialist system. Consequently, there were important differences in nationalisation of land, in the system of agricultural co-operatives and in the rules on the ownership of dwelling-houses. The differences were reflected in the functioning of the land registries as well: in some countries it continued functioning though it became slow, in some other countries it became unreliable. It means that the starting point is different from country to country. The German situation is special in this respect too, and the former Soviet Republics are in an extreme position because all forms of private property on land were liquidated in the Soviet Union while in other countries some forms of private property remained[1].

In all the former socialist countries agriculture was a particularly important part of the economy. In all of them peasants are, even after industrialisation, a serious political factor. Therefore, partly the aims of peasants must be considered, partly the maintenance of agricultural production and provision for the non-agricultural population are of key importance in political life. The often conflicting factors cause serious difficulties and these problems influence the uncertainties of the regulation of ownership on agricultural land. The main problem is whether land should be restituted or not and further whether the existing co-operatives should be maintained or liquidated (the regulation of ownership is a basic element of their existence).

There are other factors which are decisive in the privatisation and the regulation of ownership of dwelling-houses and other buildings. Here again political factors play a role. In connection with dwelling houses social problems have a key role, while in the case of other buildings, general investment aspects are to be considered.

Although emphasis has been laid on the differences in the situations of the countries concerned, there is a common feature: privatisation in this field needs special rules and solutions.

13. In most countries, foreign participation in the privatisation process causes special problems. The problem is known in West-European countries as well. I would refer only to the

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[1] R. Steding, Privatisierung der Landwirtschaft sowie des Grund und Bodens aus juristischer Sicht, Wirtschaftsrecht 1992. 12. p.p. 495-497, W.Ja. Usun, Agrarreform in Russland, Osteuropa 1992. 9. p. 755, V. V. Petrov, Novii zemelnii stroi Kossii: Formi sobstvennosti na zemliu i ieio privatizatsii, Vestnik Moskovskogo Universiteta, Seriia Pravo 1992. 1. pp. 28-33.

French rules of privatisation setting a 20% limit for the foreign party's share in a company[1]. Central and Eastern European Countries had special rules on joint-ventures before 1988 but these rules have been replaced by new ones since that time[2]. An early example of it was the Hungarian 1988 Act on foreign investments which merits mentioning from another point of view too: it is the most liberal regulation, granting the same position to foreign companies as the domestic enterprises have. The general problems in connection with foreign investment are whether everything can be sold to foreigners or whether there are some key positions in the economy which should be kept as national property, and if there is no exception to foreign investment whether the proportion that can be acquired by foreigners should be limited. Public opinion is here a decisive factor but the question is a hot political issue.

In the framework of the general problem of foreign investment a special question having a particular importance is whether foreigners can buy land in the country. Different views are based not only on emotions but - among other factors - on consideration of the inflationary consequences of the presence of foreign buyers and on the effects of foreign competition in agriculture upon the position of the new farmers.

II. Legal Institutions of the Market Economy

14. It has been noted already that privatisation cannot be analysed separately without paying attention to other elements of the existing economic and legal system. In the following I shall try to point to some parts of the economic and legal system which are especially important for the privatisation process.

i. Company law

15. There is a direct connection between the economic system and the legal form of the economic actors. In a planned economy based on state ownership of the means of production, the legal form cannot reflect a market economy concept. The state enterprise was an entity of public law, a unit of administration. It has not been completely changed by the economic reforms of the 1960's. At that time even if the market had been taken into consideration to some extent, a special notion of the market prevailed. It did not cover the actors nor the changes in the persons of the actors according to the requirements of the market. The continuous flow of entries and departures was neglected. The creation of new actors depended wholly or to a great extent on central state decisions and not on the market. The liquidation of the actors was somehow known in principle but never really put into practice and where it was admitted it depended again on central decisions.

In West European countries the legal form of state enterprise is known. Experience shows, however, that the legal form is changed when privatisation takes place, and state enterprises are converted into commercial companies[3]. In the former socialist countries a new market concept is

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1 A. Bizaguet, Le secteur public et les privatisations, Paris, 1988. p.p. 84-85.

2 Information on the rules of different countries can be found in several reviews. Reference is made here only to the series of articles and translations published by the Review of Central and East European Law in 1992 and 1993, and by the International Legal Materials in 1991, see a comparative survey by K.J. Kuss, Das neue polnische Investitionsgesetz im osteuropäischen Kontext, Beilage Nr. 3 zu Recht der Internationalen Wirtschaft 1991. Nr. 11.

3 See e.g. D. Heald, D. Steel, Privatising Public Enterprises: An Analysis of the Government's Case, in: Privatisation and Regulation - the UK Experience, ed. J. Kay, C. Mayer, D. Thompson, Oxford, 1986, p.

needed involving dynamism in the personal structure of the market and transformation of the legal form of state enterprise into a legal category reflecting the market is also needed if the enterprise is to be privatised. The co-operative is a legal form which is applied in market economies as well. Nevertheless, the kind of co-operative which existed in socialist countries was in many respects different from the co-operative of West European countries. Legal rules on co-operatives are to be revised consequently so that these rules can be applied under the conditions of a market economy.

16. Privatisation needs rules of company law. In some countries of Central and Eastern Europe such rules did not exist and in others rules of rather old Commercial Codes were in force but applied only on rare occasions. These countries decided to enact new rules of company law.

The legislator has to decide on several questions of economic policy when working out new company law rules. Here only one of these questions is mentioned. There is a dilemma whether liberal founding rules are to be adopted or whether requirements protecting the interests of future creditors and investors are to be set which may refrain from creating a new company in some cases. If it is easy to found a company, there will be several new undertakings on the market changing the personal structure of the market and increasing the private element, which can be considered as a kind of privatisation (even if state property has not been sold). On the other hand, these countries are suffering from a lack of capital and serious investors are foreigners. If investors do not feel that the rules on companies protect their interest, they will not invest and it will slow down privatisation. As it is doubtful whether governments and opposition parties have detailed economic policies and experience in company law is missing, it is not sure that the rules on companies give an answer based on careful analysis of the situation.

Another question of legislative policy concerns the types of companies. The legislator must know the economy of the country and should consider what types of companies will be made use of for what purposes under the given conditions of the economy. Here again special attention should be given to the new (possibly) small companies with small capital and supposing strong personal involvement of the parties on the one hand and to the requirements of the privatisation of a great number of state enterprises on the other, where there is a great temptation to lose sight of all other types of companies except companies limited by shares. The danger is that a company law which has not been properly worked out will make privatisation difficult.

17. When company law rules are mentioned here, they cannot be understood in a narrow sense. Privatisation needs rules on how to transform state enterprises into companies, and rules of transformation from one type of company into another type, too. Company law needs properly functioning registration as an infrastructure, which cannot be easily built up. Similar elements required for the normal functioning of company law are bookkeeping, rules on accounting, auditing and personnel who can do the task. These elements are missing in many of the countries. Consequently, there are serious problems from the founding of the companies until the end of the life of a company.

Normal market life goes with founding new companies and winding up certain existing ones. It means not simply rules on restructuring enterprises or rules on bankruptcy but rules concerning their consequences as well. Important consequences are unemployment and labour movements.

60, M. Durupty, Les restructurations du secteur public, Revue Française du Droit Administratif 1991. mars-avril p. 314.

In countries of Central and Eastern Europe in the recent past there has been no experience gained of easing problems of unemployment, working out an effective social security system which is not part of state administration, handling labour conflicts or building institutions of interest representation and dispute resolution. In addition people do not understand easily market justice[1]. In an indirect way these problems may have an influence on privatisation as investors (particularly foreigners who are not familiar with the situation) need a lot of patience and have to wait until the system which is slowly building up brings results.

ii. Capital market and finances

18. The countries which are in transition from a command economy to a market economy do not have a strong capital market. Most of them are now establishing a stock exchange. This means that privatisation cannot be carried out by means of selling shares on the stock exchange. In some countries, rules on the stock exchange have been put into force but many years will be needed until the population becomes accustomed to it. It is obvious on the other hand that state enterprises could not be sold on the stock exchange (with some exceptions) even if the stock exchange were strong and experienced.

The lack of the possibility of privatisation by means of the stock exchange has a seriously inconvenient consequence. There is no market where the value or the market price of the enterprise could be stated. It had been pointed out that unfamiliarity with how assets are valued has produced a belief that an ex ante fair privatisation process can be constructed, in which values do not fluctuate but are steady[2]. The result is uncertainty concerning the evaluation of state enterprises making privatisation slower (and often more expensive) and causing many political problems. Furthermore it is an additional factor increasing the danger of corruption in privatisation affairs.

19. An important part of the economy which also plays a role in privatisation is the banking system. Finances and banks in general were neglected parts of the economy during the era of planned economy. Economic reforms of the 1960's have not profoundly changed this part of the economy (the concept of market economy prevailing at that time did not embrace fundamental changes in the financial sector). It has been underlined that privatisation without banking reforms would fail. The banking reform entails partly the improvement of efficiency in the use of resources and partly the liberating of banks from bad loans given to state enterprises who can never pay them back. Privatisation could also be connected with the government's fiscal policy efforts and with cleaning up enterprise balance sheets[3].

iii. Law of competition

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1 R. Sharlet, Perestroïka, the autonomous sector and the transition from the "contra-system" to a civil society? in: Privatisation and Entrepreneurship... (note 8 supra) p. 50.

2 H.J. Blommenstein, M. Marrese, S. Zecchini, Centrally planned Economies in Transition: an Introductory Overview of Selected Issues and Strategies, in: Transformation of Planned Economies... (note 18 supra) p. 12.

3 L.J. Brainard, Strategies for Economic Transformation in Central and Eastern Europe: Role of Financial Market Reform, in: Transformation of Planned Economies... (note 18 supra) p.p. 95-96, 102-103, see also I. Abel, J.P. Bonin, Capital Markets in Eastern Europe: The Financial Black Hole, Connecticut Journal of International Law, Fall 1992. pp. 10-13.

20. In a market economy rules of competition are of great importance. Privatisation could be an important instrument for creating a market economy in which competition acquires its role. One of the objectives of privatisation is the creation of competition. The economy of the former socialist countries is characterised by monopolies of state enterprises in different fields of the economy. Administrative monopolies can be destroyed by deregulation. It is more difficult to bring about any change if the monopoly is a consequence of the size of the enterprise. In principle it is easy to require the splitting up of enterprises before privatising them. In practice there are, however, serious difficulties. Enterprises usually struggle against structural changes. More serious is the will of possible buyers. Buyers do not take into consideration the needs of restructuring the economy, they want to buy what will give them profit. Sometimes they want to acquire the monopoly of the state enterprise and they require even the protection of the state against possible foreign competitors. West European experience shows that privatisation has not resulted in greater competition in many countries[1]. There is a great probability of the same result in the former socialist countries.

III. Rules on privatisation

21. There is an abundant literature on privatisation giving information about the rules of the countries concerned[2]. In this paper only three elements of the rules are mentioned:

a. Institutions

Two main possibilities are known in the practice and in the rules of privatisation. One of them is spontaneous privatisation, whereby the enterprise to be privatised will sell itself. In this case, the managers of the enterprise negotiate with buyers. The danger of this solution is that managers are interested in getting a good job and not in getting a high price for the enterprise. It has been criticised for political reasons as well saying that the old nomenklatura transforms in this way its political power into an economic one. Therefore this solution is not usually applied in the case of privatisation of big enterprises but it is accepted for privatising small shops and restaurants. The other possibility is privatisation by central state agencies. According to the present situation of the state administration several ministries and inter-ministerial committees will be involved, often with the Council of Ministers giving a decision. Whether Parliament has any serious role in controlling privatisation depends on the political situation. A mixed solution is privatisation by means of an agent. In this case the agent is an expert businessman (firm) arranging privatisation and the result is controlled by a central state body.

b. Procedure

Two types of procedure can be distinguished. The first type means market methods; i.e. the owner sells the enterprise or shares. In this case there can be no complaint against the action of the owner. The second type is an administrative procedure. Privatisation takes place on the basis

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[1] J. Wickers, V. Wright, The Politics of Industrial Privatisation in Western Europe: An Overview, West European Politics 1988. 4. pp. 6,24.

