

1991

## European Convergence

Gerhard Casper

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Gerhard Casper, Comment: "European Convergence," 58 University of Chicago Law Review 441 (1991).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# INTRODUCTION

## European Convergence

*Gerhard Casper*†

In the minds of people who have lived through or at least during epochal events, such events later tend to become personalized. Those old enough can vividly remember where they were and what they were doing when they learned of the attack on Pearl Harbor. The personal focus adds life to the past; it confers on us the dignity of having been participants, if not in the making, then at least in the experiencing of history. These observations will justify, I hope, a few autobiographical notes at the beginning of this Introduction.

In September 1989 I participated in the European Regional Institute on Comparative Constitutionalism, a conference organized by the American Council of Learned Societies. It took place in what was then West Berlin. Other participants were primarily constitutional law scholars and political scientists from “Western” countries. Academics from the German Democratic Republic, Hungary, Poland, and the USSR also attended. While the conference was going on, thousands of East Germans were fleeing through Hungary to the West and the Hungarian communist government announced that it would suspend a bilateral agreement with East Germany under which it was obliged to return to the GDR those East German citizens who were caught in attempts to migrate. Hungary justified the suspension by reference to superior international law. Invoking “higher law,” the Hungarian communists eliminated any chance that they might lift the suspension at a later date. This forced the GDR to limit travel to Hungary, a fellow

---

† William B. Graham Distinguished Service Professor of Law and Provost, The University of Chicago.

member of Comecon and the Warsaw Pact, in the same manner as it restricted travel to Western countries.

Hungary's action was very much in accord with positions pronounced at the West Berlin conference by a Hungarian professor, Kálmán Kulcsár, who then also served as the communist Minister of Justice. He had submitted a paper that began as follows: "The three terms, the most humanistic products of the development of political thinking and practice: rule of law, constitutionalism, and human rights, are not accidentally the key words of the current political reform in Hungary. To wit, the social content of this reform is nothing else but the disintegration of an *authoritarian-bureaucratic political system so as to be transformed into a pluralistic-democratic one.*"<sup>1</sup> Kulcsár also spoke about the need "to return to Europe."

Other conference participants from the East represented various stages of political development. The elder academic statesmen from the Soviet Union were ready to admit to Stalinist abuses and favored some change, but also emphasized that the valuable contributions of Leninism had to be rediscovered and maintained. The East Germans (from the Institute for Theory of State and Law) put forward a last-ditch defense of the Wall and government restrictions on the right to travel. They seemed most out of tune. In the wake of the Round Table Talks between Solidarity and the communists and the formation of the first non-communist government in Poland, a Polish participant said that in her country communism was simply a thing of the past.

After the conference ended, I went to East Berlin as I had done many times over the last three decades to visit my wife's mother, my brother-in-law (an internist), and his family. I showed up at the Friedrichstrasse crossing point (not suspecting that it would be for the last time) and waited for hours, along with other tourists, to obtain my entry visa. (East Germany required separate entry and exit visas, the latter issued by the People's Police once you were in the country.) What I remember most about this crossing was my sense of excitement that in part had been generated by the conference. I recall saying to Michael Koschel, my brother-in-law, as we were driving to the suburb where he lives: "Michael, for the first time I really believe that change is likely." Then I continued—wondering whether I should actually say something so dar-

---

<sup>1</sup> Kálmán Kulcsár, *Rule of Law, Constitutionalism, [and] Human Rights in the Transformation of the Hungarian Political System* (emphasis in original) (on file with U Chi L Rev).

ing—"For all I know, even reunification is not unthinkable any more." Less than two months later the Wall had fallen, literally and metaphorically, and less than a year after that, West Berlin had become western Berlin, and the German Democratic Republic, eastern Germany. Fifteen months after the West Berlin conference, Michael Koschel was engaged in the private practice of medicine in an office suite that formed part of his parental home and that, since the end of World War II, my mother-in-law had been forced to lease to "the state" for a state medical practice. While others in Eastern Europe can tell similar "happy end" stories, in most instances (even in relatively privileged eastern Germany), Eastern Europeans find it excruciatingly difficult to emerge from the tangle of political and economic collapse, uncertain property rights, and differences of opinion about the best course for the future.

Kulcsár referred to the "disintegration" of an "authoritarian-bureaucratic political system." The disintegration had been long, if excruciatingly slow, in the making. Ironically, the very steps that formally stabilized the political map of postwar Europe (the West German Ostpolitik dating from around 1970 and the Helsinki Accords of 1975) probably expedited disintegration by facilitating interaction. Toward its end, the process of disintegration seemed to acquire the very attribute of inevitability that communist writers since Marx and Engels had associated with the predicted dissolution of modern capitalism. Gorbachev, of all people, gave expression to this sense of historic inevitability in, of all places, East Berlin. On October 7, 1989 (three weeks after my conference), Gorbachev visited East Berlin to celebrate (irony upon irony) the fortieth anniversary of the German Democratic Republic's existence. He told Honecker: "Those being late will be punished by life itself."<sup>2</sup> The punishment of the German communists began within weeks, that of others followed (who can forget the pictures from Romania at the end of December 1989?), and Gorbachev himself may yet become the victim of having come too late.

