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Property Rights:

A View from the Trenches

Michael A. Heller[†]

How do governments create — or in some countries recreate — basic property rights that citizens demand in the transition to a market economy? My first comment, quite briefly, is on the debate within this Symposium on the relationship between constitutional reforms and the emergence of new property regimes. Second, I will comment on the counterintuitive property rights regime that is emerging from the "big bang" — the post-1989 collapse of the old socialist legal order in Central and Eastern Europe and the former Soviet Union and its replacement with a new, market-oriented system of property rights.

From my experience working with socialist countries in transition, constitutional debates have had little to do with the creation of property rights. For example, in Hungary, the right of individual property owners to compensation in the event of expropriation, enshrined in the current democratic version of the Constitution,¹ was also guaranteed by the socialist versions of the Constitution.² Writing constitutions seems much less vital than creating the nuts and bolts of legal infrastructure that underlie ordinary transactions, like selling, mortgaging, or renting an apartment.³ None of the government officials with whom I work refer to their constitutions when creating property registration laws, institutions for condominium management, foreclosure and eviction procedures, subdivision regulations, and dispute resolution mechanisms.

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1. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 13(1) (1989) (Hung.), *translated in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1* (Albert P. Blaustein & Gisbert H. Flanz eds. & Marta Kiszely trans., 1990).

2. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 8 (1957) (Hung.), *translated in 3 CONSTITUTIONS OF NATIONS 432, 433* (Amos J. Peaslee ed., 1968); *see Cheryl W. Gray, Rebecca J. Hanson & Michael A. Heller, Hungarian Legal Reform for the Private Sector*, 26 *Geo. Wash. J. Int'l L. & Econ.* 296-302 (1992) (discussing Hungarian constitutional reform).

3. *See generally* CHERYL W. GRAY ET AL., *EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE* (World Bank Discussion Paper No. 209, 1993) (discussing current constitutional and property rights frameworks in Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovenia).

Turning to the "big bang," the emerging property rights systems are counterintuitive because they are so utterly conventional. American law or economics professors, who work with countries in transition, often view reforms as a grand experiment and an opportunity to discuss property in an aspirational sense — to suggest new types of property rights that meld together market mechanisms with more equitable, perhaps socialist, rights.⁴ For example, one commentator notes, "Tolstoy saw the importance of the land issue in Russian life. He knew that reconciliation would require a new concept, neither capitalist nor socialist, but a synthesis of both. Now 80 years after his plea for a land policy based on the ideas of Henry George, the Soviets have another opportunity."⁵ Nevertheless, in every country where I have worked — from Albania to Russia — there appears to be little interest among reformers in these aspirational experiments to recast the bundle of property rights. The fights are practical: central governments, local governments, enterprises, and individuals accept a laissez-faire conception of property rights and then struggle to gain control of particular assets.

At least in these early stages of transition, the pendulum has swung from one utopia to the other, from a socialist to a nineteenth-century vision of property rights. Even after forty years of socialism (over seventy years in Russia's case), people seem to possess an intuitive, implicit understanding of "ownership" that resonates within the spectrum of traditional understandings of property rights in Western market economies. Governments are now moving to adopt this intuitive approach to ownership with a comprehensive framework of legal instruments and institutions that structure the "rules of the game" in Western market terms. There is still little sensitivity to the balance between public and private rights that has emerged in Western legal systems. Reforming socialist countries, however, may well adopt this distinction in a later stage of the transitional process.

Let me refer to my own experience. In one country, I was working with a team trying to establish a housing finance system that would help mobilize funds to rehabilitate beautiful old buildings in the capital's historic core. We structured the proposal, however, so that rehabilitation would not be financed by gentrification. We designed a mechanism for cross-subsidizing those who could not otherwise afford to remain in their apartments, primarily pensioners. In rejecting the proposal, one local mayor accused us of being communists for incorporating a social safety net and subsidy for vulnerable groups, an unusual criticism to level at a World Bank team.

4. See, e.g., Nicolaus Tideman et al., *Open Letter to Mikhail Gorbachev* (Nov. 7, 1990) (on file with author) (about 30 signatories, mostly American professors of economics or law, advocating Georgist concept that Soviet Union not privatize land, but instead have local governments determine and collect annual rents from land users).

5. E. Robert Scrofani, *Soviets Should Try Henry George Land Plan*, N.Y. TIMES, Sept. 21, 1991, at A20 (letter to editor).

Housing provides a good example with which to analyze the strength of the current push to create practical, conventional property rights and institutions that transform socialist renters to private property owners. Under the socialist system, households could not own or sell their apartments. Unless they were moved for administrative convenience or punishment, however, they had lifelong tenancy, which they could pass on to their children. Rent was nominal, as was maintenance; eviction for non-payment was unknown. The combination of socialist property interests made mobility virtually impossible. Generations of families, including ex-spouses, were often trapped in a single, small apartment. Today, people know what they want: to get their apartment unit, vacation dacha, or piece of farmland away from the hands of the state; to own, sell, or improve it; to build new structures or enterprises. They want a transparent, simple, and inexpensive legal system that will allow them to do so, with little decisionmaking discretion left for public officials.

Why has such a traditional vision of property rights emerged? Of course, Western countries have had a great effect, both directly and indirectly. First, reforming governments have sought out Western legal approaches for the sake of efficiency: applying ready-made models requires less effort than reinventing a legal system. Second, Western governments, enterprises, and banks have reinforced this approach by preconditioning foreign investments and loans on the adoption of such a familiar set of ownership patterns. Aid agencies, law firms, professors, and consultants have also stepped in with drafts of legislation. A third explanation is more historical. In countries like Poland and Hungary, people conceptualize the transition experience less as the creation of property rights than as the reclaiming and updating of property rights that were taken away within their living memory.

Yet, something more than constitutional debate, Western pressure, efficiency concerns, and history explains the conventional set of property rights emerging in reforming socialist countries. For instance, the practices of newly established real estate brokers in remote parts of Siberia — without exposure to Western consultants, reformist officials, or any history of individual land ownership — would be quite familiar to Americans. The transition experience in these countries suggests to me, not the indeterminacy or unpredictability of market property rights, but rather a broadly shared understanding of the fundamentals of property that is relatively stable across cultures. Our common task as outside observers and advisors should be to reinforce this understanding by providing practical examples of legal tools, procedures, and institutions from a range of market economies, rather than to promote more noble experiments.