[2] Interesting papers have been presented to different conferences giving the possibility to compare rules of different countries (as literature usually deals with one country without much comparison). Materials of one of these conferences were published last year: Wirtschafts - und Gesellschaftsrecht Osteuropas im Zeichen des Übergangs zur Marktwirtschaft, ed. by F.-J. Säcker, W. Seiffert, R. Wolfrum, München, 1992.

of an administrative decision which can be controlled by the courts. (The question has been discussed in Germany[1]).

c. Methods

Temporary transfer (lease, contracting out) can be distinguished from final transfer. In the latter case the person of the buyer can be important: management buy out, employees shares, non-profit organisations and foreigners as buyers are the most important categories. In all these cases there can be not only different techniques applied but the political background is different and the aim of the business will be different, too. The level of development of company law may have an importance: state control can be maintained in different ways offered by company law. It is a further question how groupings of enterprises (Konzerne) are taken into consideration. An important part of the problem is the protection of workplaces, of employment and the way employees are involved in the transaction.

[1] W. Möschel, Treuhandanstalt und Neuordnung der früheren DDR-Wirtschaft, Zeitschrift für Unternehmens - und Gesellschaftsrecht 1991. 1. pp. 181-182, R. Weimar, Handlungsformen und Handlungsfelder der Treuhandanstalt - öffentlich-rechtlich oder privatrechtlich?, Die Öffentliche Verwaltung 1991. 19. pp. 813-823.

b. The legal aspects of privatisation - Report by Mr Ilko ESKENAZI, Former Prime Minister of Bulgaria

The phenomenon of privatisation is the centre of attention in political, legal, economic and other spheres throughout the world after the collapse of the Communist regimes in Eastern Europe at the end of 1989. It is true that several countries have already commenced privatisation, but never before has society been obliged to take up the challenge of privatising almost 90% of the State economy, in the absence of a stock market and of any real valuation of businesses. This presentation studies certain legal aspects of privatisation in general, as well as problems specific to privatisation in the former Communist countries. It is important to stress immediately that it is impossible to give a detailed analysis of all the problems arising in this area in a report like this. I propose, therefore, to examine questions which I consider both typical and important from the point of view of legislation and practice in Eastern Europe and in Bulgaria in particular.

I. Privatisation as a general legal problem

1. The notion of "privatisation"

a. Despite the abundance of definitions the meaning of "privatisation" can be summarised as the transfer of State-owned businesses to ownership by private individuals. Privatisation may well relate to parts of businesses in operation, such as restaurants, workshops etc. However, the sale of certain items of stock (equipment, machinery, installations) belonging to State enterprises must not be regarded as privatisation. Furthermore, this is a subtle legal question, comparable to the classic question as to how many grains of sand form a pile. The fundamental criterion is whether the part sold may be regarded as a separate business. Finally, under certain laws, privatisation may include immovable and other State property which is not part of a business.

b. In some countries privatisation also includes municipal property. This is primarily the case in the former Eastern block countries and in Bulgaria in particular, where the Soviet model of local democracy was adopted in the 1950s. The municipalities disappeared as legal entities when local councils were set up as managing bodies. Municipal ownership disappeared becoming indistinguishable from State ownership (in fact, everything which was not private property was public property, that is to say the property of the State). Municipal property was restored by the very first democratic laws. However, its scope is much wider than that of the municipal ownership which occurs naturally in countries with market economies. As it includes much of the State's real property and businesses, privatisation was bound to affect it.

c. The term "transfer" covers not only sales but every kind of transaction which results in the transfer of ownership, even if this occurs after the event (leasing with an option to purchase, sales with retention of ownership until full payment of the price).

2. Transfer of State property

In countries with a market economy, and even in the countries of the former Eastern block, there is no obstacle in principle to the State selling its property. However, in the two groups of countries privatisation calls for a special law. State-owned property is public property in the first place and it is hardly necessary to enter into further explanations with regard to this particular feature. It is accepted that the person who exercises the right of public ownership cannot dispose of the property in the same way as a private owner. This follows from the need to protect the

public interest and from the fact that the State is a special kind of owner, managing the State's assets in a particular way.

The transition to a market economy gives rise to specific legal problems which will be studied later. They relate not only to privatisation in the real sense but also to particular phenomena, for example the desire in some quarters to transform State property into private property as quickly as possible, without respecting legal procedures (hidden privatisation) or the transition to a new system of management for State enterprises and, as a consequence, the constitution of a new power structure for taking decisions relating to the disposal of property.

3. Legislative provisions

a. The need for a special law does not only follow from considerations of protection of the public interest and from the special rules governing the disposal and management of State property. Of necessity the legal regime of privatisation sets aside the general rules of civil and administrative law. A typical privatisation law settles at least the following questions:

- the scope of privatisation with regard to property; this is defined by general rules of the law, but also, in certain countries, by special laws adopted with a view to the privatisation of certain large enterprises;

- the decision-making body and procedure for privatisation, both with regard to general governmental strategy and the businesses themselves;

- control over the activities and decisions of the privatisation body;

- techniques of privatisation and the specific rules to which they are subject;

- the preference given to categories of persons, such as those working for the enterprise, national buyers, voucher schemes, employee scheme ownership programmes, etc;

- provisions relating to the use which is made of the proceeds from privatisation.

b. The legal provisions cannot be studied alone. They reflect a particular economic policy and the basic approaches may be distinguished as a function of it. These approaches determine the content of the law. In the first place, the legal rules demonstrate the policy of the State with regard to the aims of privatisation, for example, to make State enterprises more efficient by transforming them into private enterprises and by attracting investment, to increase State revenue, to allow the citizen to participate as a shareholder in privatised industries etc. In the second place, privatisation is a significant economic problem, but also a political and social question. In several countries this question serves as the demarcation line between the economic programmes of the political parties. However, privatisation is an undeniable political and economic imperative in the transition to a market economy. It is impossible to create a market economy when 80% - 90% of property is State owned, the more so when this property is structured and operated by a political regime which has proved its incompetence and its irresponsibility. Bearing in mind the economic catastrophe which they inherited, the ex-Communist countries do not question whether they should or should not privatise, only how to privatise - to what extent, how quickly and at what social cost. These are all factors which have implications for the legal provisions to be adopted. First of all the law reflects the choice between commercial, market-oriented privatisation, and distributive privatisation whereby a

large part of the property must be shared amongst the population, without taking account of the need to find entrepreneur-owners. Almost all the laws in Eastern Europe pay particular attention to State revenues, but practice shows that in the long run expenditure equals revenue. Almost all the laws in Eastern Europe pay particular attention to the procedures for valuing enterprises to be privatised, but experience shows that the asking price is greater than that offered by the investors. Accordingly, the rules on the procedure and criteria of evaluation have been toned down, particularly in the case of tenders, so that the majority of privatisation projects do not founder because of the price. We will try to illustrate all that has been said with examples from Bulgarian legislation.

II. Legal aspects of privatisation in the light of Bulgarian legislation

On 23 April 1992 the Bulgarian Parliament voted the Law for the transformation and privatisation of State and municipal enterprises (OJ, 1992), which will be referred to hereafter as "the Law". The reason for the delay as compared with other Eastern European countries cannot be dealt with in the present summary, more particularly as it is not a legal problem, though we should perhaps mention that the laws restoring ownership were voted two months earlier. Legislation has thus defined the two main groups of property which will become private property. From a legal standpoint the delay has enabled us to take account of the experience of the countries mentioned.

1. Market-oriented privatisation and its social aspects

It is important to underline specifically that the Law stresses market-oriented privatisation, that is to say, it gives priority to commercial techniques. It has been judged that the social emphasis should be on the effort to rebuild health and retirement funds with revenues from privatisation and from part of the revenue from holdings and shares in privatised industry. Thus we obtain a more equitable social effect, as the income is divided amongst the beneficiaries of social funds in accordance with their needs. The so-called "mass privatisation" places all citizens on the same footing, whatever their needs. Furthermore, in the presence of such privatisation, every citizen is exposed to the risk of personal choice as to where to place his voucher, and consequently to loss because of his lack of experience. It is true that mass privatisation brings short-term political dividends, but in the long term it does not create real ownership. Shareholders of this type are very far from the real situation of any given enterprise, its management and its profitability, so Bulgarian law gives special preference to those who work in the business being privatised. They have the right to purchase up to 20% of the business under preferential conditions, the rate of individual participation being limited by seniority and other conditions.

2. The scope of privatisation in terms of the units to be privatised

Privatisation affects State and municipal enterprises. The separate units of an enterprise may also be put up for sale, along with State and municipal shares in commercial companies. The legal problem has been to ascertain if the State and municipal assets not forming part of a business may be subject to privatisation under the terms of this Law. The idea which prevailed was that such property (land, buildings) should not be subject to this Law; the object of privatisation is to increase the efficiency of the economy, and it must be limited, therefore, to legal entities carrying out economic activities. Thus the State's legal entities, such as research and cultural institutions, have been excluded from privatisation. Their sale must be in accordance with the general regime for State and municipal property.

A peculiarity of Bulgarian legislation stems from the fact that commercial law (the code of company law) has provided for the possibility of transforming State enterprises into single-owner commercial companies (public limited companies or limited partnerships). This transformation is very frequent in practice, and as commercial law specifies that it must be in accordance with the procedure specified by law, the respective provisions have been included in the privatisation Law. In this way the transformation has been linked with the privatisation process. Furthermore, the respective procedures are regulated to prevent hidden privatisation as far as possible, so the powers of transforming bodies have been harmonised with the powers of the Privatisation Agency.

We have already explained why Bulgarian law also regulates the privatisation of municipal property. We will confine ourselves to stressing that this is carried out by municipal bodies and the proceeds go to the communal chest. Nevertheless there is still the great practical question of separating State property from municipal property. The law on local democracy only contains basic criteria permitting the identification of property within the municipality belonging to it. In fact this type of property is not identified on the basis of restitution but on the division of the ever-present State property into State and municipal property. Thus the ownership of almost every shop or small business on the municipality's territory is contested.

As regards the objects of privatisation, we must remember that Bulgarian law authorises the privatisation of any type of property except that which can only belong to the State under the terms of the Constitution. In its annual privatisation programme (approved by the National Assembly) the Government can specify areas and/or businesses which cannot be privatised either wholly or partially for the duration of the programme.

3. Participants in privatisation

a. All physical persons and legal entities may participate equally in privatisation (Article 5 section 1 of the Law). Bulgarian legislation, therefore, imposes no restriction on foreigners' participation in privatisation. It should be pointed out, however, that under the terms of the Constitution a foreigner may not own land. This problem is avoided by granting the foreigner the right to purchase either the building alone, together with the right to use the adjacent land, or the right to register his own company in Bulgaria (even if he has a 100% shareholding in it). In this way he becomes a Bulgarian.

b. In order to prevent State property sliding away into State or municipal enterprises by means of privatisation, it is provided that legal entities with a State or municipal holding of more than 50% may take part in privatisation only by written agreement with the privatisation agency or the municipal council (if privatisation is municipal).