Economic reporting on Eastern Europe in the postwar period generally does not deserve Pulitzer Prizes. As I mentioned, family ties brought me to East Germany on a regular basis throughout my adult life. When it became possible, we traveled all over the coun-

---

<sup>2</sup> Serge Schmemmann, *Security Forces Storm Protesters in East Germany*, NY Times A1 (Oct 9, 1989). Honecker, said a Soviet spokesman, "expressed 'gratitude' for the information." David Marsh, *East German Clashes Continue as State Leaders Keep Hard Line*, Fin Times 1 (Oct 9, 1989).

try, including its industrial heartland. What we saw left no doubt that the GDR was an economic disaster zone, and yet the most respectable Western publications were taken in by fake statistics suggesting that the country exemplified "socialism that works," ranking among the leading industrial economies of the world. Western readers knew more about the dismal state of some other communist economies, such as Poland's, and yet very few observers realized the full extent of the bankruptcy.

While it is certainly inappropriate to engage in economic reductionism when trying to understand what happened in Eastern Europe, one must stress the importance of the economic factor. The portion of the economic infrastructure that survived World War II had seen (by comparison with the West) relatively little renewal and replacement. The stock that had been left was exploited to the fullest extent; what was added was mostly substandard and staggeringly inefficient. With the fiction of full employment, worker productivity was, on the whole, low (as the workers' saying went: "They pretend to pay us and we pretend to work"), and millions were engaged in completely unproductive activities such as the surveillance of their fellow citizens. The system staggered from crisis to crisis, propped up by the Soviet military and Soviet energy subsidies, until the USSR itself could no longer afford its empire.

In a manner of speaking, what has happened in Hungary, Poland, East Germany, Czechoslovakia, Romania, Bulgaria, and Albania partook as much of Chapter 11 reorganization as of political change. Indeed, the Round Table Talks that preceded the governmental changes in all countries other than Romania and Albania, and through which the transitions were negotiated, were somewhat reminiscent of bankrupt management asking creditors for forbearance.

In all countries other than Hungary and the former GDR, the awesome tasks of restructuring include the writing of new constitutions. East Germany simply acceded to the Federal Republic's Basic Law, while Hungary, for the time being, engages in piecemeal amendments of the existing document. The drafters face all the usual problems and choices, many of which are detailed in the articles in this issue. I shall not rehearse them.

I should like to speculate, however, about some features of the constitutions that will emerge. My thesis is a simple one. On the whole, Eastern Europe will follow Western European examples. The Eastern Europeans will find this path pragmatically desirable because of their aspirations to join the Council of Europe and,

more importantly, the European Community. They will also find these models congenial because underlying them is a concept of the state and its role that goes back all the way to the late eighteenth century.<sup>3</sup>

The new constitutions will not only design what one hopes will be democratic methods for producing a social order,<sup>4</sup> but they themselves will identify democracy with substantive notions about the social order. The constitutions will lay down values that are to guide legislatures. Many aspects of life will be subjected to governing principles of a programmatic nature and placed under the overarching care of the state. By comparison with the socialist regimes, pluralism will be constitutionally anchored, and the private realm will receive constitutional protection, but the state will serve as the ultimate guarantor of many human aspirations.

This comprehensive ordering approach will create the immediate problem of sanctifying as constitutional law vague propositions about the appropriate scope of government. Every social issue will become a constitutional issue, and law and its oracles will be severely overtaxed. It will also create the potential for constitutional disappointments on the part of those who will come to believe that constitutional promises have been breached.

The new constitutions will have comprehensive bills of rights (even their predecessors had) that will be one of the vehicles for articulating social values. These bills of rights are likely to leave details to legislative discretion. Few rights will be truly absolute, and there will be some duties that will be viewed as concomitant to rights. Whether it will be possible under the prevailing economic and social conditions to guarantee the right to hold private property in a meaningful manner is highly dubious.

To the extent that the separation of powers may offer a measure of institutional protection where the rights approach fails, the new constitutions are likely to have a weak form of such separation. An independent executive branch along American lines is hard to imagine anywhere except as an expression of a preference for a "strong president," which is nearly the opposite of what Americans mean when they invoke separation of powers concepts. The rule will be one form or another of parliamentary democracy, though there will probably be considerable experimentation paralleling the great variety of solutions to be found in Western Europe.

---

<sup>3</sup> See Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 S Ct Rev 311.

<sup>4</sup> See Hans Kelsen, *Vom Wesen und Wert der Demokratie* (J.C.B. Mohr, 2d ed 1929).

Finally, Eastern Europe will follow other European countries and accept the American "higher law" concept of constitutions. The new constitutions will institutionalize judicial review, though likely on the Austrian, German, and Italian model of separate constitutional courts composed differently from ordinary courts and with their own procedures. The institutionalization of judicial review (already actively implemented in Hungary) will present one of the greatest challenges in the absence of an independent judiciary and, for all practical purposes, a high-quality legal profession. The socialist regimes prized neither independent judges nor lawyers. The legal profession found little social respect, though the situation was somewhat different in different countries. Under these conditions, it will be very difficult to create a legal profession that can avoid the pitfalls of politicization, especially in light of the legalization of many political questions that, I predict, will occur.

One of the main dangers ahead is that the organizational issues that in 1989 and afterwards were posed primarily as issues of practical politics continue to be seen mainly that way. Constitutional politics inevitably are matters of practical politics, but they also transcend practical politics. Constitutionalism does not refer simply to having a constitution, but to having a particular kind of constitution, however difficult it may be to specify its content. The task is also to assure the stability of the new order—to take the long view, rather than the short one. This is difficult under the best of circumstances. It is an awesome challenge under the conditions prevailing in Eastern Europe, where the political sorting-out after forty-five years of communist dominance must occur at the same time as the reorganization of bankrupt economies and the redefinition of national, ethnic, and other cultural identities.