4. Privatisation organs

Under the terms of Bulgarian legislation the Council of Ministers exercises rights of ownership for the State in accordance with the procedures fixed by law. As privatisation is an extremely important process for the disposal of State enterprises, the Law provides a system of bodies which deliberate on privatisation and which control the process.

a. Various approaches have been adopted in Eastern Europe, from privatisation carried out entirely by the executive power to autonomous bodies subject to Parliament. In general the executive is granted the most significant prerogatives when the regard for efficiency and speed

prevail. However, this approach varies from one country to another: a special ministry managing State assets; a special executive body responsible for privatisation or the transfer of powers to certain ministries. The second approach stresses the openness of privatisation and its separation from the executive power. Furthermore these are the main arguments in support of the constitution of an autonomous body which is usually subject to Parliament.

b. Bulgarian law combines the two approaches and has adopted the following system of privatisation bodies:

- The main body is the Privatisation Agency. This is a State body reporting to the Council of Ministers which organises and controls the privatisation of State enterprises. It implements privatisation, except in cases where this power has been delegated to the respective ministries . In order to avoid hidden privatisation and decisions which could block privatisation (the transformation of enterprises, share transfers), the Agency is vested with monitoring powers (see below, page 8). A certain autonomy is guaranteed by the Agency's supervisory council. This consists of eleven members, five being nominated by the Council of Ministers and six elected by the National Assembly for a period of four years. The Supervisory Council defines the broad lines of the Agency's activities; it approves the budget, its draft annual privatisation programmes and the annual implementation reports; it approves privatisation transactions the amount of which exceeds the ceiling fixed by the Agency's regulations, it selects and dismisses the Executive Director and determines his salary, it selects the regional offices, approves their directors and approves the Director's quarterly reports etc (see Article 13).

- State enterprises whose fixed balance-sheet assets are less than 10 million leva are privatised by the respective ministries.

- The Council of Ministers approves the privatisation decisions taken by the Agency if the value of the balance-sheet value exceeds 200 million leva. In addition it submits the annual privatisation programme to the National Assembly so that it can be voted with the State budget. This is also the case for the annual report on the implementation of the privatisation programme - it must be approved along with the report on the execution of the State budget. It is clear that Parliament controls the Government's activities with regard to privatisation by approving the annual privatisation programmes and the report on their implementation. This control is indirect, because it is approved within the framework of the State budget.

- The municipal councils take decisions on the privatisation of enterprises belonging to the municipality.

5. The speed of privatisation

The speed of privatisation is of the first importance for the former Eastern bloc countries. As we have indicated, privatisation, for these countries, is the hinge of economic reform, an important factor in the transition to a market economy and a question of survival for a number of enterprises. Accordingly the laws on privatisation in Eastern Europe reflect the concept of rapid and radical social reform. However, the practical results have chilled the euphoria about successful privatisation. It is not only a question of the immense social problems connected with the fall in employment. Investors' interest has been very modest, and the sell-off has provoked political and social unrest. However, Western experts, the IMF and the World Bank continue to

judge the success of reform by the number of industries privatised. Thus, in the former Communist countries, such emulation evokes a very recent past, when it was a question of quoting figures and not of concrete results. In no way do we underestimate the necessity for speedy privatisation, though we are not obsessed by it. The concept of a more rapid or more specific privatisation can be expressed in the following legal rules:

- the requirement to adopt an annual privatisation programme;

- more or less strict requirements with regard to the selection of experts responsible for the valuation of businesses, the procedures for ordering valuations and their adoption by the privatisation body etc.;

- the privatisation procedures from the taking of the decision to privatise to the implementation of the transaction. On the one hand the speed requirement imposes a simplification of procedures and short periods for valuation and decision-making. On the other hand social back-up for privatisation processes and the regard for State revenues requires that privatisation should not be "botched". It has been found that a system of legal rules can express a reasonable balance between these apparently contradictory aims.

6. The social aspects

a. One of the main social aspects of privatisation is the concern to ensure that privatisation does not aggravate unemployment. As the transition to a market economy is accompanied by a sharp increase in unemployment, this concern is an important economic and political priority. The legal tools are to be found in the resort to the clause requiring the number of jobs to be maintained as a condition of the transaction rather than in the legal rules.

b. Another social aspect is the participation of citizens in privatisation under preferential conditions. Most Eastern European countries have introduced systems of mass privatisation which can be summarised as follows:

- the distribution to the population of free vouchers to enable them to participate in privatisation up to a certain sum. In most countries the vouchers are not used for the free purchase of shares. There are specific financial instruments for the acquisition of shares in one or more investment funds. From a legal point of view, this system is extraordinarily interesting, but I find it impossible to analyse it in the context of this summary;

- the preferential participation of workers in the privatisation of their own undertaking. This is the approach which has been adopted by the Bulgarian Law (see above, heading I.3b and II.1). Its advantage is that the preferences enable shareholders who are capable of contributing to the management and the successful future of the enterprise to participate. In a sense, therefore, the shareholders become entrepreneurs.

Furthermore, these concrete preferences go hand in hand with a plan to transfer the money from privatisation and part of the holdings and shares in privatised industries to the social funds. Firstly 20% of the cash proceeds from the sales of non-transformed enterprises or their autonomous units, and 20% of the holdings and shares in privatised State and municipal enterprises are paid free of charge into a special fund. Proceeds paid into this fund are remitted

to social security funds and to two other special funds, one for the free participation of Bulgarian citizens in privatisation and the other to indemnify former owners whose property, confiscated or nationalised by the Communist regime, has never been restored. Secondly, 30% of the money from the sale of State and municipal enterprises or their autonomous units are paid into social security funds. Thirdly, 10% of the revenue from privatisation is paid into "Agricultural Aid and Promotion" funds. It is important to stress that 20% of the receipts from municipal privatisation are paid to the special fund and 30% into social funds, the rest being reserved for the municipality.

c. The privatisation body also has the power to offer favourable conditions to workers in the undertaking for actual transactions, but these favourable conditions are not preferences of the type mentioned earlier. Thus there is no obstacle to the sale of the enterprise on credit to the workers, or to the holding of a competition for equity instead of a call for tenders. Employee share ownership programmes may be envisaged, although their proponents in Bulgaria call for special rules.

7. Privatisation techniques

In the legal sense these are different types of transaction. They cannot be studied within the context of this summary, but it is important to stress that under Bulgarian law there is no numerus clausus of possible transaction modes. Consequently the privatisation body is not limited in its choice of the type or conditions of the transaction.

a. When it decides to sell an enterprise the body may opt for a call for tenders, and may include various transaction modes in its conditions. It may announce a competition imposing various conditions, including a condition that there shall be no change of use, the maintenance of jobs or the creation of new jobs, additional investment, postponement of transfer of the property until payment has been made in full or a period of time during which the purchaser may not resell the enterprise. For example, there is no obstacle to leasing rather than sale.

b. The sale of shares is limited to four types of transaction: open sale, a public call for tender for parcels of shares, a publicly announced competition (of the "call for tender" type) and negotiations with potential purchasers. It is clear that the first type of transaction is inapplicable for the sale of shares in a private limited company. It is equally clear that sale by competition or by negotiation with potential purchasers allows a wide range of transaction modes.

8. Privatisation and management of State enterprises

Privatisation represents, first of all, an intervention in the general regime for the disposal of the assets of State enterprises. This question will not be the subject of comment, as deviations from the general regime are determined by a special law (the privatisation law). It is important to highlight a typical problem arising from the relationship between privatisation and the management of State enterprises in the transition to a market economy. There are two contradictory tendencies as to how to manage State property. On the one hand it is obvious that State enterprises cannot be efficient if their managers have no freedom of action. On the other hand, hidden privatisation has shown that restrictions of the right to dispose of State enterprises are imminent. It is not possible for a State enterprise to be limited in the creation of mixed-ownership companies, but these companies are a popular form of privatisation which do not comply with the Law's special rules.

What is more practice has shown that leasing is a method of transferring the capital of state enterprises to private enterprises, some of which are constituted by intermediaries for the management of the business. We may assume, therefore, that we run the risk either of blocking privatisation or, conversely, of promoting hidden privatisation, depending on the legal regime for the management of State enterprises. It is interesting to note that this is done by legal mechanisms which correspond to the regime for the management of State enterprises, but these tools distort the privatisation procedure. These considerations have given rise to several special provisions in Bulgarian law:

- the transformation of State enterprises whose balance sheet asset value exceeds 10 million leva is made after consultation with the Privatisation Agency (Article 17 section 2). The aim is obvious; the agency which privatises these industries must not be presented with the fait accompli of transformation carried out by another body;

- for commercial companies in which the State or municipal shareholding is 30% or more, the privatisation body gives its consent to a decrease in this shareholding (Article 10 section 1 of the temporary and final provisions). This decrease in the State or municipal shareholding is designed to be a first stage of privatisation, as the holding is part of the assets of the State or municipal partner;

- under the terms of Article 10 section 2 of the temporary and final provisions, legal entities in which the State or municipal shareholding exceeds 50% may not sell without the agreement of the bodies specified in Article 3, nor may they lease capital assets the value of which exceeds 5% of the total value of their balance sheet assets. This rule categorically contradicts the requirement that State enterprises be independent in their transactions, particularly with regard to leasing. In practice, however, it has been found that sales of plant are in danger either of making privatisation meaningless or of leading to the privatisation of a significant part of the patrimony in defiance of the Law. Leasing may also block privatisation or create practical advantages for a lessee chosen by the management in the event of privatisation.

The brief analysis of the legal problems outlined shows that some of them are well-known, as they follow the trail blazed by other countries. However, it is essential to identify the problems specific to privatisation in former Communist countries. They arise from the legal system, but above all from the unknown transition of a centralised State economy in a deplorable situation to a market economy with a great deal of private ownership. Of necessity this process must be carried out quickly, in the absence of a series of laws relating to the operation of a market economy. This is a challenge to jurists as well as to the economic decision-makers.

c. Privatisation as a fundamental socio-economic reform - Statement by Mr Teruji SUZUKI, Tokai University, Tokyo, Japan

There is no doubt about the necessity of implementing a privatisation programme in former socialist countries, particularly those countries like Hungary, Poland, the Czech Republic, Slovakia and Bulgaria which are already members of the Council of Europe and are bound by Protocol No.1 of the European Convention on Human Rights. This Protocol extends the guarantees of the Convention to the fundamental right of private ownership and, from this perspective, privatisation may be seen as a normative obligation in those countries.

1. In the Soviet type political system, the dominant notion of ownership is one of total control over property. From this, it is but a natural progression to the central planning of all economic activities by a monopolistic State administration. For this purpose, and inspired principally by the Soviet model, existing laws on private ownership were progressively repealed throughout the 1940s by the new socialist governments of Eastern Europe through the implementation of programmes of nationalisation.

In the latter half of the 1960s, when criticism of the socialist command economic system became acute, partial reforms were introduced in some countries like Hungary and Yugoslavia. During this period, the idea of a "socialist market economic system" was introduced, whereby a partial mechanism of relative independence in the management of State economic activities was permitted as a functional improvement on the command system. In these circumstances, although public ownership of the means of production was maintained as a fundamental part of the socialist socio-political system, the notion of ownership was slightly enlarged in its conceptual parameters and liberated somewhat from the notion of absolute State control over property.

In legal terms, the traditional notion of ownership or of ownership rights, irrespective of the legal status of the owner, is defined in terms of collective rights of custody, usufruct, alienation and destruction of property. However, these were far from the reality of the socialist system, it being there understood that all such rights were unambiguously vested in the administrative organs of the State. Even economic entities of the State such as State enterprises enjoyed no rights of ownership as such, but were rather the holders of specific administrative rights and duties, notwithstanding that they might constitute a monopoly in any given sector of the national economy.

In practice, therefore, the State organ as an exclusive administrator of the particular State property had no need to distinguish those conceptual differences between ownership, management and entrepreneurship which go to the very basis of an understanding of a market-oriented economic system.

In consequence, an adequate understanding of the privatisation process demands that one looks beyond the question of transferring particular subjects of ownership from the State to private persons. It requires instead an examination of the whole process of transformation, in social and spiritual terms, which such a transfer entails.

2. It is also necessary to recognise at the outset that there are differences of legal structure, deriving from different legal traditions, among the former socialist countries.

In those so-called "people's democratic" countries like Poland, Czechoslovakia, Hungary, Bulgaria and Romania, some or part of the prior legal institutions were not explicitly abolished, but survived as a symbol of continuity with the presocialist legal tradition or as part of legal practice, whereas the Soviet practice was to abolish pre-revolution legal institutions in their entirety. In the former case, the process of privatisation has as its first concern the restoration of rights of private ownership which were unlawfully interfered with by the legal structures and procedures created during the 1940s. By contrast, in the Republics of the former Soviet Union (apart from the Baltic States) the process of privatisation necessarily entails a process of denationalisation of State-owned property because, without such measures, there exists in law no private property which may be the subject of restitution.

In systems governed by the rule of law, where private ownership rights are secured under a Constitution, the expropriation of private property by the State for specific public purposes is firmly conditioned by principles of restitution (in certain cases of illegality) and by the principle of adequate, prompt and effective payment of compensation (in other cases). In cases of restoring rights of private ownership, therefore, it follows that restitution should be the normal legal remedy.

3. In practice, however, the process of restoring rights of private ownership in Eastern Europe is not as important in an economic sense as that of transforming the almost wholly State-owned industrial sector. The task of privatising large scale State property should therefore be focused upon.

From the experience of the past two years, it is possible to identify certain difficulties in implementing programmes of privatisation which, to some extent, can be seen to have been exacerbated by conceptual confusion on the appropriate policy goals of privatisation. Although there are evidently also difficulties which derive from institutional defects, particularly in the field of financial systems, this conceptual confusion makes government policy decisions extremely difficult. Roughly speaking, the following attitudes to privatisation policy can be made out in contemporary political arguments in these countries:

- the first argues for the complete restoration of private ownership through the distribution in equal shares among the people without payment of State owned property and for allowing the subsequent sale of such shares through the market mechanism. In short, the policy is the complete restoration/creation of private ownership;

- the second views denationalisation as a first stage and then, utilising existing industrial capacities and sometimes retaining established technocrats in positions of management, looks to a new form of ownership for at least a transitional period.

The first approach is represented by populist groups, the second by realist ones, and as a result of often long and serious debate between them the outcome in practice is a political solution which agrees upon a compromise of the above two stances. In general, a variant of the first type of privatisation has been employed in most formerly independent Central and Eastern European countries as well as in the Baltic States, whereas forms of denationalisation as a first step to privatisation are prevalent in the Republics of the former Soviet Union.

In terms of the difficulties of implementing privatisation programmes in respect of large scale State enterprises, however, one cannot say that they are any greater or smaller in either region. In this connection, it is necessary to distinguish small scale privatisations from large scale ones. To date, it is true that privatisation on a small scale has been relatively successful, although the question may be reserved in terms of economic policy, taking market competitiveness into consideration, as to whether or not "small is beautiful" is an adequate watchword for restructuring the former socialist economies. As regards large scale State enterprises in Eastern Europe and the Republics of the former Soviet Union, most have been denationalised and transformed into legal entities in varying legal forms but at least having the status of separate legal personality under civil law. However, most of their share capital is reserved to State privatisation agencies or is otherwise assimilated to State property as a temporary measure. Having the exclusive function of privatisation, such newly established agencies are characterised by their transitional character. In principle, therefore, it was to be expected from the beginning that these institutions would gradually wither away as the privatisation process neared completion, yet the indications to date are that the now firmly established State property agencies, whose functions are formally limited, now intend to manage the denationalised property on a continuous basis.

4. There is another aspect of ownership, namely the material value of property, whose examination is important in practice. It is universally understood in the theory of market economics that for the purposes of property valuation, the investment value of materials, and particularly of equipment, is calculated by reference to an adequate scale of amortisation. In the socialist economic system, however, the investment value of property was maintained as initially registered in the books, with no rule of amortisation being recognised. Although it can be seen as simply a matter of accounting, privatisation based on market oriented values cannot proceed without adequate, universal rules of bookkeeping.

In addition, there are evident and serious differences in attitudes to intellectual or intangible property. According to the socialist economic rule, it is unnecessary to take account of or to recognise such intellectual property as management, marketing, know-how, software technology and so on except in so far as specific technology may be protected by conventional laws, such as patent law. In complete contrast, the evaluation of corporate worth in a free market is formulated principally by reference to complex aspects of the company's market activity extending beyond the material value of its assets to non-material elements affecting its competitiveness in the market place.

In large scale State enterprises in the countries under discussion, there is almost nothing in the way of management, marketing or software value which could be accounted for as part of their intellectual or intangible property in a market economy context, especially after the collapse of COMECON. Within the framework of COMECON, State enterprises of the former socialist countries were guaranteed an adequate portion of that part of the given market which derived from international orders, as determined by planning in the international division of labour. However, after the fall of COMECON, most of these State enterprises have totally lost such assignments and they must now manage independently for the first time and seek new market shares in both domestic and international markets. Apart from a few cases, they are faced with serious financial difficulties and in some cases are near to bankruptcy. In such an economic situation, the privatisation of large scale State enterprises in particular becomes heavily dependent on the restructuring of the whole national economy and on the creation of macroeconomic conditions which enable those enterprises to secure an adequate portion of the relevant market in the new international economic order.

5. In discussing privatisation, it is instructive to introduce a comparative consideration of the cases of China and Japan.

Today, it is widely reported that China is rushing towards a "socialist market economy" and that this move is proving to be successful, a claim which puzzles many observers familiar with the incidents of Tiananmen in 1989. For the Chinese authorities, the human rights issues are simply regarded as secondary to the wider social reforms. So, at the International Conference on Human Rights held in Vienna in 1993, officials from the Chinese delegation argued that it was wrong for the wealthy Western countries to impose their notion of human rights on poorer countries and, further, that in developing countries the imperative of economic growth required that human rights be given a lower priority. This position, however, runs contrary to present realities in China.

Just before the incidents of 1989 in China, political power was close to being transferred to the people, who had claimed a more democratic process of decision making. This demand is what lay behind the reform of the political and economic system through the gradual development of market economies. Millions of people, and especially the young, then demanded even faster change, including the introduction of political pluralism. After the political setback of Tiananmen, the real and practical transfer of power away from the Communist Party, for example the decentralisation of aspects of economic policy, has now begun again, and as a result its economy has rapidly attained high levels of growth.

However, this is in itself and without more a rather superficial observation on China. This is because the political dilemmas facing China are being revived gradually as they were in 1989, but this time they are rooted more deeply than before. It is generally true to say that economic development inspired by market mechanisms is always associated with a process of democratisation, including the full protection of human rights. From this point of view, the Chinese economy is completely exceptional because its economy is far from privatisation and a large part of the national economy remains under the strict control of State and Party.

In consequence, it is better to examine the economic success of China in the light of its own peculiar features, for example the decentralised relationship between central and local government, the relatively independent decision making power of local government, the effective utilisation of foreign investment through the introduction of special economic zones completely separated from the ordinary State administration, and the patriotic sentiment of expatriate Chinese. In short, Chinese economic reform is greatly influenced by these non-economic factors.

Japan represents a different case again, although its economy was indeed privatised a very long time ago. According to official documents, the process began in the 1870s , the first private transactions in real estate being recorded in 1873. Over a period of a century, the modernisation process of capitalisation was carried backwards and forwards through a series of historical developments which culminated in the adoption of the so-called "Japan Model". This is characterised by collusion between the government and the private business sector, lifetime employment, harmonious relations between labour and management, salary scales based on seniority, and so forth. In particular, it could be said that Japan's postwar resurgence was possible only because of this Japanese style system.

Although there are doubtless some innovative elements in this system which may be instructive and applicable in the post-privatisation economies, this requires further study because the Japanese model has been elaborated in its own economic and cultural conditions.

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d. The legal aspects of privatisation
Summary of the Discussions

In Western European countries there are various kinds of hidden privatisation like the setting up of mixed private/public enterprises or concessions giving private operators the task of setting up and managing during a certain period a public undertaking. Once the private capital has been amortised, the undertaking reverts to the public sector. This allows the realisation of infrastructure projects for which the State has not enough capital.

In Eastern Europe the tasks are more far-reaching since nearly all of industry is in the hands of the State. Another incentive for privatisation is the need to get rid of the old nomenclatura management which was often incompetent and ran down the enterprises close to bankruptcy. Privatisation allows the bringing in of new management, know-how, software and marketing experience. Privatisation is usually linked to the transfer of shares to the employees. This may in theory be regarded as an unnecessary complication, but in practice it is the rule.

Foreign investment is of paramount importance in Eastern Europe since the countries lack capital, new technology and know-how. Foreign investment also gives outsiders a stake in the national economy which may therefore lead to other States being willing to defend the country. Since privatisation is often linked to tough decisions like the closing down of factories, governments have an interest in giving this task to outsiders.

However it is not surprising that in these circumstances public opinion is getting wary of foreign investments and that many people are against any foreign involvement in the life of the country, however necessary it may be from an economic point of view.

Legal rules and administrative structures play an important role in countries wishing to attract foreign investment. Private capital will flow to those countries which offer the best legal framework and where the administration is competent and able to take rapid decisions. In this respect, there is competition between the member States of the European Union for foreign capital, or between the various Germany Länder and now between the various countries of Eastern Europe.

FOURTH WORKING SESSION

Chaired by Prof. Antonio LA PERGOLA
Chairman of the European Commission
for Democracy through Law

CONSTITUTIONAL BASIS AND GENERAL PRINCIPLES OF FISCAL LEGISLATION

a. Constitutional basis and general principles of tax legislation
Report by Professor Ch.P.A. GEPPAART

b. The reform of fiscal legislation in the Republic of Bulgaria
Report by Professor Gueorgui PETKANOV

c. Summary of the Discussion

a. Constitutional basis and general principles of tax legislation - Report by Professor Ch.P.A. GEPPAART, Tilburg, the Netherlands

1. Introduction

This report is written as a contribution to the UniDem seminar in Sofia on 14-16 October 1993. The report entails a study on the constitutional basis and general principles of tax legislation. The rapporteur was asked to focus on the general, constitutional aspects, without entering into the technicalities of tax regulations. The report should also consider the political aspects of introducing taxation in a country where it was virtually unknown, as part of a market economy.

2. The aims of taxation

2.1 A stable tax system is essential to a free and democratic society. In order to finance vital public spending, the state must have access to a regular source of income. This can be obtained through regular tax payments by the population, who can exercise influence on their government through elected representatives. A major proportion of a country's national income is thus provided by its citizens. In return, the state transfers money to the private sector in various forms, such as salaries, grants or investments.

2.2 The state can of course attract income in other ways than through taxation. For example, it can generate income from capital which belongs to the state itself, say, in the form of shares, bonds or land. There is no objection to the state having assets of its own as a means of guaranteeing creditworthiness, provided these assets do not exceed a certain level.

If, however, there is too great a concentration of capital in the public sector, this could weaken the private sector. In a free-market economy, it is important to ensure that the state is not permitted to distort competitive relations. Moreover, too much state capital could limit democratic accountability to an unacceptable degree. The remainder of this report will therefore assume that state capital as a source of income remains within certain limitations.

2.3 This obviously restricts the opportunities open to the government to borrow money to finance expenditure, since its creditors would require security to cover the repayment of the debt and the interest on the debt. However, as long as taxes continue to form a regular source of income, the government will usually be able to borrow sufficient capital on the money markets on normal commercial terms. This of course depends heavily on how far the value of national currencies can be maintained.

If a government takes on too many financial commitments through borrowing, there is a considerable danger that this will lead to an increase in taxes. Such a policy could have a negative economic effect on the private sector, and create a downward spiral which can only be reversed by the laborious process of cutting government spending. Many European countries are at present struggling to overcome their excessive public debt.

2.4 Traditionally, taxation has always been given a budgetary role, due to the importance of taxes in financing the management of government tasks. These are usually taken to mean the core tasks of government, e.g. maintaining public safety, administering justice, and organising defence and transport. The budgetary role of taxation can thus be linked to a highly limited conception of the role of the state, often referred to as the 'night watchman' approach (i.e. a role

concerned primarily to the preservation of law and order). In this conception, the role of government extends no further than preserving the status quo.

2.5 During the first half of this century, however, it was realised that the tasks of the state should be interpreted more broadly. The government was increasingly expected to respond to prevailing economic developments. These included the economic repercussions of the two World Wars and frequently high levels of unemployment. Taxation therefore began to acquire an economic role, and tax revenue began to be used partly to stimulate economic growth and employment, to keep currencies stable and to maintain a stable balance of payments.

In pursuing these policies, governments run the considerable risk of trying to achieve too much at once. Economic conditions tend to respond only gradually to tax measures. Sometimes, for example, an announcement of higher taxes produces exactly the opposite effect to what was intended. Similarly, the announcement of investment facilities can lead precisely to a temporary postponement of investments.

Too many hopes have also been pinned on anti-cyclical tax policies, in which taxes are either raised or lowered in response to economic cycles. For example, during a recession, governments usually feel unable to cut taxes to stimulate economic growth, due to the fact that government debt is too high.

2.6 Views on the social role of the state also changed greatly. It was increasingly felt that the state should extend its former role of merely preserving the status quo and adopt a more caring role towards its citizens. The concept of the welfare state aims to provide each citizen with a viable place in society. This means that those members of society with a greater ability to pay are taxed more heavily, while the weaker members of society are expected to pay less, or, if necessary, to receive benefits of some kind. Taxation is thus also used to improve social relations.

Yet even this policy is not without its dangers. For example, if the social role of taxation is overemphasised, the sources of prosperity in a country could be too severely undermined by high taxes. Moreover, social security payments are largely used for consumption purposes, and often leave the country in the form of vacations abroad.

The experience of too steeply progressive a tax rate - that is, the imposition of a higher percentage of tax when the individual has enjoyed only a marginal increase in income - is by no means wholly positive. For one thing, taxpayers tend to react by changing their legal behaviour, which creates a different social reality to that envisaged by the legislator. For example, if taxpayers transfer some of their income or capital to another country or move themselves to another country where taxes are lower, this can lead to a significant fall in tax revenue.

3. The principle of legality

3.1 How should the government levy taxes in a democratic society? Under current practice, it must seek the prior approval of parliament. This approval is granted in the form of a law which sets out the essential elements necessary for a particular tax, such as its subject (i.e. who should pay it) and object (i.e. what it should be paid on). Another essential aspect is of course the tax rate itself.

The belief that all forms of taxation must be based upon law is generally referred to as the principle of legality. This principle is the basis for almost all of our taxes in Europe. Its enormous importance will be clear from any examination of the constitutions of the European states, of which the principle of legality is often an integral and indivisible part.

3.2 The history of the principle of legality goes back many centuries, and has its roots in the Magna Carta of 1215. This document stated that the reigning sovereign in England must seek the approval of certain representatives before levying taxes. Article 12 of the Magna Carta specifies that: 'No scutage nor aid shall be imposed on our Kingdom, unless by common council of our Kingdom'. Since then, the same principle has often been appealed to in phrases like 'no taxation without representation' or 'nullum tributum sine lege'.

3.3 To prevent arbitrary taxation, the principle of legality is usually expressed by means of a negative formula. In other words, the government is expected to exercise its right to levy taxes only within the limits imposed on it by parliament. This means ensuring that these limits are not allowed to become too vague through the use of provisions which are too loosely formulated. An attempt is therefore made to prevent arbitrary taxation through carefully formulated legal provisions.

Nevertheless, practical requirements also exercise their own influence. To begin with, the safeguard contained in the principle of legality does not prevent lower levels of government from also being given the right to levy taxes. In most European countries, the right to levy taxes is granted notably to provinces and local authorities, in addition to central government. However, their powers of taxation are usually limited, since there is a risk that taxation by lower government authorities could conflict with the tax policy of central government. On the other hand, the autonomy of lower levels of government can be of great value in a welfare state.

Secondly, the negative formulation of the principle of legality does not prevent certain powers from being delegated to the government or to the tax authorities working under it. There can be no objection to this if, as mentioned earlier, the essential elements governing a tax are set down in law. Delegation means that, within the framework specified by the law, additional rulings can be issued by or on behalf of the government.

3.4 Thus far, the principle of legality contains safeguards to prevent arbitrary taxation. An essential element in the operation of these safeguards is the legal protection provided by an independent and unbiased court. Because the powers of the implementing authority may not exceed the limits prescribed by parliament, a court can rule against any exceeding of these powers. In such cases, the court can declare a contested ruling non-binding.

The court issues rulings in accordance with the law. Neither the independent court nor the citizen is bound by official rulings issued by the tax authorities. The administration of justice does not prevent the law from having to be clarified if the letter of the law allows for several interpretations.

Here again, the influence of practical considerations can be felt. For taxpayers, government rulings are important in the sense that they affect the decisions they make. Under certain circumstances, taxpayers will appeal against these rulings to a court. If these rulings are not carried out in the interest of taxpayers, they may give rise to arbitrary taxation. In a democratic constitution, this must be opposed.

3.5 It is also possible to formulate the principle of legality in a positive manner. This formula, preferably anchored in the constitution, would then state that taxes are levied on the basis of the law. This puts a greater emphasis on one of the core elements in a democratic society, namely the belief that both the government and the population are obliged to comply with a country's laws.

For the government, this means that tax legislation must be implemented even when citizens may not be able to reconcile themselves with the requirements of the law. Because the government has a monopoly on force in a democratic society, it is obliged to recover taxes using coercive means if necessary.

For citizens, the positive formulation of the principle of legality means that they cannot escape their legal obligation to pay tax simply by appealing against it on the grounds of their personal beliefs about society. This leads to an ethical problem. After all, according to prevailing ethical views, citizens are obliged to obey the laws of the democratic society in which they live. However, this does not preclude the fact that it is ethically permissible to set certain limitations, for example, if by obeying a law, an individual were to be placed in a serious moral dilemma.

3.6 A positive formulation also helps to prevent tax evasion, which occurs when taxpayers deliberately supply incomplete or false information to the tax authorities, such that the individual making the declaration is not telling the truth. In a democratic constitution, it is illegal to lie to the government.

Large-scale action to combat tax evasion is needed throughout Europe, although there is relatively little consensus about the reasons underlying the practice. Nevertheless, it is clear that inadequate monitoring can often encourage human greed to triumph over an individual's sense of public responsibility. Obviously, tax evasion can also be a signal that the tax burden is too high.

A positive formulation of the principle of legality does not prevent a taxpayer from seeking to minimise his tax liability. It is perfectly possible to avoid paying tax. After all, those who do not drink beer do not have to pay duty on beer. It is also possible to avoid paying tax using legally accepted methods. For example, by writing off as much as he can on fixed assets in a given year, a businessman can succeed in paying less tax.

However, if it is clear that a taxpayer is simply using legal procedures with the obvious intention of avoiding tax, the law may still under certain circumstances require tax to be paid. This practice on the part of the taxpayer is known as tax avoidance. Efforts to combat tax avoidance can be linked to a positive formulation of the principle of legality.

4. General principles of taxation

4.1 Any government wanting to realise the budgetary, economic and social aims of taxation based on legislation will find a solid basis in the general principles of taxation. A legal system is made up of various elements which on the one hand are interlinked and strongly influence one another, but which are also to some extent based on independent principles. The principles governing certain aspects of a legal system can usually be regarded as a particularisation of general legal principles, such as equity, equality before the law and legal security. This also applies to tax law.

There are wide differences of opinion within tax science concerning the general principles of taxation. Of particular importance for prevailing theories in Europe was the publication of Fritz Neumark's book 'Grundsaetze gerechter und oekonomisch rationaler Steuerpolitik' (Tuebingen, 1970). However, opinion is even divided on this authoritative work, particularly as regards the practical application of the principles in question.

4.2 In tax law, general legal principles are particularised to produce principles which are geared towards the practical formulation of this part of the legal system. For example, most tax systems focus on the principle of taxable capacity, which specifies that the level of taxation is matched to the ability of an individual to pay, so that the tax burden on higher incomes is proportionally greater. This involves a particularisation of the principles of equity and of equality.

In the case of taxes - an obligatory contribution required to finance social costs - the taxpayer cannot in principle claim a reciprocal service in return for payment. In other words, a citizen who pays more tax cannot claim greater rights over the government. As soon as a taxpayer begins to profit from certain government services, this leads into the realm of the 'profit principle', which states that he should bear a larger share of the cost of these services.

These principles can encourage the legislator either to raise or lower the tax burden. The principle of taxable capacity can, for example, lead to a progressive rise in the rate of income tax. However, it can also lead to a reduction of income tax in the form of child allowance or deductions to cover sickness costs.

4.3 The principle of honouring expectations raised is another vital element in tax law. The principle of legality can be regarded as an extension of this. A reliable system of legal protection by an independent court is also clearly based on the principle of honouring expectations raised; in this case it involves a judgment in accordance with the law. The taxpayer is only obliged to pay tax insofar as parliament has given permission for taxes to be levied, as explained above. The court must be independent of the implementing authority to ensure that the taxpayer is not bound by the government's own views or those of the tax authorities working for the government.

This principle, which is based on traditional theories of the division of power between the legislator, the implementing authority and the judiciary, does not exclude certain forms of legal protection within the domain of the implementing authority. For example, in most European countries, taxpayers can submit a notice of objection to the tax authorities before resorting to an appeal to a court. This allows the tax authorities to review their decision, so that a court is only involved when absolutely necessary.

4.4 Because taxes are levied on the private sector, there is, not surprisingly, a close link between tax law and private law. Consequently, tax legislation - certainly in its initial phase - is heavily based on the legal concepts used in private law. Examples include some of the concepts found in property law, such as ownership and usufruct, or in contract law, such as sale or rental. The concepts used in family law are especially important. In addition to natural persons, the law also recognises legal entities. Legal entities play a major role in tax legislation.

As a tax system continues to develop, the number of purely tax law concepts tends to increase, due to the need to match taxation to economic conditions. This gives rise to concepts such as investment facilities, consumption and goodwill. An important element to consider here is that

the taxpayer sometimes allows his choice of legal status to be governed purely by tax considerations. If the tax authorities are unable to prevent this type of unacceptable tax avoidance, the law can intervene. Such unacceptable behaviour might include declaring a notional return on assets which do not generate taxable income.

4.5 A more practical guideline in the development of a tax system involves dividing the tax burden between several forms of tax. Most tax systems are divided according to taxes on income and wealth, and taxes on consumption. In very broad terms, an attempt is made to equalise income from each of these groups. If the burden of one form of taxation becomes too great - e.g. that of a tax on income or a tax on consumption - there is a danger either of large-scale tax evasion or, failing this, of serious economic repercussions.

Systems for taxing income are usually divided into taxes on income, wages, profits, interest and dividends. Wealth is subjected to wealth tax, capital transfer tax, death duties and duties relating to legal transactions. Consumption is taxed by means of value added taxes, excise duties and road tax. Local authorities generally always levy property taxes. Environmental taxes are now also beginning to become more common.

4.6 There is no legal system in which the general principles of law can be fully realised. Law is always a synthesis of equity and expediency. In tax law, allowance is therefore also made for the provision of expediency.

If an attempt were made to strive toward optimum equity in taxation, the job of the tax authorities would become too difficult. One effect of this might be to reduce the manpower needed to combat tax fraud. If, on the other hand, efforts were made to strive toward maximum expediency, this could lead to serious infringements of general legal principles.

A compromise between equity and expediency can be found in a system of acceptable legal deficits. Such a system could be said to exist if the removal of a legal deficit is likely to lead to an infringement of expediency which would compromise equity even further. This is a delicate balancing act which both the legislator and the tax authorities must strive to achieve.

5. Legal powers

5.1 If taxation is to have a legal basis, the tax authorities must be given extensive legal powers. These powers involve the ability to impose legally enforceable obligations on natural persons and legal entities. In a free society, the government may not enjoy greater powers than are reasonably necessary for bringing about the aims formulated by the legislator. This means that the powers granted to the tax authorities should not infringe an individual's privacy, which in most countries is protected by the constitution.

However, this does not preclude giving tax authorities operating in a complex modern society the powers to specify the actual basis on which tax legislation is to be applied. An important aspect of this is that in almost every tax system, taxpayers are obliged to provide information, accounts and other documents to the tax authorities for inspection.

5.2 Only in exceptional cases can certain taxpayers - such as doctors, lawyers and notaries - refuse to meet these obligations on the grounds of professional confidentiality. This can be necessary in order to protect the trust which individuals place in certain professionals to whom they can turn for advice in confidence. The legal position of the taxpayer can also be

strengthened against the extensive powers of the tax authorities insofar as they can only be exercised (if necessary by a court) within the limits of reasonableness. 'Reasonableness' can include specifications as to the time and place for complying with obligations under tax law.

5.3 In almost every highly developed tax system, the tax authorities are entitled to provide tax returns. These forms must be filled in comprehensively and truthfully by the taxpayer. A number of tax laws, such as those governing wage tax and sales tax, require that the tax owed is paid with immediate effect. Other laws, such as those governing income tax and corporation tax, allow the tax office to issue a (provisional or definitive) tax demand to the taxpayer. If afterwards new information comes to light, a revised tax demand is issued.

A modern tax system contains a large number of rulings issued by the tax authorities. Such rulings help to further determine the legal position of the taxpayer. For example, the extent to which losses can be offset in the future can be fixed by means of a ruling. The nature of rulings can also be useful when tax facilities are offered. For instance, many tax systems allow a company owned by a natural person to be transferred to a legal entity by the issuing of shares, without any tax being liable. In such cases, a ruling as to which conditions can be attached would be regarded as an acceptable legal option.

5.4 No tax system could work if the government, which is required to levy taxes in accordance with the principle of legality, did not have recourse to means of enforcement. In most tax systems, a special regulation entitles the government to collect unpaid taxes. Although this process could in theory be carried out in much the same way as claims are recovered in the private sector, such a method would not be very effective, especially since it would require extensive judicial intervention. Consequently, in most tax systems, the official responsible for recovering the taxes is given special powers, such as the power to seize assets without prior judicial intervention. Even more important is the notion of the distress warrant with the right of summary execution. This gives the tax authorities the automatic right to sell off any goods belonging to the individual or organisation found to be in arrears.

An objection which is often levied against the extensive powers of the tax authorities to collect unpaid taxes is that this puts other creditors at a disadvantage. Nevertheless, in most tax systems, claims by the tax authorities are given priority by the legislator.

5.5 Nor can a tax system work properly without recourse to penalties. These include purely criminal law penalties issued in response to infringements of legal tax norms. The objection to this approach is that it could lead to an overburdening of the judicial system. In practice, therefore, this form of penalty is usually limited only to serious tax offences.

The tax authorities in most countries tend to give preference to penalties in the form of fines imposed under administrative law. These can include notably supplementary tax demands if a taxpayer has deliberately made a false declaration. Such penalties are a practical option under administrative law. However, the European Court of Human Rights has now ruled that the actual nature of the penalty to be applied must be considered. As a result, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms are now also generally applied to penalties imposed under administrative law. In accordance with Article 6 of the Convention, the main concern must be to ensure that the imposition of penalties is monitored by an independent and unbiased judicial authority which has been established by law.

In cases where taxpayers fail to comply with specific obligations, such as supplying information to the tax authorities, the penalty imposed usually takes the form of increasing the burden of proof. In most tax systems, individuals running a business are obliged to keep accounts. If these are found to be unreliable, they are generally not accepted. The businessman can then only refute the findings of the tax authorities if he can produce substantial evidence to the contrary.

5.6 This report has already discussed the importance of a reliable system of legal protection for taxpayers. An essential aspect of this continues to be the ability to appeal to an independent court. Some degree of legal protection is also afforded by the ability to submit a notice of objection to the implementing authority.

Normally, appeals against decisions by the tax authorities are heard by a court with special responsibility for dealing with tax matters. However, these courts are not always experts in tax law. It is often incorrectly thought that anyone with sufficient knowledge of private law is automatically able to pass judgment on tax law. The tradition of jurisprudence is intractable in this respect.

It is important for the legal position of the taxpayer that he is able to be advised or represented by a tax consultant. The law is often silent about how a taxpayer should be defended in a tax suit. It is often claimed that such lawsuits are simple, inexpensive and informal procedures, whereas the reality is often different. In many countries, the profession of tax consultant is not legally regulated. But although this means that in theory, anyone can operate as a tax consultant, the public usually learns to tell the good from the bad. Countless professional associations of tax consultants have sprung up, many of which are affiliated to the Confederation Fiscale Europeenne, which was founded in Paris in 1959.

6. Limitations on taxation

6.1 The above account shows that taxation is bound by certain limitations. After the budgetary, economic and social aims of taxation have been laid down, the structure of the taxes themselves (subject, object and rate) must be fixed by statutory regulation. The general principles of taxation play a vital role here. Even when it comes to granting powers to the tax authorities, taxation is bound by limitations, mainly with regard to individual privacy. So in practice, the drafting or amending of a tax law can be a complicated business.

In this context, the key question should remain whether the projected aims of taxation are actually being realised. The more a tax law goes beyond its aims, the more it will lose its credibility. After all, although taxation can help to improve social relations, it can also conflict with the prevailing sense of justice in the population to such a degree that it becomes almost impossible to implement. In a welfare state, this must be avoided at all costs.

6.2 A major limitation on taxation is formed by general international agreements to which various countries are signatories. This report has already described the effect of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in many respects exercises restraint on the operation of penalties imposed under administrative law.

Of these various treaties, the Treaty of Rome has had a particularly important influence. Originally, it mainly affected taxes on consumption, such as value added taxes and excise duties. Over the last few years, however, the structure of various other taxes, such as corporation tax, has been increasingly influenced by EC directives. Rulings by the European Court of Justice,

which has the power to make preliminary rulings concerning the meaning of provisions in EC treaty law, are also highly important. These rulings are gradually and increasingly being taken into account when interpreting decisions on tax terms at national level.

Another treaty of major significance in this context is the International Treaty on Civil and Political Rights, known as the New York Treaty. Article 26 of this treaty provides a firm basis for the principle of equality. Since treaties take precedence over laws in most European states, this article could lead a court to declare that a ruling contained in a national tax law is not binding. This could help to remove numerous forms of discrimination.

6.3 Naturally, every state's authority is restricted to its own territory. In terms of taxation, this means that although a state may levy taxes on any legal entity or natural person registered within its territory, it is unable to do so without restriction beyond its borders. A state is usually also authorised to claim tax from individuals who have the nationality of that state but who are located outside its territory. It is also regarded as lawful for a state to claim taxes from taxpayers registered abroad but who have sources of income within that state. However, in cases where residents of a particular state have sources of income abroad, the state in which the profit or taxable income is generated often takes limited precedence over the state of residence. However, in practice, there is never a full 'mirror image' situation.

6.4 Due to the different ways in which countries determine their own national tax sovereignty, it is not surprising that there are repeated cases of double taxation. International tax law is constantly faced with the question of how states can limit their tax sovereignty towards each other. However, a wide diversity of regulations governs various elements of income or capital. Sometimes the other state becomes fully entitled to the taxation of some of these elements, but in most cases the problem of double taxation is only partly reduced.

More recently, an extensive network of treaties to prevent double taxation has been drawn up across Europe. The model treaty developed by the OECD (Organisation for Economic Co-operation and Development) has been particularly influential here, and has been used extensively as a basis for drafting other treaties. The work of the International Fiscal Association, an organisation which holds an annual conference based on a general report and a large number of national reports, should also be mentioned.

6.5 Yet even when the powers of a state are not limited in one of the ways mentioned above, it is still possible that the arrears claimed under tax law need not be payable in some cases. In a number of countries, the tax authorities are restricted in their activities by the general principles of sound or proper administration. These state notably that they may not act contrary to the principles of equality and honouring expectations raised.

This means that in certain circumstances, the application of positively formulated tax laws must be made to give way. This applies especially to situations in which the tax authorities have developed a specific policy, e.g. through assessments or resolutions, under which principally all taxpayers can demand to be treated in the same way in accordance with the principle of equality. Similarly, the principle of honouring expectations raised can under certain circumstances specify that the tax authorities should be bound by concessions or compromises.

In other countries, the disabling of positively formulated tax legislation is in practice regarded as inadmissible. In such countries, if the tax authorities behave improperly, an appeal can be made

against an unlawful government action, and the state can be made to pay compensation for damages.

6.6 Obviously, almost no tax law is ever fully realised, since taxpayers always exhibit varying degrees of legally sanctioned behaviour (we have, for example, already covered tax avoidance and tax evasion).

No less important, however, is the fact that taxes often cannot be collected because the taxpayer is not in a position to pay. Sometimes, this may be completely impossible. Non-payment of tax can also result from a decision by the tax authorities to waive a tax claim if collection of the tax would be regarded as unacceptably severe.

In other cases, the revenue yielded by one tax can be limited by another. For example, high death duties payable following the death of an individual can result in lower income tax revenue from the individual's heirs. Similarly, a system in which corporation tax and income tax are not coordinated - the so-called classic system - can lead to lower dividends, and thus to a possible loss of income tax. This again illustrates the limitations which surround taxation.

7. Conclusions

A stable tax system is vital to a free and democratic society. A country's constitution must therefore give a solid basis to the principle of legality. The general principles of taxation, which have been developed using experience gained in other countries, can provide the legislator with the necessary framework for realising budgetary, economic and social aims. Obviously, the tax authorities must be given the proper powers to carry out their work. Finally, it should be remembered that taxation is always bound by various limitations.

Through our taxation system, we can create a high ideal which can contribute to a stable society. The task of working towards this ideal is well worth the effort we put into it. At the same time, no tax system is ever perfect, but this does not make tax law any less fascinating.

b.The reform of fiscal legislation in the Republic of Bulgaria - Report by Professor Gueorgui PETKANOV, Dean of the Law Faculty of Sofia University St. Kliment Ohridsky

Introduction

The transition to a market economy requires the introduction of a new tax system and the establishment of a different type of fiscal relationship. The present tax laws are an amalgam of obsolete postulates dating back to the planned economy and of occasional adjustments to meet the imperatives of the market. They were inadequate even during the transition period and they are inconceivable for a market economy organised around fundamentally different relationships between the State and its citizens. Fiscal relations in their present form prevent the introduction of the market economy, make public treasury receipts unpredictable and are prejudicial to taxpayer's rights and interests. This calls for the introduction of a tax system which is different both in structure and organisation and is closely adapted to the market's requirements and principles.

Fiscal reform is a slow, difficult and painful process in the context of the reworking of the whole body of legislation. It is painful even in flourishing economies and it gives rise to even more complicated problems in countries changing over to a market economy. It is nevertheless indispensable. Particular attention must be paid to the legal methods directing the process when it is implemented. The economic priorities of reform must not obscure the importance of fiscal legislation. Fiscal relations are part of relations with the public and cannot exist objectively or independently of the law, nor can they appear until the law introduces them. Fiscal legislation has peculiarities and mechanisms which must be thoroughly understood. In general terms, they relate to the organisation of taxation, the actual assessment of taxes and to the collection system. The causes, methods and direction of reforms to the system must be clarified before it is overhauled. Care also has to be taken to distinguish between tax law and tax legislation. Reform must never be based on political considerations or on individual or group interests but must obey the interests of the nation and of society.

1. Arguments in favour of tax reform

An analysis of current fiscal regulations and practices enables us to discover numerous arguments in favour of tax reform.

Bulgarian tax laws came into effect in the nineteen fifties; they are among the oldest, and they follow the logic of economic relations as they existed at the time. They are unsuited to the market economy and the many subsequent amendments have altered the form rather than the substance.

Previous legislation completely ignored whole areas of the fiscal system, in particular the status and powers of the fiscal administration and the collection process. These deficiencies have been remedied by the adoption of two new statutes, the law on fiscal administration and the law on fiscal procedure. The other rules, however, remain incomplete and equivocal when they are not contradictory or even absurd. This disorganises the system, creating inequality between taxpayers and providing many opportunities for tax evasion.

The new tax regime must be based on the Constitution; it must fix stable rules and it must prevent the delegation of powers in fiscal matters as far as possible. It is no less important to build a hierarchical structure of fiscal laws and to avoid provisions which transform the payment

of taxes into an exercise in concealing income rather than a system for regulating it. A flagrant example of this is provided by the system of taxing citizens in the form of a trading licence.

It is hardly necessary to take the analysis further to appreciate that fiscal legislation is in great need of reform based on the principles of legal, neutral, uniform and universal tax imposition which give an adequate guarantee of the rights and interests of those subject to it. The reform must take account of international experience without underestimating local conditions, tradition, cultural level, the degree of preparedness of the population and the fiscal administration. It is good practice to adopt the best examples from foreign legislation, but this must not be carried to extremes or applied without discernment, as no tax system can be deemed to be perfect. Copying foreign experience purely and simply can sometimes even be dangerous. All legislation is designed to meet specific socio-economic and political conditions. A system which works in one country is not necessarily appropriate to others.

2. Nature and peculiarities of fiscal laws

First and foremost, fiscal rules are set out in laws. For a long time there has been a tendency to underestimate this principle in Bulgaria, as we underestimated taxation in general. The predominance of State ownership and the economic planning system enabled the administration to levy whatever resources it deemed necessary, in whatever form it thought appropriate. In theory, taxes were to disappear progressively, so levies took the form of "compulsory financial payments". It is no longer necessary to demonstrate the utopian nature of this system, but the introduction of fiscal legislation must take account of the defects of the practice, of the break with tradition over several decades and the inexistence of fiscal thinking and morality in the population. It is necessary to implement laws which specify precisely the relations between the State and the subject, clearly defining the procedures for determining the tax base, assessing amounts due and collecting taxes.

Fiscal relations are legal relations which give rise to social rights and obligations and which are expressed in the State's right to levy and the citizen's obligation to pay. They emanate from the right of the public power to impose constraints on the taxpayer, which is vested in the State. However, these fiscal laws must not be regarded solely as instruments in the service of the State. Relations between the State and the taxpayer affect the material and other interests of large sections of society. The fiscal burden must therefore be evaluated carefully as it relates to economic development. It is often less economically advantageous to increase the rate of taxation than to improve the tax collection mechanisms provided by the law. Nor should we forget that taxes are fiscal instruments and not a method of settling social problems. There is a great difference between fiscal laws and social laws. Social objectives can be achieved by budget grants, social security payments, compensations etc., and not by tax concessions. In this area, the policy of modern states is implemented by budget expenditure rather than by taxation.

Fiscal laws are effective in the State's sovereign territory, unlike civil laws, which may extend over a much wider area. However, fiscal laws apply equally to foreigners who draw an income from the country. This specific feature should be taken into consideration, in particular when it relates to the avoidance of double taxation and to attracting foreign investment.

3. Fiscal law and fiscal legislation

Distinguishing between tax law and tax legislation is not just a theoretical exercise. It is also a source of practical instruction.

Tax law is part of financial law and is an element of the legal system. It consists of a set of legal rules which regulate social relations in the fiscal sphere. Fiscal law consists mainly of legal rules. From another point of view, fiscal legislation is the whole range of tax codes, rules and regulations. It consists of statutes and their sections, and there is a difference, therefore, in the two terms, in spite of their apparent similarity. We see the proof of this in complex statutes which comprise rules deriving from several areas of law.

However, the difference between the legal and legislative aspects is only evident within the context of the whole. It is only there that the two concepts do not coincide. Fiscal statutes comprise the rules of fiscal law; the rules of fiscal law have no existence outside fiscal statutes. Thus the distinction is not absolute; we may allow that fiscal legislation is a form of fiscal law, the form in which fiscal rules of law exist, the means by which they are organised and given shape. The conclusion is that fiscal law has no existence outside fiscal legislation and that at the same time fiscal legislation is the fiscal law. The use of the two concepts as equivalents creates no difficulties and they may be regarded as synonymous.

However, we must not lose sight of the distinction cited above. It is absolutely necessary for the theoretical examination of the problems connected with reforming fiscal legislation. We must make the greatest possible effort to bring legislation into line with the law. This means that complex statutes and in particular statutes in other judicial areas must not include fiscal provisions. If it is necessary to rework the tax system, it is the fiscal law which must be amended. From another point of view fiscal statutes must only include rules connected with fiscal relations. Our main efforts should be directed towards gathering together all fiscal provisions in fiscal statutes. In this way, fiscal law will have its own profile. This solution meets the requirements of Article 3 paragraph 1 of the law on legislative acts, under which "all the main social relationships which are subject to permanent regulation must be governed entirely by the law on the subject matter to which they relate.

In the present circumstances, the reform of fiscal legislation is possible objectively if we formulate new rules and if we rework the contents of existing fiscal law, without amending its form, at the same time preserving the various existing fiscal statutes. However, we must envisage a second stage, even at the outset, in which the form itself must be amended by the reorganisation of texts and the adoption of a fiscal code.

In the first stage fiscal legislation may cover the various statutes already undergoing reform. However, from now on it will be possible to bring fiscal legislation closer to the legal system and to establish the greatest possible degree of agreement between legislation and law. It is important to create an organised system of fiscal statutes which corresponds to modern requirements. It is with this objective in mind that drafts representing a "package of fiscal statutes" have been laid before the National Assembly for examination. The merit of this approach rests in its systematic aspect, which is preferable to dealing with subjects case by case, but it should be noted immediately that this is not sufficient. The package in question can only lay down the broad outlines for fiscal reform. If we wish to go further, we must continue with our legislative efforts. Fiscal laws must also be closely connected with the laws on the budget, financial audit, local and national taxes, social security, etc. Generally speaking, fiscal reform must be linked with all the reforms of the nation's financial system.

4. The levying of taxation fixed by law

Fiscal legislation is based on the Constitution. The question of the "constitutional basis" on which legislative texts must rest is vital. It includes a strict respect for the rules and principles set out in the Constitution which relate directly or indirectly to one legal matter or another.

The first principle to be respected in fiscal legislation is the rank of legislative texts on taxation. The Constitution reserves the National Assembly the right to regulate fiscal relations. Questions relating to fiscal matters must therefore be dealt with by statute. It may be said without exaggeration that the principle of regulation by law is applied in the strictest fashion in taxation matters, in the same way, for example, as in criminal cases. Absolutely no departure from this principle can be tolerated, as it is fundamental, and guarantees the respect of all the other principles on which fiscal law is based.

Under Article 60 paragraph 1 of the Constitution " citizens shall pay taxes and duties established by a law proportionately to their income and property", whilst Article 84 paragraph 3 of the Constitution specifies that the National Assembly shall fix the nature and amount of taxes. It is clear, therefore, that fiscal relations can only be based on statutes. Fiscal statutes are at the summit of the fiscal regulations hierarchy. The existence of other rules depends upon the existence of a law which fixes the nature and amount of the tax.

The fact that the subject of taxation is dealt with by statutes bears witness to the importance of fiscal relations. The National Assembly cannot delegate its exclusive powers in this area to other bodies. It should also be noted that it has this power not only to fix the nature and amount, but also any concession or surtax (Article 60 paragraph 2 of the Constitution). This clause guarantees that the executive cannot grant relief or impose increases in taxation.

The principle of the fixing of taxes by law has always existed. Texts of the same type are to be found in the country's previous constitutions, but unfortunately they were not respected. Fiscal rules were laid down not only by the Council of Ministers but also by the Minister of Finance. There are numerous examples of this practice, some of them recent. For this reason it is essential to restore a hierarchical structure of fiscal regulations by suppressing the powers delegated to the Council of Ministers or appropriated by it. One of the positive elements of the present Constitution is the abandonment of the provisions of Article 78 section 8 paragraph 2 of the Constitutional Law of 1971, which allowed the National Assembly to delegate the fixing of tax sums payable by State enterprises to the Council of Ministers. This departure from the principle of fixing taxes by law, which was even permissible under the Constitution, was unacceptable. The methods of delegating powers, although expressly specified, were often violated. Very often it was the Council of State and not the National Assembly which delegated the fixing of taxes to the Council of Ministers. In other cases, the Council of Ministers took the decision even without being empowered to do so.

The anti-constitutional procedure set out above must be banished resolutely. The promulgation of fiscal acts, legislative in form but administrative by nature, was typical of recent decades. This practice was probably based on the idea of the unity of the power of the State. Article 8 of the present Constitution provides for the separation of powers and develops the principle of taxation fixed by law. It only remains to ensure that this principle is applied universally when fiscal legislation is reformed.

5. Fiscal regulations

Regulations are subordinate to statutory provisions. Their nature and hierarchical structure are fixed by the Constitution and by the Law on Legislative Acts. Even before examining their role in the fiscal legislation system, we should raise the question of principle: are regulations necessary in the tax sphere? Should we promulgate detailed laws which do not require recourse to regulations or should we, on the contrary, promulgate brief laws whose application is governed by regulations. Without going into detail, and taking account of existing practice and of the short time at our disposal for putting reforms into practice and introducing new laws, it seems that the second solution is preferable.

Article 114 of the Constitution provides that "pursuant to and in implementation of the laws, the Council of Ministers shall adopt decrees, ordinances and resolutions. The Council of Ministers shall promulgate rules and regulations by decree". Article 115 provides that "a Minister shall issue rules, regulations, instructions and orders". Similarly, Article 3 of the Law on Legislative Acts provides that all the main social relationships which are suitable to permanent regulation shall be governed entirely by statute, whilst other relationships in the same area may be regulated by regulations as provided for by the law.

The Law on Legislative Acts provides that regulating provisions shall be set out in decrees, regulations and instructions. What is the nature of these acts in the sphere of fiscal regulations and what is their field of application?

The second hierarchical level of fiscal regulations is made up of Council of Ministers acts. In fact it consists of regulating provisions, as the Council of Ministers does not have primary legislative powers, particularly with regard to taxation. Though Article 114 of the Constitution gives the Council of Ministers regulating powers, they are only exercised "pursuant to and in implementation of the laws", which means that it is limited to relations which are not controlled by statute.

What has happened in practice up to now?

In recent decades the Council of Ministers was frequently delegated powers to create primary regulations, including in the fiscal sphere. It is unnecessary to give further details, as we know that during this period the Council of Ministers fixed the nature and amount of almost all taxes (taxes on production plants, profits etc.), even if the fiscal nature of the tax was concealed behind terms such as "compulsory transfers", "normative transfers" and "financial transfers". Delegation must not affect the fiscal sphere reserved for the constitution, as this would amount to amending the constitution by means of the law.

At the third hierarchical level of fiscal regulation we find acts emanating from ministries and in fact from the Ministry of Finance. They are subject to the same principles as the acts of the Council of Ministers. Although Article 115 of the Constitution does not expressly provide that ministerial acts must be effected pursuant to and in implementation of the laws, this principle is incontrovertible and there is no need to prove it.

What are the main problems with regard to regulating provisions to which a solution must be found when we reform fiscal legislation?

Firstly, we must put an end to the practice of resorting to regulating provisions to implement or abolish taxes, to fix the rates and amounts of taxation, to award abatements or impose increases and to widen the category of persons liable. When fiscal law has defects or irregularities in these

areas, they must be eliminated by legislation and amending the law, and not by the publication of regulating provisions.

Secondly, regulating provisions by the Council of Ministers or the Minister of Finance may only be enacted under powers expressly granted by the law, which specifies the body receiving the powers, the type of act and the extent of the powers, which may cover all or part of the sphere dealt with by the law. The regulating provision enacted under these powers must deal comprehensively with the matter to which it relates. It may not delegate the issuing of acts applying these provisions to other bodies. The regulating provisions in application of fiscal laws must be promulgated when the law itself comes into force, though up to now, in practice, this principle has not been observed. Furthermore, temporary provisions of the legislative act must refer to the statutory provision which is the basis of their enactment. In the absence of specific powers any reference to any other statutory provision is valueless.

Thirdly, we must pay particular attention to instructions, the more so because they have lately been given a very wide application. Under Article 7 section 3 of the Law on Legislative Acts the instruction is a regulating act with a limited field of application. Instructions enable a superior to instruct his subordinates as to how to carry out an act of which he is the author or which he is appointed to perform. This means that the instruction can only be applied to relations between superiors and subordinates. The Minister of Finance may issue instructions to be applied by the General Directorate of Taxes, its departments and offices. These instructions will have no effect outside relations between these bodies. The particular nature of these acts reduces their field of application in the fiscal sphere; unfortunately, practice gives us opposing examples. In fact, the instruction is the most frequently used normative act for fiscal regulation. Instructions are used to settle questions relating to the tax base, methods and payment dates. This practice must be abolished when fiscal legislation is reformed.

Fourthly, many acts take the form of "letters", "circulars", "indications" and "orders" from the Minister of Finance and the Director of Taxation, which claim to be part of the sphere of regulations. Letters are the most widespread and are regarded as "particularly reliable legislative acts". Between 1991 and 1993 the General Tax Directorate published more than thirty letters of this type.

These acts are issued at different times and under different pretexts, usually to clarify some provision of the law. However, they do not have the weight of a regulating provision and can only include suggestions about the technical operation and organisation of the service, the non-observation of which may involve disciplinary sanctions. It is a mistake, therefore, to place them on a par with regulating conditions, as is often the case.

6. Additional requirements for fiscal legislation

It is not possible to make a detailed examination of all the requirements which fiscal legislation must meet in this summary, and for this reason we have confined ourselves to citing the most important.

Fiscal laws affect the rights and interests of a great many people, and for this reason they must be specific, clear and easy to apply. Fiscal standards set out in the law must be fully comprehensible not only to employees of the tax department by also to the taxpayer. Precision is especially vital in defining the content of fiscal relations - the tax base, the taxpayer and the amount of the tax. Imprecision, ambiguity and doubtful formulations must be avoided.

The fiscal system can only be coherent if it is based on and operates under stable legislation. When they come into force, fiscal laws must be applied over a long period of time, in order to create stable conditions for the operation of the system and to give the taxpayer a feeling of security, at the same time providing a reliable source of revenue to the Treasury. The text of the law must be explicit with regard to its entry into force, the rescinding of previous statutes and the means of settling matters pending. Fiscal provisions may not be retroactive, and this includes sections relating to abatements or increases in taxation. This principle has not been respected up to now.

Fairness of taxation is an important principle. It must be apparent in the legal text, the more so as it corresponds to the constitutional requirement which specifies that citizens shall be taxed in accordance with their income and property. In practice, fairness may be ensured by applying proportional and progressive systems and by a differentiated regime based on a non-taxable minimum etc. The principle of equity specified in the Constitution must be developed in fiscal legislation.

Finally, fiscal laws must be designed to guarantee easy collection. It is one thing to impose a tax and another to collect it. High taxation will bring no benefits if effective collection is not assured, just as civil proceedings will be useless if the judgment is not executed. With regard to proceedings, fiscal law must allow fast, easy and cheap collection both from the standpoint of the tax authorities and the taxpayer.

c. The constitutional basis and general principles of fiscal legislation

Summary of the Discussions

Taxation is of essential importance in a market economy. Since the basic characteristic of a market economy is that economic activity is mainly in the hands of private individuals, the State has no or little profit from economic activity and needs taxes.

Taxes have to be based on a law. In this context the distinction between taxes and levies becomes important. If the State asks an exorbitant fee for a minimal service this is a tax in disguise and the principle of legality should apply. Article 60 of the Bulgarian Constitution provides that taxes and duties have to be "established by a law" and Article 84.3 provides that the National Assembly establishes the taxes and their size. In practice, as far as duties are concerned, the law only establishes the existence of a duty but not its size. Another problem arising under the Bulgarian Constitution is whether the Council of Ministers which under Article 114 can, pursuant and in implementation of the laws, adopt decrees, should use such decrees to close gaps in the law.

Equity and equality are other fundamental concepts for tax law. Article 60 of the Bulgarian Constitution provides that citizens shall pay taxes and duties proportionately to their income and property. This can be criticised since for certain taxes like VAT income and property are not relevant. Fiscal legislation can contribute to social justice, for example it seems reasonable not to tax income of the very poor. Otherwise they will have to receive back in grants what has first been taken from them.

Tax collection is a very important problem in Eastern Europe. For example in Bulgaria only about 40% of taxes due are really collected. A reliable legal mechanism of collection is still lacking and there is a lack of qualified people. In principle the easiest tax to administer is the tax on wages since it can be withheld at source. VAT is also fairly easy to collect. In general consumption taxes, except taxes on necessities, can be regarded as good taxes and there is less resistance against consumption taxes than against income tax. For income tax it also depends on the percentage. If it goes beyond 50%, people increasingly try to avoid it and it dissuades them from work.

In Bulgaria there was a lot of discussion on the degree of centralisation of the fiscal system. Parliament decided in favour of a more centralised system since local authorities do not seem to have the capacity to take over tax collection. It can be said that there should be some local taxes but that these should not go too far and local authorities should not be able for example to raise the rate of income tax to the level of 70%.

CLOSING SPEECH

Chaired by Prof. Antonio LA PERGOLA,
President of the European Commission for Democracy through Law

Speech by Prof. Antonio LA PERGOLA,
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a. CLOSING SPEECH - Mr Antonio LA PERGOLA, President of the European Commission for Democracy through Law

"The Venice Commission over which I have the honour to preside, is gratified to acknowledge the important contribution made by our distinguished Bulgarian hosts to the UniDem programme. We know from experience that the building of democracy is a complex and painstaking process. Democracy does not spring into existence fully-clad from the head of Jove. It is a conquest that must be made every day through the diffusion of a democratic culture and the emergence of a ruling class imbued with the spirit of liberty. I may say with admiration that Bulgaria has undertaken its democratic experiment with determination and clarity of vision.

Democracy thrives where free and reasoned debate resonates in a nation's political life. It is my fervent hope that our seminar here in Sofia, invigorated by an open exchange of knowledge and opinions, will help to further the development of democracy in Bulgaria. You have addressed many of the fundamental issues surrounding the new institutional order established in this country, one which is reflected in the other new democracies of Central and Eastern Europe. In keeping with the central objectives of the UniDem programme, our Sofia seminar has elucidated how the principles of the new Bulgarian Constitution may be concretely applied, once the building blocks of democracy are put in place.

UniDem closely parallels the work being carried out by the Venice Commission as an expert body set up to aid the process of constitutional reform. The UniDem programme has been put to the test of experience and has proved successful. We have so far tackled a wide range of issues. A Seminar was held in Moscow concerning the same area of interest that we are addressing today in Sofia. Another in Istanbul was devoted to the broad problems of the transition from dictatorship to democracy. And a seminar in Warsaw centred on the relationship between international and domestic law. Emphasis was placed on the growing phenomenon of integration of which the European Community is the best known example. The discussions in both Istanbul and Warsaw highlighted the fact that democracy at the national level must be ensured by the observance of international law. But it is not only a question of adapting domestic law to the law of nations. Nation States must also be enabled through appropriate constitutional provisions to fulfil the obligations deriving from membership in supra-national bodies. How else could we hope to one day enlarge the European Community to a like-minded group of States, how else lay the foundations for a closer knit circle of democracies on our continent? In this respect, we have focused on the architecture of integration to explore the ways in which Central and Eastern European States can be involved in designing European institutions. To address this problem further, a seminar has been planned for next year in Greece on the modern idea of confederation. This is a topic that we will have to consider in terms of the expansion of the European Community and the rebuilding on a new democratic basis of what were once the Soviet Union and Yugoslavia. UniDem is thus making a special effort to cover the most important aspects of constitutional development confronting the new European democracies.

Let me close these brief remarks with a heartfelt note of praise and appreciation for what Bulgaria has already achieved. Our dear and distinguished colleagues, Mr Alexandre Djerov and Mrs Snejana Botusharova, with their experience and enthusiasm, have never failed to contribute to the work of the Venice Commission, and I would like to thank both of them warmly on this occasion. The Venice Commission is proud to have participated in Bulgaria's constitutional process when the new basic text, which has paved the way for the reforms debated in this seminar, was drafted.

The Constitution of 1991, which is by any standard a modern and forward looking basic charter, contains provisions that delineate a new economic system. Among other basic rights, the right of private initiative has found its place among the freedoms which individuals enjoy under a regime based on political pluralism and the rule of law. Bulgaria is thus moving along the time-honoured path of Western experience, of all countries where freedom is indivisible and must be guaranteed both in the political and economic spheres. Freedom can, however, be limited to protect overriding public interests; and the first requirement of the rule of law is that such limitations on individual rights be clearly defined by the law maker.

If a nation's constitution is a rigid one, as is the case with Bulgaria, the basis for political and economic pluralism must be laid down in the fundamental charter, which cannot be changed by the legislature without a qualified majority. The Bulgarian Constitution has been written with this requirement firmly in mind. The procedure established in Chapter 9 makes certain that all constitutional amendments are adopted after a serious deliberation, and by a complex procedure which protects minorities.

The constitutional rules that have been laid down are clearly traced guidelines for the legislation that will shape the economy of this country. Suffice it to recall various articles of the basic text : Article 17 guarantees private property and provides for due process and fair compensation for forcible expropriation of property which can be effected only by virtue of law to meet state and municipal needs that cannot otherwise be satisfied. Article 18 concerns the conditions according to which the State shall enjoy exclusive ownership rights and the subject matters these rights bear upon. Article 19 states that the economy of the Republic of Bulgaria shall be based on free economic initiative and places on the State the duty to establish and guarantee legal conditions for economic activity to all citizens and corporate entities by preventing any abuse of monopoly status and unfair competition, and by protecting the consumer.

Other constitutional guarantees protect investments in economic activity by Bulgarian and foreign persons and corporate entities. Special provisions have been made in Article 22 to define what real rights a foreign person or foreign legal entity can acquire. And Article 20 has been laid down to establish conditions conducive to the balanced development of the regions in the country. This last provision outlines an important principle: the territorial bodies shall be assisted in their activity through the fiscal, credit and investment policies of the national government. The point here is the need for cohesion. The market should be free. But it must also be fair, where differences in the quality of life and the level of employment are reduced. This is true of each of our countries no less than of the European Community. The liberalisation of the economy does not mean the disappearance of the Welfare State. The daunting task of a modern constitution is to balance properly the needs of individual initiative with those of the collectivity. Should Bulgaria succeed in striking such a balance it will have given one more proof of its maturing democracy."

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